

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

K/S HIMPP
Petitioner,

v.

BRAGI GmbH,
Patent Owner.

IPR2023-00901
Patent 10,635,385 B2

Record of Oral Hearing
Held: August 14, 2024

Before LARRY J. HUME, STACEY G. WHITE, and
NORMAN H. BEAMER, *Administrative Patent Judges*.

IPR2023-00901
Patent 10,635,385 B2

APPEARANCES:

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The above-entitled matter came on for hearing on Wednesday, August 14, 2024, commencing at 1:00 p.m., via video teleconference.

P R O C E E D I N G S

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JUDGE BEAMER: This is Judge Norman Beamer. With me on the panel are Judges Larry Hume and Stacey White. This is K/S HIMPP vs. BRAGI GmbH, IPR2023-00901, concerning Patent 10,635,385 B2. Two comments before we start. This is a video hearing. Our first priority is to make sure everyone can be heard. So, if any time anyone has difficulties or is disconnected, please speak up. Or if you're disconnected, you may contact the team. If you do drop off, try to note where things were being discussed at the time so we can pick up at the proper point. Anyone not speaking, please mute your mic and only unmute when you're speaking and identify yourself when you speak so that the transcript reflects the speaker correctly.

When referring to an item on the record or a slide in your presentation, please specify the slide number or the citation so the panel can follow along, and so the transcript is clear. I understand this is a public line. There may be members of the public listening in.

So, with that, Petitioner, each party has one hour except that Petitioner has gotten the Leap practitioner approval for Brian Lambson. So, the Petitioner has an extra 15 minutes beyond the hour. Also, I note that Petitioner has filed some objections to some of Patent Owner's demonstrative exhibits, and we'll take those objections under advisement, although you can be assured that we're only going to consider evidence that's actually in the record and that anything in the slides beyond that will not be considered.

And with that, Petitioner, could you make an appearance?

1 MR. LAMBSON: Yes. This is Brian Lambson, and I'm joined by
2 lead counsel, Haixia Lin. We're both from Wilmer Hale. Also joining on
3 the line, we have Douglas Bridges from HIMPP.

4 JUDGE BEAMER: Patent owner, could you make an appearance?

5 MR. JARRETT: This is Bradley Jarrett of McKool Smith.

6 JUDGE BEAMER: Could unmute.

7 MR. JARRETT: Behalf of Patent Owner --

8 COURT REPORTER: I'm sorry. I can't really hear him.

9 JUDGE BEAMER: Patent Owner. Haven't heard from Patent
10 Owner yet.

11 MR. JARRETT: Good afternoon, Your Honors. Can --

12 JUDGE WHITE: Your audio is very low. I don't know if you're
13 close enough to your microphone or if you may need to switch out. It's
14 very, very low.

15 MR. JARRETT: Is this, is the same, sorry, Your Honors, is this
16 any better?

17 JUDGE WHITE: No.

18 MR. JARRETT: Your Honors, is this, sorry, is this better? I
19 probably have to darken it. Thank you.

20 JUDGE BEAMER: While we're waiting to address this audio
21 issue, Petitioner, how much time would you like to have for your initial
22 presentation?

23 MR. LAMBSON: We'd like to reserve 20 minutes, so 55 minutes
24 for the initial presentation.

25 MR. JARRETT: Your Honors, I've attempted to dial into the
26 conference line. I'm just waiting to correct the audio issues. My apologies,

1 I had done the audio check 30 minutes prior, and I had no issues, so I
2 apologize.

3 JUDGE BEAMER: Okay. Well, why don't we start with
4 Petitioner, and when we get to Patent Owner, hopefully by then — we can
5 kind of hear you off and on, but it's not optimal. So, Petitioner, when
6 you're ready, you may start.

7 MR. JARRETT: Thank you, Your Honor, and may it please the
8 Board. The '385 Patent claims a routine, smartphone app --

9 JUDGE BEAMER: Back or something back --

10 SPEAKER: Also, can you mute your backup mic? He just called
11 in.

12 JUDGE BEAMER: Let's try again.

13 MR. LAMBSON: Thank you, Your Honor. And I'll start over.
14 May it please the Board. The '385 Patent claims a routine smartphone app
15 that has a single alleged improvement what the claims call a visual
16 representation of a wireless earpiece. Everything else in the claims is
17 conventional. Now, there's no dispute in this case that before the priority
18 date of the '385 Patent the Hensen reference disclosed a smartphone app that
19 had a visual representation of a wireless earpiece. Instead, Patent Owner
20 primarily argues two things. First, Patent Owner argues that for one of the
21 Hensen references, Hensen video, a prior art exception applies and Patent
22 Owner also argues that the Hensen references are not sufficiently functional
23 to render the challenged claims obvious. Today I'll explain how each of
24 Patent Owner's primary arguments relies on a legally erroneous premise.
25 Patent Owner carried out the wrong test to determine whether the prior art
26 exception is applicable, and Patent Owner also carried out the wrong

1 analysis for purposes of obviousness. Patent Owner also raises an argument
2 of secondary considerations. The Board has already correctly determined in
3 the institution decision that these alleged secondary considerations lack the
4 required nexus.

5 With that, I'll go to slide 2, which is my proposed agenda. I
6 propose to briefly give an overview of the '385 Patent, as well as the prior
7 art that we rely on in the ground, and then hope to get right into the disputed
8 issues.

9 Turning now to slide 4, the '385 Patent purports to invent an
10 improved smartphone app that is able to communicate with one or more
11 wireless earpieces. Notably, the '385 Patent claims a priority date of 2015.
12 By that time, smartphone apps and smartphones had been around for many
13 years. The Patent goes on to acknowledge that the underlying platform, the
14 smartphone, and the smartphone applications, are conventional. And so, for
15 example, the paragraph at the bottom of this slide lists iOS and Android as
16 potential platforms that support the claimed invention.

17 JUDGE HUME: Counsel, it's Judge Hume. Could you identify
18 the demonstrative you're referring to? I'm not sure how to see it on the
19 screen here. I'm following separately.

20 MR. LAMBSON: I'm not sharing my screen right now. I'm just
21 referring to the slides. Is there a --

22 JUDGE HUME: Right. Can you give the slide you're referring
23 to?

24 MR. LAMBSON: You'd like me to share? I can share my screen.

25 JUDGE HUME: No, just tell us what slide you're talking about.

26 MR. LAMBSON: Oh, I'm sorry. Slide 4. That was slide 4. I'm

1 now moving to slide 5. The alleged improvement of the '385 Patent is what
2 the claims call a visual representation of a wireless earpiece. So, that's
3 shown here in the form of a screenshot in Figure 6 of the Patent. And again,
4 just to emphasize, the screenshot shown right in Figure 6 is a conventional
5 smartphone display. And that goes to show that the underlying graph -- the
6 graphics themselves are what the '385 Patent purports to be a novelty, not
7 the underlying technology platform.

8 Turning now to slide 6. This is Claim 1 of the '385 Patent. The
9 highlighted portions at the bottom of the claim correspond to what the
10 examiner of the Patent identified in the notice of allowance as being the
11 distinguishing features over the prior art that was considered during
12 prosecution. All of the highlighted limitations pertain to the visual
13 representation of the wireless earpiece. Again, the visual representation is
14 the novelty, purported novelty of the '385 Patent.

15 Turning now to slide 7. Over the next few slides, I'll give a brief
16 overview of the prior art references that we use in the grounds, starting with
17 the Hensen references. Each of the grounds in the petition relies on two
18 Hensen references, and there's three total Hensen references in the petition.
19 They're all associated with the same individual, Dr. Eric Hensen.

20 Turning now to slide 8, on the left --

21 JUDGE BEAMER: I have a preliminary question. Both parties
22 have referred to videos, and in some cases we see links to the video, and in
23 other cases we see screenshots from the video. Does Petitioner intend us to
24 review the entire video as part of the record, or just screenshots or
25 descriptions in the brief and so on as part of the record?

26 MR. LAMBSON: So, the former. So, we filed Exhibit 1004,

1 which is the video itself. We also filed Exhibit 1010, which is the
2 screenshots from the video, both of which we refer to as the Hensen video
3 reference, and we rely on the entire teachings of Hensen video, including the
4 visuals and also the narration that Dr. Hensen provides in the video.

5 JUDGE BEAMER: How did you file the video? Did you
6 physically file a recording or what?

7 MR. LAMBSON: Yeah, I believe it's an MP4 recording of the
8 video file itself.

9 JUDGE BEAMER: Okay, well that must be filed somewhere in
10 the Patent office, but it's nothing that we've ever had access to.

11 MR. LAMBSON: Yeah, and the video link is still live at the
12 YouTube video, which I believe the link is in the petition somewhere, but
13 we do have Exhibit 1004, which is just the raw video file.

14 JUDGE BEAMER: Submitted -- how is it physically submitted? I
15 guess I'm not sure how we're going to have access to it.

16 MR. LAMBSON: Yeah, it was submitted electronically via P-
17 TACTS is my understanding, or to the extent this was filed before P-TACTS
18 came online, the previous system, but it was submitted electronically.

19 Returning to slide 8. Dr. Hensen is shown on the left. He's an ear,
20 nose, and throat doctor I believe based in Texas. And throughout the early
21 2010s or so, he devoted himself to developing a wireless earpiece system
22 that eventually became a company and also a Kickstarter campaign that went
23 under the brand name of FreeWavz. As part of his activities in connection
24 with this wireless earpiece system, he filed a Patent which describes the
25 overall components of the earpiece system. That's our Hensen Patent
26 reference. He also developed a prototype of a wireless earpiece system and

1 he demonstrated its capabilities through a series of disclosures that include
2 the YouTube video. That's our Hensen video reference. It also includes a
3 kickstarter page with a blog post, which is our Hensen Kickstarter reference.

4 Grounds 1 through 3, which are on this slide, rely on the
5 combination of Hensen-Patent and Hensen-Video for the independent
6 claims, and Grounds 4 through 6, so I'll have a slide on later, that relies on
7 the combination of Hensen-Patent and Hensen-Kickstarter. I'll point out
8 that there has been no dispute about the motivation to combine any of the
9 Hensen references.

10 Turning to slide 9, this gives an overview of the teachings of
11 Hensen-Patent. So, on the left is Figure 1. Figure 1 depicts the overall
12 wireless earpiece system, so it includes two wireless earpieces, along with a
13 remote control unit. On the right, we've blown up the remote control unit to
14 show that it has a display 53. The specification explains the display and
15 shows information about the wireless earpieces. So, for example, the
16 volume settings or the remaining battery life of the wireless earpieces.

17 Now moving to slide 10, this is shown in the teachings of Hensen-
18 Video. On the left is a screenshot from the video, and overall, in this video,
19 Dr. Hensen is explaining how a smartphone app can be used as the remote
20 control unit of a wireless earpiece system. And so, so the screenshot on the
21 left shows the display of the smartphone. Blown up on the right, we see that
22 the display includes a visual representation of the wireless earpieces. And
23 there's no dispute from Patent Owner or its expert that the icons that we see
24 on the display and blown up on the right on the screen are, in fact, a visual
25 representation of the wireless earpieces in the system.

26 Turning now to slide 11. Claim 1 also has a requirement that the

1 visual representation be indicative of a function or property of the wireless
2 earpiece. I'll point out that only Claim 1 has this feature, not Independent
3 Claims 13 and 14. But focusing first on the lower left, this is an excerpt
4 from the prosecution history of the '385 Patent. And during prosecution, the
5 applicant had specifically identified the battery life indicator shown in
6 Figure 6 of the '385 Patent as being an embodiment of a function or property
7 that satisfies this limitation 1F. That Figure 6 embodiment is shown on the
8 lower right of this slide. The battery life indicator is indicated by the red
9 box. And just above that, we have Hensen-Video's visual representation of
10 the wireless earpieces, and we can see that it includes similar battery life
11 indicators that also satisfy limitation 1F. I'll note that one of Patent Owner's
12 arguments is that a battery life indicator does not satisfy limitation 1F. I'll
13 have some slides addressing that argument in more detail later on. For now,
14 I'll just make the point that Patent Owner has not attempted to reconcile its
15 arguments with the file history, and the applicant's admission that battery
16 life indicators are within this limitation.

17 Turning now to slide 12, this gives a brief overview of Grounds 4
18 through 6, which are very similar to Grounds 1 through 3. The only
19 difference is that Hensen-Video is replaced with the similar teachings of
20 Hensen-Kickstarter. In the petition we explain that Hensen-Kickstarter
21 discloses the same smartphone application as Hensen-Video just uses a
22 different mode of disclosure, a blog post rather than a YouTube video.

23 Turning now to slide 13, I'll be skipping over the slides in this
24 module in the interest of time but this introduces our secondary references
25 for the dependent claims, LG Manual, and Lee. I'll just at a high level I'll
26 point out that the motivation to combine for both of these secondary

1 references is not disputed. The teachings of Lee are not disputed. The only
2 disputed issue relating to these secondary references is whether LG Manual
3 teaches the lighting limitations of Claim 5. And I'll have some additional
4 slides later on that particular dispute.

5 That brings us to slide 16. The first issue that I'll be covering
6 today is Patent Owner's argument that Hensen-Video is not prior art to the
7 '385 Patent. Throughout the course of this proceeding, this argument has
8 taken on several different forms, first in the Patent Owner response, then in
9 the sur-reply, and now in the demonstrative slides, with each successive
10 filing containing new and different arguments related to this prior art
11 exception. But no matter how many bites of the apple Patent Owner takes,
12 they can't overcome the fact that this argument is based on a fundamentally
13 incorrect analysis of the prior art exception. The way I'll approach this
14 today is I'll start by addressing the original Patent Owner's response
15 arguments, which apply only to Grounds 1 through 3, which are based on
16 Hensen-Video. I'll then move on to the new sur-reply arguments, which for
17 the first time attempt to fold Grounds 4 through 6, which are based on
18 Hensen-Kickstarter into this argument. And then if Patent Owner attempts
19 to make the additional arguments that are being raised for the first time and
20 it's demonstrative slides that we projected to slides 24 through 32, I'll
21 address those during my rebuttal time.

22 Turning to slide 17. This is an excerpt of the prior art exception
23 found in 35 U.S.C. § 102(b)(1)(B). This provision basically provides that a
24 disclosure that's made within a year of a Patent's priority date is subject to a
25 priority exception if the inventor previously disclosed the same subject
26 matter. Now, Patent Owner is arguing that this priority exception is

1 applicable to Hensen-Video, but I do want to make an initial point that
2 there's no issue here of copying. As our Hensen-Kickstarter grounds
3 demonstrate, Hensen-Kickstarter predates the inventor's alleged disclosures,
4 and those grounds demonstrate that Dr. Hensen had already disclosed a
5 smartphone app that had a legal representation of a wireless earpiece before
6 any of Patent Owner's alleged disclosures. And so, any suggestion that
7 Patent Owner was the true innovator of the subject matter that's found in
8 Hensen-Video is simply not correct. And so, the upcoming slides are going
9 to address the prior art exception as written, but we do feel it's important to
10 keep in mind this background fact that in fact Dr. Hensen developed and
11 disclosed this system before any of Patent Owner's disclosures.

12 JUDGE WHITE: All right. Counselor, while we've got the
13 language of the statute in front of us, I would like you to talk to me about
14 what subject matter means here. What is -- looking at the language of the
15 statute what subject matter are we supposed to be looking to see, if
16 anything?

17 MR. LAMBSON: Thank you, Your Honor. That's a good
18 question, and I think I can maybe address that with an upcoming slide,
19 which is slide 23 and 24, which addressed our expert, Dr. Anthony's
20 testimony regarding the subject matter that was relied upon in the petition,
21 which is Hensen-Video's smartphone application and its visual
22 representation of a wireless earpiece and explain that the relied upon subject
23 matter in the petition is different from Patent Owner's earlier disclosures.

24 JUDGE WHITE: Counselor, I think that that's not quite the
25 question I was getting at. When we look at the statute, it says that the
26 subject matter, and let me scroll back up to was it slide 16 so that I can be

1 clear, 17. So, the question for us is whether the subject matter disclosed had
2 before such disclosure been publicly disclosed by the inventor. What
3 subject -- are we looking to see whether the subject matter of the Patent have
4 been previously disclosed, or are we comparing the Patent? Are we
5 comparing the alleged prior art with the disclosure -- the inventor's
6 disclosure? What subject matter?

7 MR. LAMBSON: Yes, I should be comparing the subject matter
8 of Petitioner -- of Hensen-Video with the subject matter of that the inventor
9 allegedly disclosed before Hensen-Video.

10 JUDGE WHITE: Now, looking at the language of the statute, how
11 do you come to that conclusion? And I'm specifically saying, looking at the
12 language of the statute because I know you've got some, some MPEP things
13 coming up, but I want to be clear about which authority we're relying on
14 right now. I want to see what are you relying on in the statute to have that
15 distinction be the subject matter of the alleged art and the subject matter of
16 the disclosure as opposed to the subject matter of the alleged art -- as
17 opposed to the subject matter of the disclosure and the subject matter of the
18 Patent.

19 MR. LAMBSON: I think I understand your question. And the
20 statute says what it says. It says the subject matter disclosed, and that's
21 referring to the subject, the disclosure that's being made in the first part of
22 that sentence. So, a disclosure made one year or less before the effective
23 filing date of the claimed invention. That's Hensen-Video. The subject
24 matter disclosed again, the subject matter of Hensen-Video had before such
25 disclosure being publicly disclosed by the inventor, and that's the inventor's
26 disclosure. And so, we have in the statute two things being referred to,

1 Hensen-Video, which is the disclosure one year before or less before it, and
2 we have the inventor's disclosure. That's the only two disclosures being
3 referred to in this statute. There's no reference to, for example, the
4 disclosures of the '385 Patent. And then, of course, on top of that, we have
5 the guidance that we've cited and that you referred to from the MPEP and
6 how those are the inventors.

7 JUDGE WHITE: And I'm sure we'll get to the MPEP part in just
8 a second. I tried to look for some case law on this, and it looks like case
9 law is very limited on this particular provision. Is that your -- what you're
10 finding as well is that there's very limited case on this exception. And I
11 mean very limited --

12 MR. LAMBSON: (INDISCERNIBLE) case law we did want to
13 call your attention to a very recent Federal Circuit case that came out on July
14 31st.

15 JUDGE WHITE: *Sanho*?

16 MR. LAMBSON: *Sanho*, yeah. Which -- which does address the
17 prior art exception and we would refer to you to the final written decision in
18 the case that was the subject of that decision, which is IPR2021-886. And in
19 that final written decision, the Board essentially asked the same question
20 what, you know, what is the, what is the subject matter we should be
21 analyzing, and came to the conclusion that the subject matter to be compared
22 is the Hensen -- in our case, the Hensen-Video reference to the prior art
23 disclosure. And the inventor's disclosure, not the claim language.

24 JUDGE WHITE: Now, to be fair, the *Sanho* case is more about a
25 public sale. So, it's not directly our facts here, but looking at the Federal
26 Circuit opinion there was a portion of it that, and I'll quote the language.

1 See, where are. So, it's towards the end of the decision. It says, here, it is
2 sufficient to say that *Sanho* made no showing that the sale at issue publicly
3 disclosed the relevant aspects of the invention to the public. Would that
4 seem to indicate to you that we should be looking at whether the public
5 disclosure would have the relevant aspects of the invention, as in, we're
6 comparing the alleged disclosure of the inventor to the disclosure of the
7 invention as filed? As opposed to, I feel like I, -- it's like, I've got
8 disclosure, disclosure, disclosure, and I'm trying to be clear about which
9 disclosure I'm saying.

10 MR. LAMBSON: I do, I do think I understand the question. And
11 I would -- I think we'd caution against reading too much into that passage
12 because in a footnote in that decision, footnote three, the, I believe it's
13 footnote three, the Federal Circuit expressly said they did not reach the
14 question of whether the same subject matter is applicable. And so, to the
15 extent that, you know, there's other language within the decision that may
16 appear or not appear to relate to the same subject matter requirement, I think
17 the overall opinion is clear that they're not addressing the same subject
18 matter requirement.

19 JUDGE WHITE: And I think that that's fair to say that this case is
20 not -- it's not clear that it's the same facts of the exact same circumstance,
21 and it's not clear that the Federal Circuit has actually necessarily decided
22 this particular issue, but that's just me talking. There's two other voices on
23 the panel and I'll let them have their say as well on what that says. But, so
24 that's the little bit of case law that we have. Is there any legislative history?
25 I didn't see any that you specifically relied on unless I had overlooked it.

26 MR. LAMBSON: Yeah, the legislative history is essentially a

1 verbatim copy of what's in the MPEP, so we didn't cite both. But they are --
2 there was some legislative history that ultimately resulted in the language
3 that we see in the MPEP.

4 JUDGE WHITE: So, do you want to move on now to the MPEP
5 part?

6 MR. LAMBSON: Sure. So, that begins on slide 20. And maybe
7 I'll just back up one slide to slide 19 just to sort of set up the issue. Slide 19
8 is a passage from the Patent Owner's response where Patent Owner is
9 acknowledging that there's the same subject matter requirement where it
10 needs to show that the subject matter of the two disclosures is the same.
11 And the way that Patent Owner is attempting to satisfy that burden is to
12 point to how, in their view, the inventor's disclosures satisfy the same claim
13 elements as the '385 Patent -- of the '385 Patent that Hensen-Video is relied
14 upon for. Now, to emphasize at no point is Patent Owner directly making
15 any comparison between its inventor's disclosures, and the teachings of
16 Hensen-Video, Patent Owner is solely relying on the similarities between
17 the inventor's disclosures, and the claims of the Patent.

18 So, in our reply, we identify two problems with Patent Owner's
19 approach. First, Patent Owner is counting on the wrong test because without
20 a direct comparison between the disclosures, there's no way to establish that
21 they are the same. And even if Patent Owner had applied the correct test,
22 Patent Owner is substantively incorrect that the two disclosures are not the
23 same, and that's reflected in Petitioner's expert testimony, for which we
24 don't have any substantive response from the Patent Owner outside of
25 attorney argument.

26 Now turning to slide 20. The question becomes, what is the

1 correct test for the same subject matter requirement? That's sort of what
2 we've been discussing on that previous set of questions. And it turns out
3 that the MPEP provides a robust framework for analyzing the same subject
4 matter requirement. As I mentioned previously, this section of the MPEP
5 that extends across the next few slides is all based on some amount of
6 legislative history. Now, the MPEP guidance as a whole makes clear that
7 comparing an inventor's disclosure to the claim language alone is not
8 sufficient to make a showing that the prior art exception should apply. So,
9 for example, in this passage on slide 20, the guidance is emphasizing the
10 need for two disclosures to disclose identical subject matter. If there's any
11 differences, even if they are merely insubstantial changes, trivial or obvious
12 variations, any differences at all, then the disclosures are not the same and
13 the prior art exception does not apply.

14 JUDGE BEAMER: Counsel, so, by my way of thinking, this
15 basically eviscerates the exception, doesn't it? How could there ever be on
16 that exception that applied? Unless they indeed copied, the third party was
17 copying verbatim, well, not verbatim because they do have that ipsissimis
18 verbis language elsewhere in the MPEP. But it seems to me that unless the
19 third party is copying the inventor, obviously there's going to be some
20 differences because two different human beings come up with two different
21 species of the embodiment. So, I don't -- it just seems very odd that this --
22 so you're applying this would be the correct way of applying it.

23 MR. LAMBSON: Understood. And I mean, without getting too
24 deep into, you know, hypotheticals, you know, we pointed out, for example,
25 in our reply that Hensen-Video and Hensen-Kickstarter are examples of two
26 different disclosures that disclose the exact same smartphone app but use

1 different modes of disclosure. Just to give an example of that particular
2 distinction, you know, maybe this is, and to be clear, I mean, there's no issue
3 with this being a narrow exception. It's supposed to be a narrow exception.
4 As we pointed out in our reply, the, you know, there's -- there needs to be
5 an incentive to file, you know, Patent applications to establish a priority
6 date. And if simply publicly disclosing some aspects of an invention that
7 gives you the same amount of protection against prior art, that would, you
8 know, obviously disincentivize. And so, disincentivize the filing of priority
9 applications with the Patent office. And so, there -- this --

10 JUDGE WHITE: Counselor, there's a ticking time bomb on that
11 one. So, I don't know that it would be a complete disincentive to filing. It's
12 not a situation in which, I made a public disclosure, so I am forever and
13 always protected. I think that the more interesting question is, we're in a
14 situation which, actually hasn't necessarily been explored in too many
15 venues, because I just haven't seen much out there at all on this. We do
16 have this MPEP language, but the first page or so of the MPEP says --

17 MR. LAMBSON: I'm sorry, I have lost the --

18 JUDGE BEAMER: You're getting -- it cut off. Like we lost
19 Judge White. Okay. You're back?

20 JUDGE WHITE: Can you see me? Can you hear me?

21 MR. LAMBSON: Yes.

22 JUDGE WHITE: All right. I could see and hear you the whole
23 time, so I don't know what happened there, because I heard you all saying
24 that you can't see me, the technology. But I was getting to the question of
25 where we've had limited exploration of this particular statutory provision,
26 and we have MPEP clarification, but MPEP says on its face that it's not, it's

1 not, doesn't have force of law, it's not binding. It says that on its face. I
2 think what my colleague was getting to was the question of policy and
3 whether we are overly narrow in our view of things if we say that you
4 basically have to present us with a repackaged version of whatever the
5 inventor said. And whether that is too narrow, because, you know, if the
6 inventor disclosed a puppy and then you come in talking about a small dog,
7 have we missed the point of encouraging public disclosure and moving the
8 patent system forward with these disclosures if we are that exacting on the
9 requirements of what's being disclosed?

10 MR. LAMBSON: I understand the policy question, and I think
11 maybe the fact that this is a, you know, a technology where we have, you
12 know, fairly complex smartphone applications, you know, that may lend
13 itself to more differences than you see in, for example, you know, if you just
14 have a simple -- simpler system with two or three components, then it's
15 maybe easier to have a situation where you have the exact same subject
16 matter being disclosed. But what we've seen from Dr. Anthony's testimony
17 is that these are, in fact, fundamentally different software applications for
18 different operating systems. They function differently, you know, we know
19 from the fact that they're on different operating systems, their source code,
20 and, you know, everything has to be different because they're not
21 interchangeable. You know, I think that pretty clearly sets these two apart,
22 you know, the expert testimony that we have on the subject. You know,
23 whether there's hypothetical scenarios that, you know, where the MPEP
24 does provide the guidance of, you know, providing a genus versus a species,
25 saying, you know, and they provide some outlets to show where a different
26 disclosure may still satisfy the same subject matter requirement. But in this

1 case, where we have alternative species, that's one that the MPEP expressly
2 says is a situation that's outside of the scope of this prior art exception.

3 JUDGE BEAMER: As a point of policy. Would it be correct to
4 say that the MPEP seems to be placing a value on first to file, you know, as a
5 Patent application, over first to disclose publicly. So, and that's why the
6 exception is so narrow.

7 MR. LAMBSON: I think that's a very fair framing of, you know,
8 how this MPEP guidance came to be the guidance because it is emphasizing
9 the need for the shift to a first to file system and not the first to disclose
10 system. I think also, you know, a bigger picture point to make is that, you
11 know, there's no question here that comparing the disclosures to the claims
12 is not what this prior art exception is after. It's not looking for any
13 disclosure of -- any public disclosure that satisfies the claim language being
14 enough to, you know, avoid, or render as accepted as other prior art. That's
15 from the statute itself to the MPEP guidance around it. I think that's clearly
16 outside the scope of what this exception is intended to cover. And so, and in
17 this particular case, we have an instance where Patent Owner only compared
18 the inventor's art to the claim language. And that would not be a sufficient
19 showing under any sort of interpretation of this exception.

20 I'll make the point that, you know, we've been discussing the
21 MPEP framework and MPEP's guidance on the scope of whether alternative
22 species and so forth are within the scope of this exception. I do want to
23 make the point that in Patent Owner's papers, they haven't acknowledged
24 the MPEP framework at all. They don't cite to it. There's no attempt to
25 explain it, and they certainly don't apply it in their analysis of Hensen-
26 Video. They have their own framework, which I'll get to in a few slides

1 based on materiality, but that's not based on any authority. By contrast here,
2 you know, we have the MPEP. From Petitioner's perspective we have the
3 MPEP, the statute itself, which makes clearly the distinction that the
4 comparison should be between the prior art disclosure and the inventor's
5 disclosure. We have the MPEP guidance, which breathes some light into
6 sort of what we should be looking for in that comparison. And then
7 although case law is limited, we do have the final written decision, and that
8 was recently affirmed in the Federal Circuit in IPR2021-886. As again, you
9 know, guiding us that this is in fact the correct interpretation of this statute.

10 JUDGE BEAMER: You say 2021 at 886?

11 MR. LAMBSON: Twenty twenty-one, 886, *Kaijet v. Sanho*. With
12 that, I'll turn to a slightly more detailed discussion of slides 23 and 24,
13 which are our expert testimony on the comparison. Again, we know from
14 the statute that the comparison is between the inventor's disclosure and the
15 prior art reference, in this case, Hensen-Video. And so, only Petitioner has
16 carried out that particular comparison and provided expert testimony on the
17 subject. And that expert testimony has not been challenged by any cross-
18 examination or rebuttal expert testimony. So again, the prior art exception is
19 focused on the subject matter that's relied upon in the petition. And in our
20 case, we relied on Hensen-Videos disclosure of a smartphone application
21 and a visual representation of a wireless earpiece displayed on that
22 smartphone application. And so, what Dr. Anthony did is he compared
23 those subject matter that we relied on in the petition directly with the
24 inventor's, the inventor's disclosures, and he noted a number of differences.
25 So, on this slide, we're looking at the smartphone application as a whole.
26 And on the left, it may be a little hard to see, but that's Dr. Hensen holding a

1 Samsung phone that's running an Android smartphone application. And on
2 the right, that's the inventor's disclosures and it's an iPhone running an
3 iPhone application. Dr. Anthony explained that from the perspective of
4 someone skilled in the art, that that's a fundamental difference. Android and
5 iPhone applications are not interchangeable. I mentioned earlier source
6 code, they run different hardware, firmware, everything all the way up to
7 stack, culminating in what's ultimately different smartphone apps that have a
8 different look and feel and functionality.

9 JUDGE WHITE: Well, counselor, that brings me back to that
10 policy question. So, and I know you're going to point out some other things
11 that you that you think you're different, so I'm not discounting those. But
12 just for -- this Android iOS difference right here. If that were enough of a
13 difference to be dispositive here that you could have a situation where an
14 inventor would disclose, you know, a fully functional iPhone app and then
15 some competitor could be like ah, but I can do it on Android, and fully take
16 the features point by point by point and make an Android version and all of a
17 sudden that's okay. That disclosure is not going to be exempted from your
18 view of things. Will you see why that seems like that could be troubling
19 when what we are trying to do here is encourage disclosure and encourage
20 disclosure of course leading to a Patent application. Whether a difference
21 like that which is implementation detail on, I mean don't get me wrong
22 anybody actually doing the work would say that that's a -- that there's a lot
23 of work to implement it in one system versus the other. But it would give
24 you sort of the -- the storyboard of where to go to put this thing together.
25 Why should a distinction like that be enough to -- to keep this in the realm of
26 prior art?

1 MR. LAMBSON: Yeah, so I guess, you know, a hypothetical
2 scenario where the only difference was Android versus iOS and everything
3 else was identical. You know, that may result in some difficult questions,
4 but we don't really have that situation here. You know, first of all as I
5 mentioned right up front, you know, the -- because we're talking about, you
6 know, policy here we have an issue -- we have a situation where Dr. Hensen
7 actually disclosed his application first before the inventors disclosure. So,
8 there's no question of deriving or somehow the inventor disclosing the
9 subject matter, giving the public the benefit of it, and then Dr. Hensen
10 coming along and benefiting from that. That's not what we have in this
11 case. We have not only different smart phone apps running on different
12 hardware resulting in different limitations, but they look different. They
13 function differently, as we've seen. And so, in this case, we don't
14 necessarily need to address some of these maybe edge cases where there's
15 an issue of copying an app or reporting one from one platform to another.
16 And, you know, if that situation came up, it may be, it would, you know,
17 ultimately be down to the specific claim language or the specific disclosures
18 being relied upon to satisfy the same claim language. But, ultimately, you
19 know, there's an incentive here to be a first to file Patent system. And to the
20 extent that, you know, the exception is narrow to preserve that incentive, you
21 know, Petitioner doesn't really see a problem with this being interpreted as a
22 narrow exception for -- from a policy perspective. There's a greater
23 emphasis on being first to file, then maybe incentivizing an inventor to make
24 a public disclosure.

25 JUDGE WHITE: Thank you.

26 MR. LAMBSON: I'm turning now to slide 24. The -- Dr.

1 Anthony, this is now focusing on the visual representation of the wireless
2 earpieces, which is sort of a more specific aspect of the subject matter of
3 Hensen-Video that Petitioner relied upon. And again, Dr. Anthony carried
4 out side by side, you know, direct comparison between the references --
5 between Hensen-Video and the inventor's disclosures and came to the
6 conclusion that the visual representations were not the same. Specifically,
7 you know, in addition to the overall differences in their look and feel, he
8 pointed out that one is a photorealistic representation, that's the inventor's
9 disclosures on the right, it's sort of a 3D model of what the actual earpieces
10 look like. On the left is Dr. Hensen's disclosure, and it's more of a
11 representative line art, just getting an outline or silhouette of the earpieces,
12 two different ways to -- to accomplish what is claimed, which is a visual
13 representation of the wireless VOPs and that makes them alternative species.

14 JUDGE BEAMER: Just as a heads up, 'you have about 10
15 minutes left.

16 MR. LAMBSON: Thank you. I'll just point out that the Patent
17 Owner did nothing to challenge Dr. Anthony's opinions here, and once again
18 the point being that the inventor did not disclose the subject matter that the
19 Petitioner relied upon, which is in this case Hensen-Video's visual
20 representation, and so the prior art exception does not apply.

21 Moving to slide 25, this slide briefly addresses some of Patent
22 Owner's sur-reply arguments. I'll emphasize again that Patent Owner has
23 not responded to the requirements we've seen in the MPEP, that the subject
24 matter of the two disclosures should be identical, or that they should disclose
25 the same species. No attempt to address that framework. Instead, what
26 Patent Owner argues is that the difference is that Petitioner sites do relate to

1 what are in their view immaterial factors. Again, we talked about authority.
2 Patent owner doesn't say any authority to suggest that materiality should be
3 a relevant factor in this analysis. And in fact, it's squarely at odds with the
4 MPEP guidance on slide 20, which provides that any differences, even
5 trivial or immaterial differences, any differences, then the prior art exception
6 does not apply. And even if materiality were a relevant factor, in this
7 particular case, and on these particular facts, we have Dr. Anthony's
8 testimony that explains that the differences that we see between the two
9 applications and the two disclosures is in fact significant. And by contrast,
10 all we have from Patent Owner is attorney argument. Down at the bottom,
11 Patent Owner also argues that Petitioner's arguments are untimely. Point
12 appeared to be that Petitioner had some sort of initial burden, not only to
13 demonstrate that Hensen-Video satisfies the limitations of the challenged
14 claims, but also to describe various differences that would be relevant to the
15 prior art exception. You know, these Android versus iOS photo realistic
16 versus blind art, those differences mentioned on the previous slides. But
17 again, there's no citations to authority and ignores that its Patent Owner's
18 burden to establish that this prior art exception applies.

19 With that, I'll move on to slide 26 and switch topics. The next set
20 of slides addresses a new argument in the sur-reply that Petitioner's reliance
21 on Hensen- Kickstarter, in Grounds 4 through 6 is improper. Just as an
22 original point, this is an untimely argument. It was raised first in the sur-
23 reply when it could have and it should have been raised in the Patent Owner
24 response. And also, the merits are wrong. Patent Owner is glossing over the
25 actual analysis that we put in the petition for Hensen-Kickstarter, and instead
26 is engaging it in a strawman argument.

1 So, turning to slide 27, the first couple of slides are just sort of for
2 level setting to explain the petition's approach to Hensen-Kickstarter
3 grounds, and then I'll get into Patent Owner's arguments. In case I didn't
4 say it's slide 27 that I'm on. So, for Grounds 4 through 6, the Petitioner
5 explained that Hensen-Kickstarter and Hensen- Video contain very similar
6 teachings. The same smartphone app just through different mode of
7 disclosure. And we previewed our analysis by stating that given the
8 similarities between these two disclosures, they disclose the same elements
9 for the same reasons.

10 Turning now to slide 28, Petitioner's analysis didn't stop there.
11 The Petitioner carried out a detailed element-by-element analysis to show
12 that for every feature in the petition that Petitioner relied on Hensen-Video
13 for there was a corresponding teaching in Hensen-Kickstarter. It also
14 includes, the Petition also includes a motivation to combine analysis that's
15 specific to Hensen-Kickstarter. So, that analysis continues on slide 29, and
16 I'll move to slide 30. In the Patent Owner response, Patent Owner didn't
17 take any issues whatsoever with Petitioner's approach to Grounds 4 through
18 6. And, in fact, Patent Owner adopted the exact same approach in
19 formulating its own arguments for Grounds 4 through 6. And as we can see
20 at the end of this paragraph, they cite their own expert's testimony, Kai
21 Johnson, in support of this approach.

22 Turning to slide 31, in the sur-reply, Patent Owner does a 180.
23 And now for the first time the Patent Owner is arguing that Grounds 4
24 through 6 are improper, that Hensen-Kickstarter is missing elements, that the
25 side-by-side comparisons that we showed from the petition are insufficient.
26 Again, this is an argument that's untimely and wrong on the merits. It

1 should have been raised in the Patent Owner response, and by waiting until
2 the sur-reply to take any sort of an issue with Grounds 4 through 6, the
3 argument should be deemed waived or given no wait. And second,
4 something that, you know, stands out in the sur-reply is the lack of any
5 support for Patent Owner's arguments, whether that's legal authority or,
6 technical analysis. They don't cite any legal authority for the contention that
7 Grounds 4 through 6 are improper and there's no expert testimony or any
8 citations to the evidence for its contention that Hensen-Kickstarter is missing
9 any claim elements.

10 JUDGE BEAMER: Counsel, in the Patent Owner's initial
11 response, they said there was no analysis of element 1F for Ground 4. Is that
12 correct?

13 MR. LAMBSON: I believe that's a typographical error and I think
14 that's how Patent Owner framed it. You know, we do provide the side-by-
15 side analysis of the visual representations to show that they're identical, and
16 so, you know, for the purposes of carrying out the analysis. And so, to that
17 extent, you know, we demonstrated that the substance is the same, we just
18 forgot to cite the particular claim element number. I'll note that element 1F
19 only appears in Claim 1, not in the other two independent claims.

20 Turning to slide 32, Patent Owner's only substantive criticism of
21 Hensen- Kickstarter is that it's a relatively short blog post. I think it's fair to
22 say that simply characterizing a reference as a short blog post is not enough
23 to create any sort of bona fide dispute over whether specific claim elements
24 are disclosed. The petition is supported by citations to the record and expert
25 testimony, none of which has been challenged in cross-examination and
26 nothing in the sur-reply provides any evidentiary basis to refute that. I'll

1 briefly point out at the bottom here that Patent Owner is also holding
2 Petitioner to a double standard as Patent Owner took no issues for its own
3 kickstarter blog posts for its 102(b)(1)(B) needs.

4 I understand that I only have a couple of minutes left. I think
5 given the timing, that I'm at a good place to stop. And will, unless there's
6 further questions, I'll reserve the remainder of my time.

7 JUDGE BEAMER: Okay. So, you have about 20 minutes for
8 rebuttal. Perhaps one or two extra minutes because there were some
9 interruptions. Patent Owner, how much time would you like to reserve?

10 MR. JARRETT: Yes, Your Honor. I'd like to reserve 20 minutes
11 for sur-rebuttal.

12 JUDGE BEAMER: Okay. So, you'll have 40 minutes. You may
13 start when you are ready.

14 MR. JARRETT: Good afternoon, Your Honors, Bradley Jarrett,
15 on behalf of Patent Owner, BRAGI. I would like to start with -- direct your
16 attention to slide 2 of our demonstratives. And just to begin, there are three
17 main points why Petitioner's obviousness grounds fail. So first, as was
18 discussed during Petitioner's presentation, first things first, Hensen-Video is
19 not prior art to the '385 Patent. This is because it's disqualified as prior art
20 under section 102(b)(1)(B) based on Bragi's Patent Owner inventor
21 originated prior public disclosure. The disclosure is made less than one year
22 before the '385 Patent's priority date. It discloses the same subject matter of
23 Hensen-Video that's relied upon by Petitioner's obviousness grounds in the
24 petition, either explicitly in Grounds 1 through 3, which explicitly reference
25 Hensen-Video and the obviousness combinations, or implicitly through
26 importation into Hensen-Kickstarter in Grounds 4 through 6. And the

1 importation of those teachings of Hensen-Video into Hensen-Kickstarter are
2 improper. And, Your Honors, I would like to clarify that Patent Owner did
3 not make the incorrect comparison regarding the BRAGI prior art public
4 disclosure. Applying the MPEP framework, our sur-reply, we addressed
5 Petitioner's reply arguments, and we compared the subject matter. We
6 explained how the subject matter of the BRAGI dash inventor prior
7 disclosure discloses the same subject matter as the Petitioner's portions of
8 Hensen-Video that it relies upon for its obviousness grounds.

9 Now, looking even past the priority issues or the issues with the
10 priority dates or the priority issues, second, the challenged claims remain
11 Patentable over Petitioner's prior art, even on the merits. Specifically with
12 ground, what Petitioner has identified as Ground 1F, which we believe is
13 improper parsing of the claim language, that limitation fails due to an
14 antecedent basis argument that Petitioner is created just by parsing the claim
15 language. I'll explain that in more detail later. But as far as -- and third, the
16 objective evidence that exists confirms non-obviousness. The Dash prior art
17 disclosure is co-extensive with the subject matter of the '385 Patent. The
18 Dash earned immense industry praise for its novel commercial embodiment,
19 while other competitors had tried and failed within the industry.

20 Now, before getting into our first argument, Your Honors, I'd like
21 to direct your attention to what is slide 26, to just frame our position more
22 and crystallize it further. So again, with the issue with Hensen-Video, all of
23 Petitioner's grounds rely on Hensen-Video. Grounds 1 through 3, if you
24 look to the right of your slide, Your Honor, those are the grounds of
25 challenge for challenge that were referenced in the petition. Grounds 1
26 through 3 specifically explicitly reference Hensen-Video as a ground, as one

1 of the references in the obviousness grounds, and 4 through 6 do not
2 reference Hensen-Video explicitly, but again, reference the teachings of
3 Hensen-Video, in essence, actually importing the teachings of Hensen-Video
4 and using them interchangeably with Hensen-Kickstarter, which we believe
5 is incorrect. And now, Petitioner's 4 through 6 grounds, the implicit use of
6 Hensen-Video or the importation of the teachings of Hensen-Video into
7 Kickstarter, the Kickstarter is improper. There are two separate references.
8 They do not contain identical teachings. As Petitioners -- the portion of the
9 petition here that is cited on the slide would suggest that they're nearly
10 identical. That is not the case. The Hensen-Kickstarter reference is a
11 minimal disclosure. It's a few pages and a blog post with some mock-up
12 screenshots. It's not clear that the screenshots are actually of any kind of
13 functional device. They could have been just mock-ups designed in a
14 program such as Microsoft Paint for all we know based on what's in that
15 disclosure.

16 JUDGE BEAMER: Why does that matter if it's disclosing
17 something?

18 MR. JARRETT: Yes, Your Honor, it's not Patent Owner's
19 petition that a disclosure needs to be operational necessarily or fully
20 operational to be prior art, but prior art is prior art for all it teaches. And the
21 issue with the disclosure in Hensen- Kickstarter is it doesn't really teach
22 anything. There's just a screenshot that shows some icon that's not sure
23 what they are. That's why Petitioner has to rely on Hensen- Video where
24 the inventor or the inventor of Hensen Patent, Dr. Hensen has actually
25 explained the interface and how different portions of the interface work, and
26 he's showing a demonstration. The Petitioner needs those teachings and

1 those explanations from Dr. Hensen. They need those to be brought back in
2 time to support Hensen-Kickstarter to say that it teaches anything. There's
3 no teaching with those screenshots just in and of itself that would be
4 sufficient to be invalidating prior art. And even again, the Kickstarter
5 concedes that those screenshots are not the representation of a completed
6 application. And Petitioner understands they have a problem with Hensen-
7 Video. They understand the reference that I mentioned Black's petition
8 teachings to stand on its own as an invalidating reference. That's why they
9 seek to incorporate the teachings of Hensen-Video for the reasons I
10 described. And Petitioner needs those Hensen-Video teachings, specifically
11 the quotes of Dr. Hensen describing how the system works in order to bring
12 some kind of clarification or some kind of teaching actually to the
13 screenshots that are included. Essentially that barebones disclosure of the
14 Hensen-Kickstarter. So, essentially with Hensen- Kickstarter, if you take
15 out Hensen-Video, or you pull away the Hensen-Video teachings, imagine
16 that they don't exist, which they did not exist at that time, you're left with a
17 mockups of some screenshots, and no evidence of anything that is taught.
18 Specifically, if you look at the example of limitation 1D where it refers to
19 the user being able to interact with the interface and earphones. So, in a
20 nutshell, Your Honors, what Petitioner would like to do, they would like the
21 priority date of Hensen-Kickstarter and the teachings of the Hensen
22 disclosure in the Hensen-Video. So, this is why Petitioner is seeking to
23 move those teachings or import those teachings of Hensen-Video into
24 Hensen-Kickstarter. And this is why, for example, Hensen, in Petitioner's
25 briefing, Grounds 1 through 3 were briefed first to include Hensen-Video,
26 the later in time disclosure, to provide the explanations of Dr. Hensen to

1 essentially then shift the focus to Grounds 4 through 6 and just, I guess once
2 the well has been poisoned, they can just take the teachings of Hensen-Video
3 that have been described in Grounds 1 through 3 and just import them
4 seamlessly into Grounds 4 through 6.

5 And so, Your Honors, I would go to direct you to slide 3, and this
6 is going over -- this will be pertaining to Grounds 1 through 3. More of our
7 discussion about the prior art public disclosure in § 102(b)(1)(B), and how it
8 disqualifies Petitioner's reliance on subject matter.

9 So, going to slide 4, this is, as was addressed during Petitioner's
10 argument, the inventor originated prior art public disclosure exception here
11 in the statute where 35 U.S.C. § 102(b)(1)(B) provides that inventor
12 originated grace period, essentially public disclosures exclude disclosed
13 subject matter from § 102(a)(1) prior art.

14 Going to slide 5, here's the MPEP guidance. The section
15 102(b)(1)(B) comparison.

16 JUDGE WHITE: Maybe we should back up to slide 4.

17 MR. JARRETT: Yes, Your Honor.

18 JUDGE WHITE: I know I asked your opposing counsel some
19 questions about what does the statute actually say, and I'd like to get your
20 views on what the statute actually says. The subject matter disclosed that
21 there's some question as to what subject matter we're looking at and why
22 you think it's that particular one looking at the words of the statute that we
23 have in front of us. What are we comparing to what is the question, and --
24 and I know I'm getting it into some other things, but just right now, just
25 looking at the words of the statute, what is your view as far as what are we
26 supposed to be comparing to what and -- and point me to whatever language

1 in the statute you're looking at to get to that.

2 MR. JARRETT: Your Honor, based on the statutory language, I
3 know it was discussed earlier. It's not abundantly clear. My understanding
4 is more framed by the MPEP's guidance. Frankly, looking at the statute, it's
5 not to me clear what subject matter that's been disclosed, what the
6 comparison is. I think the MPEP guidance is -- adds clarifying detail. But
7 based on the statute, I would say I would defer again to the MPEP's
8 guidance, essentially interpreting the statute. I don't know if that's officially
9 answered your question, but that's the Patent Owner's position.

10 JUDGE WHITE: Okay. Well, it gives me your position. All
11 right. Move to the MPEP.

12 MR. JARRETT: Yes, Your Honor. So, going to slide number 5,
13 this is again the MPEP guidance for 102(b)(1)(B), comparing Petitioner's
14 relied upon subject matter to the inventor originated prior art public
15 disclosure. Where Petitioner said that Patent Owner has not made this
16 comparison, I can direct you to at least page 24 of Patent Owner's response.
17 Specifically, it's right in the heading for that section on page 24. The Dash
18 kickstarter disclosed the same subject matter Petitioner relies on from
19 Hensen-Video, and we go through the comparison for limitation by
20 limitation. So, we would disagree with the Petitioner's point of contention
21 on that issue.

22 And then moving on to slide 6, just to recap, essentially, of what's
23 required for the inventor originated prior art public disclosure to disqualify
24 prior art, less than one year before the priority date of the Patent at issue, and
25 just based on the MPEP guidance, discloses the same subject matter as the
26 teachings of the alleged prior art relied upon to support the obviousness

1 grounds asserted in the petition.

2 JUDGE WHITE: And I want to give you the same opportunity I
3 gave opposing counsel. Did you find any case law out there that you
4 thought was instructive on this? Is there any case law that you want to direct
5 to us other -- because I didn't find much of anything, but if you found
6 something, let us know.

7 MR. JARRETT: Your Honor, I believe from Patent Owner, we are
8 in the same position. We did not find illuminating case law. On this point,
9 it was pretty sparse in our research efforts. So, I assume it seems as though
10 it's across the board for all of us who've looked at this issue. But to answer
11 your question, Your Honor, we did not find anything exceptionally
12 illuminating, so we relied heavily on the MPEP guide.

13 JUDGE WHITE: And then one more question, just to give
14 fairness to both sides, was did you find any illuminating statutory history
15 and anything in the history that you think that you want to bring to our
16 awareness?

17 MR. JARRETT: Your Honor, we did not find anything that would
18 necessarily or substantively change our arguments, our analysis, or our
19 responses to any of the Petitioner's arguments.

20 JUDGE WHITE: Okay.

21 MR. JARRETT: Thank you, Your Honor. Going to slide 7. This
22 is just essentially a quick overview of the prior art references. The
23 references at issue, the Patent, and the different priority dates, just to give,
24 the Petitioner has pointed to some of this already, but just to give orientation
25 for the remainder of the presentation. Going on to slide 8, obviously you
26 have the '385 Patent with priority date of November 13, 2015. If you go

1 then to, skipping to slide 10, there's Hensen-Video, published September 10,
2 2015. We then have the Bragi Dash Kickstarter, published February 11,
3 2015. And then highlighting with the timeline there on slide 12, you have
4 the different dates, just to give a visual representation. And again,
5 highlighted there in red text is the Hensen-Kickstarter with the November
6 22, 2014, priority date, just further illuminating why Petitioner needs
7 teachings of Hensen-Video to be applied to Hensen-Kickstarter in order to
8 get around the Bragi's inventor's disclosure and to maintain its Grounds 4
9 through 6.

10 JUDGE BEAMER: So, you're saying that the --

11 MR. JARRETT: Now going on to --

12 JUDGE BEAMER: Counsel, are you saying that Hensen-
13 Kickstarter doesn't have enough details but the Dash Kickstarter does?

14 MR. JARRETT: Yes, Your Honor. Looking at the Dash
15 Kickstarter, the Dash Kickstarter is actually closer to the Hensen-Video
16 disclosure. There's videos, for example, there's multiple videos on
17 disclosure, but specific and different kickstarter disclosures, but specifically
18 the inventor disclosure in Exhibit 2022 with the Patent inventor, Martin
19 Steiner . He's on a video explaining what is the operation of the Dash, the
20 application, how it works. There's just more detail where that level of detail
21 was not provided for the FreeWavz system until the Hensen-Video, which is
22 after the Bragi Kickstarter disclosure, Your Honor.

23 JUDGE BEAMER: As I recall, that 2022 video primarily relies on
24 a frame where the inventor is talking to us and in the background there are a
25 whole bunch of displays from the smartphone on the wall. So, it's your
26 position that one could glean from that the details of the invention, whereas

1 the stills of the frames in the Hensen-Kickstarter are very similar, you're
2 saying that's not good enough?

3 MR. JARRETT: Yes, Your Honor, the addition of the video in the
4 Bragi Kickstarter disclosure, we believe that that gives some illumination
5 on -- on the device and the system, the Dash system, whereas it's difficult
6 with the -- the Hensen-Kickstarter particularly because having to exclude the
7 Hensen-Video from your minds and looking at the -- the disclosure in time.
8 In 2014 what the disclosure was you have to erase any kind of discussion,
9 and a description by Dr. Hensen it's provided in video. The difficulty there
10 is obviously once the position we're in now based with both the references
11 presented together the tendency would be to look at hindsight combine the
12 two teachings to be able to see, oh there's -- to be able to look at the Hensen-
13 Video disclosure, which is later in time and then match up different portions
14 of the Hensen-Kickstarter disclosure. Whereas it's difficult to then take the
15 Hensen-Video out of the equation, but when you do you're left with -- with
16 just barebones screenshot mockups, and we believe -- it's our position Patent
17 Owner's position that the Bragi inventor disclosure is more detailed than that
18 and allows for the -- a person of skill in the art to be able to understand what
19 is better understanding of what's disclosed by what topic or what the
20 teaching entails.

21 Your Honors, I would go to slide 13. This explains the issue of the
22 same subject matter or the subject matter comparison in terms of
23 102(b)(1)(B). Again, to reiterate, in Bragi's Patent Owner response, and
24 also in the sur-reply, Bragi has explained and shown, made a comparison
25 between the subject matter that's relied upon in the petition regarding
26 Hensen-Video and the subject matter of the Kickstarter. So, for example,

1 just taking some quotes here on this slide from the petition, we see Hensen-
2 Video relying on a disclosure of a wireless earpiece system for its
3 obviousness grounds clearly in the Bragi Dash Kickstarter subject matter.
4 We have here on the right side, this is from Kickstarter, showing clearly the
5 earpiece, the wireless earpiece system, different components of the earpiece.
6 Going to slide 15, again, we have a disclosure in Bragi of the earpiece
7 system, comparing again with the Petitioner's relied upon subject matter in
8 the petition, referring back to the earpiece system.

9 Going on to slide 16, we have another disclosure from the Bragi
10 Kickstarter regarding the subject matter there. We have the representation
11 of the application on the smartphone with a way to remote control the
12 earpieces and also various aspects of the display screen. Again, all things
13 that are relied upon subject matter for the obviousness ground of the petition.
14 In terms of Hensen-Video, the earpiece system, which again is displayed
15 here on the right side, and with the earpieces we've shown earlier that were
16 disclosed in the Kickstarter, remote control, the ability to display, to
17 manipulate the display and the ability to control the headphone system.

18 Your Honors, going to slide 17. This is again some more examples
19 of relied upon subject matter. So, for one of the dependent claims there is a
20 requirement for monitoring or tracking of physical activities, so we see
21 physical activities are relied upon for the subject matter. Bragi's Dash
22 Kickstarter, we have a disclosure showing that this individual is about to
23 field test the headphones and go for a run. So again, subject matter is
24 common between the petition and what it's relied upon for the obviousness
25 grounds, particularly for some of the dependent claims and then also what's
26 disclosed in the Kickstarter.

1 Going to slide 18, so what has happened in Petitioner's reply brief,
2 there's been a shift in the subject matter. So, going from the petition, which
3 focused on the earpiece system, the remote controls, display for the user
4 interface to control the earpiece system, shifting from that to trivial
5 differences between the Bragi Kickstarter disclosure and the earpiece
6 system disclosed in the inventor disclosure and what's in the Hensen-Video.
7 So, for example, if we go to slide 19 these are from Patent -- excuse me,
8 Petitioner's reply brief, and again noting the shift in the subject matter. We
9 have now the focus on showing the differentiation between Bragi's Dash
10 Kickstarter and Hensen-Video where we're left with subject matter such as
11 outward appearance, colors, icons, arrangement, and organization of menu
12 options. None of these are subject matter that the Petitioner has relied upon
13 for its obviousness grounds or disclosing of any claim limitations. These are
14 just minute differences. If you go, Your Honors, to slide 20 then, we have
15 more subject matter that's relied upon in the reply brief to differentiate
16 between Bragi's Kickstarter disclosure and the Hensen-Video reference, and
17 as Your Honors had pointed out the difference in operating systems, there's
18 no basis in the petition or nothing in the petition citing difference in
19 operating systems between Android versus iOS. It would suggest it's a basis
20 for any of the obviousness grounds or any relied upon for any limitation.

21 Next we would have slide 21. Something even more abstract
22 pointing to a different overall look and feel between the Bragi -- the Bragi
23 Kickstarter disclosure and the Hensen-Video, and I'm not sure that a
24 POSITA understands or would understand what a difference in look and feel
25 would be and how that would go towards a subject matter that will be relied
26 upon for an obviousness ground, specifically with the claims that we have in

1 front of us from the '385 Patent. And again, Your Honors, to highlight the
2 shift in subject matter looking here again at slide 23 we have from the
3 petition we have, for example, in the petition we have screenshots that are
4 compared. The Patent screenshot, the '385 Patent screenshot is compared
5 with the Hensen-Video screenshot, and we see there are pictures of earpieces
6 to show there's subject matter, oh there's your pieces disclosed in both. And
7 then we look at the reply brief and now there's a different screenshot which
8 has removed the earpieces or shown a different screen view that no longer
9 has the earpieces to show that there's a differentiation otherwise we'd be left
10 with the screenshots showing again re-emphasizing that there are earpieces
11 in both and they -- that's the subject matter that's relevant and relied upon
12 for the obviousness grounds, the earpiece system, and the ability to control
13 it remotely. And again, slide 23 here, just pointing out the differences in the
14 shift in subject matter that Petitioner is focusing on from what was relied
15 upon for the petition's obviousness grounds versus what's focused on in the
16 reply.

17 JUDGE BEAMER: So, counsel -- counsel, (INDISCERNIBLE).

18 MR. JARRETT: Yes, Your Honor.

19 JUDGE BEAMER: On page 10 of the Petitioner's reply, they did
20 compare the visual representation of the earphones, the two different -- the
21 two different, you know, FreeWavz versus the Dash. So, it's not like they're
22 avoiding that aspect of the comparison.

23 MR. JARRETT: That's correct, Your Honor. It was just to
24 highlight in that one example that there was a shift in that one example, but I
25 agree, I'm looking at page 10 of the reply brief. There is a comparison, just
26 to clarify, there is a comparison here of the two pictures of the earphones,

1 and it's focusing on -- that's, I believe, where they're focusing on the
2 difference in the overall look and feel on page 10 of the reply brief, Your
3 Honor. So, that would be in reference. That image, some of the subject
4 matter, if you look at slide 21, Your Honor, that is the bottom of that slide
5 underneath the two comparisons of the earpiece photos. So, in that
6 comparison, the earpiece photos, they're focusing on the difference of the
7 overall look and feel versus what subject matter was described in the petition
8 necessarily.

9 JUDGE BEAMER: Right. I got your point.

10 MR. JARRETT: So, Your Honors, moving back to slide 26. This
11 is what I began the presentation with when referring to the differences
12 between the two grounds. The sets of grounds, what we call the Hensen-
13 Video Grounds for 1 through 3, and Hensen-Kickstarter Grounds, which are
14 4 through 6 which implicitly reference or implicitly seek to import teachings
15 of Hensen-Video. And going to slide 29, Your Honor, we just highlight
16 that, again, Hensen-Kickstarter and Hensen-Video are not the same teaching.
17 Just to reiterate, the main difference is with Hensen-Video, you have
18 explanation and narration for the different functionality of the earpieces for
19 the FreeWavz system versus the Kickstarter page, which is just a static PDF
20 post with minimal mockup screenshots.

21 And going to slide 30. This is a reference specifically to limitation
22 1D, and what's relied upon for limitation 1D, and there's nothing from just
23 looking at the screenshots of Hensen, Hensen-Kickstarter, to reference or to
24 show using a touchscreen user interface of the smartphone to interact with
25 the earpieces, because it's a static photograph, there's -- that element's
26 missing and that's what Hensen-Video provides for Hensen-Kickstarter in

1 that manner. Otherwise, standing alone, Hensen- Kickstarter does not have
2 anything just from its teachings of showing a screenshot that there's any
3 interaction that's happening specifically. And also, with, I direct you to
4 slide 31, and this is just a reference that was in motivation to combine, just
5 more references to Hensen-Video, the entire motivation to combine,
6 essentially between Hensen Patent and Hensen-Video relies exclusively on,
7 almost exclusively on quotations from Dr. Hensen during the video, and the
8 explanation for the motivation to combined for Hensen-Kickstarter and
9 Hensen Patent relies explicitly on Hensen- Video.

10 Your Honors, going to slide 33. This is more of getting into the
11 details of how the limitations, even if we assume that Hensen-Video and
12 Hensen-Kickstarter are prior art, the disclosures of either one of those
13 references don't teach what's required for the '385 Patent claims. They
14 don't disclose the required limitations. I'd specifically direct you to slide
15 34, which Petitioners have framed as claim limitation 1F. And so, looking at
16 slide 34, the slide pertains to the portion --

17 JUDGE BEAMER: Counsel, before you go to that, pardon for the
18 interruption.

19 MR. JARRETT: Yes, Your Honor.

20 JUDGE BEAMER: Just going back to this issue of whether the
21 Kickstarter provides enough information. In your brief, you say the level of
22 ordinary skill, bachelor's degree in computer science or electrical
23 engineering or similar field, at least one year of experience in wireless
24 electronic devices, particularly software applications used to interface with
25 wireless earpieces. So, are you saying that someone looking at, and I'm
26 looking at the Kickstarter, in Exhibit 1007 and the Kickstarter says, here's

1 some sample page screenshots. And we see all these sample screens. Are
2 you saying that someone of ordinary skill wouldn't have the ability to figure
3 out what's going on here, and you see an image of the earbuds, and you see
4 a battery icon with a percentage underneath, and then you see all these other
5 things relating to distance and calories and so on. I'm having trouble
6 understanding why that's not good enough. Admittedly, it doesn't have the
7 nice narration that the video had but is that really necessary?

8 MR. JARRETT: For some of the limitations, Your Honor, there is,
9 for example, one thing is when you're referring to pulse oximetry, for
10 example. And Dr. Hensen in the video, he goes into explain he's engaging
11 pulse oximetry, which we believe is also external to the earpiece even. But
12 that's one example I can point to for sure, that is something that's not
13 disclosed based on the Hensen-Kickstarter PDF document, looking at that, I
14 don't know that there's any way to decipher that someone skilled in the art
15 would know that we'll be able to derive that from just looking at a
16 screenshot. And also, there's, to some extent, even with prior art references,
17 there are references for all they teach, but there is still some enabling aspects
18 to it, that there needs to be some kind of detail beyond just these screenshots
19 and the minimal disclosure that's there. And so, yes, I think that there's
20 still -- there's a leap between those still screenshots, not screenshots. We
21 don't know for sure that they're even screenshots. The Kickstarter
22 admittedly states that the application is not complete. So, there's still, I
23 think, is a level, there is some kind of leap between their, what's disclosed
24 there and what's disclosed in the video. And I think the Petitioner
25 understands that, which is why they've referenced heavily their Kickstarter
26 grounds all refer back to Hensen-Video. They understand, I think that's at

1 least implicitly an admission that Hensen, Hensen-Kickstarter can't stand on
2 its own. Otherwise, they would have briefed those two grounds completely
3 separately to ensure that if Hensen -- because the way Petitioners have
4 argued this, if Hensen-Video fails, either because it's not prior art or it fails
5 on its merits, all of Petitioner's grounds fail. So, they need -- essentially
6 what they need is Hensen-Video to have the priority date of Hensen-
7 Kickstarter, and I think they understand that the Hensen-Kickstarter is not
8 enough, which is why they've essentially incorporated the teachings of
9 Hensen-Video, Your Honor.

10 JUDGE BEAMER: Okay. Thank you. Then you can resume
11 where you were.

12 MR. JARRETT: Yes, Your Honor. Going to slide 34. This is
13 what Petitioner has referenced as Claim Limitation 1F. And this slide
14 pertains to this portion of the independent claim. I have -- what is on the
15 slide there is yellow text and I -- my best guess is that is pink. I'll refer to it
16 as pink text. The pink text represents what's identified as Limitation 1F.
17 And the yellow text identifies what is being identified by Petitioner as
18 Limitation 1E. So, Petitioner's argument here on why the visual
19 representation indicative of a function or property of the at least one wireless
20 earpiece communicated from the at least one wireless earpiece to the
21 computing device. Why that limitation 1D is not met. Is because there is
22 no -- because it lacks an antecedent basis back to the visual representation of
23 the at least one wireless earpiece in Limitation 1E, the yellow text there. So,
24 by separating the claims, which we don't believe they should be separated,
25 we believe it's one limitation that should be read as one limitation. By
26 separating those two limitations in this way, they pull away the antecedent

1 basis for understanding the visual representation that is claimed in 1F. So, in
2 doing so, they divorce the claim language from the antecedent basis that's
3 clearly there in the yellow text here. So, if you read it together, wherein the
4 user interface is configured to display the visual representation of the at least
5 one wireless earpiece on at least one of the one or more screen displays, the
6 visual representation indicative of a function or property of the at least one
7 wireless earpiece. When you read the claim language together as it should
8 be read, there's no way -- common sense dictates that that visual
9 representation in the pink text for 1F can only be the visual representation of
10 the at least one wireless earpiece. So, by splitting the claim language,
11 Petitioner has found a way to manufacture an antecedent basis problem
12 when there isn't one. So, if you look at the next slide, slide 35, the reason
13 why Petitioner has read the claim this way and parsed it out in such a
14 manner is to allow for the Hensen-Video to then meet this limitation
15 divorced from the antecedent basis. Because now what Petitioner is pointing
16 to are two battery icons as representing the, or indicative of a function or
17 property of the at least one earpiece. Whereas, if you read the claim
18 limitation together, it's our understanding and our expert witness has stated
19 in his declaration, that that function or property needs to be displayed on the
20 representation of the earpiece itself, so physically on the earpiece. So, for
21 example, in the '385 disclosure you have -- there are numbers and
22 percentages listed separately but those are just a representation, a
23 confirmation of what the battery life is. The headphones or earphones
24 themselves have different lighting that changes based on illumination that
25 changes based on the battery level. So, that will be the representation of the
26 actual the functionality, the battery life of the earpiece itself. And so,

1 reading the claim as it should be, not splitting it into 1E and 1F, just reading
2 it as one limitation, you're left with just a common sense understanding that
3 that earpiece representation, the visual representation of the actual earpiece,
4 has to contain that information. And so, reading the claim that way, the
5 Hensen-Video battery icon, the Petitioner points to here, it fails to meet that
6 limitation.

7 JUDGE BEAMER: Where does the Patent say that the earbuds
8 light up in relation to battery power?

9 MR. JARRETT: I would direct you, Your Honor, to the Patent
10 '385 at page 4, column 4, lines 41 to 58, and referring back to Figure 4. The
11 screen display 100 illustrates both a left earpiece, 102 and right earpiece
12 104. The screen display 100 includes a caption or label indicating the left
13 earpiece. In addition, portions of the left earpiece, 102, are illuminated
14 using one or more LEDs. This portion of the earpiece may be called a
15 corona. And that I believe your understanding between that and the
16 Kickstarter disclosure, that the earpiece level is indicated by that
17 illumination, Your Honor.

18 JUDGE BEAMER: Figure 6 talks about the battery power in the
19 form of percentages being displayed. It doesn't say anything, I don't think,
20 about the visual representation of the earbuds themselves, whether they're lit
21 up or some other thing happens. My point being, it seems to me that the
22 Patent suffers from the same criticism that you're making to the Hensen
23 embodiment which would indicate to me that it's probably not the right way
24 to read the claim.

25 MR. JARRETT: Your Honor, if I could at least refer you to slide
26 43. So, what I was referring to is -- is if you see this slide picture there for

1 the dash it shows the different colorations. The left ear earpiece has a
2 yellow indicating light on the interface, and as the -- the right earpiece has a
3 blue light indicating a higher battery level, that's what I was referring to.
4 So, if I was mistaken referring to the Patent and meant to refer to this
5 disclosure that's what I was referring to, just to clarify.

6 JUDGE BEAMER: Okay. Thank you. You have, I think, less
7 than five minutes to go. Your time is almost up actually.

8 MR. JARRETT: Yes, Your Honor. Going to just a few of the
9 dependent claims to highlight here. For at least Claim 3, we highlight that
10 on slide 37 that Petitioner fails to establish that there is -- there's tracking is
11 required by the limitation. It's our understanding that -- our experts
12 understanding and understanding from the Patent itself that the tracking is
13 going to require some kind of recording and that's where Petitioner
14 disagrees on that point. But we think it's the proper way to understand this
15 claim. And also going to Claim 4, which depends from Claim 3. One thing
16 to highlight is physical activities are selected from a set consisting of
17 running, biking, and swimming. And if you look at Hensen-Video, there's
18 no disclosure of swimming. So, that's to us an obvious limitation or
19 something that's missing from their disclosure. And it wouldn't have been
20 obvious just to add swimming. And the reason being is --

21 JUDGE HUME: Counselor?

22 MR. JARRET: -- waterproofing and whatnot that would be
23 (INDISCERNIBLE).

24 JUDGE HUME: Counselor, this is Judge Hume. Are you
25 suggesting that all -- all those must be present? It's selected from a set using
26 consisting-of language that's what you're arguing there?

1 MR. JARRETT: Yes, Your Honor. The consisting of from a set
2 consisting of running, biking, and swimming, reading the end there as being
3 conjunctive of the list. That's -- that's our understanding of that, Patent
4 Owner's understanding of that claim language, Your Honor.

5 But, Your Honors, pending any further questions, I will yield my
6 time for sur-rebuttal.

7 JUDGE BEAMER: Okay. Thank you. So, you have about, I
8 guess, 18 minutes. Let's take a brief five minute break. Where one still
9 that -- in the time we're doing that.

10 COURT REPORTER: I'm sorry, Your Honor. Can you repeat
11 that, you kind of cut out there?

12 JUDGE BEAMER: We're going to take a brief five minute break.

13 COURT REPORTER: Okay. All right. So, the time is 2:45.
14 Going off the record.

15 JUDGE BEAMER: Petitioner, you have, I believe I give you a
16 couple extra minutes. So, let's say 22 minutes.

17 MR. LAMBSON: Thank you, Your Honor. I'll start by
18 addressing, again, going back to the prior art exception that Patent Owner
19 alleges applies to Hensen-Video. For the purposes of having a slide in front,
20 I'll go to slide 17, which is the statute 102(b)(1)(B), and just re-emphasize
21 that this statute is referring to the two disclosures being the inventor's
22 disclosure and the prior art disclosure, in our case Hensen-Video. That's the
23 comparison that this statute is contemplating. Had they intended otherwise,
24 they could have very easily said that the comparison is between the
25 inventor's disclosure and the claim language. This Patent contemplates a
26 narrower exception.

1 I do want to highlight a significant point of agreement with Patent
2 Owner, which is that the MPEP is sort of the appropriate authority given the
3 relative dearth of case law on this topic that the MPEP is a proper source of
4 authority for understanding the scope of this prior art exception. And we
5 know from the MPEP, as I'll get to on slides 20 and 21. On slide 20, we
6 know from the MPEP and Patent Owner agrees that mirrored in substantial
7 changes or trivial and obvious variations do not fall within the scope of this
8 exception. The exception requires identical subject matter, which we clearly
9 do not have in this case, we have different smartphone applications
10 developed under different circumstances. And in fact, Hensen's application
11 predates the disclosures of the inventor.

12 JUDGE BEAMER: The thing that one of the questions I have is,
13 to what extent are you allowed to be aware of the claims? In other words, I
14 realize you're comparing two different disclosures. You're not comparing
15 either one of them to the claims themselves. But I assume that if the alleged
16 prior art is a widget and the widget is red, and the inventor's prior publicly
17 disclosed widget is blue, and the claims don't say anything about the color,
18 is that a trivial or obvious variation that knocks it out as an exception?

19 MR. LAMBSON: So, I understand the hypotheticals and I think
20 what we have here is a much cleaner distinction between the two disclosures
21 so that we don't necessarily need to address some of the really tricky, you
22 know, potentially, you know, deciding whether something is trivial or not
23 because we have Dr. Anthony's testimony that these are significant
24 differences between the two applications. I do want to emphasize that the
25 point of novelty of this Patent, of the '385 Patent, is the visual representation
26 of the wireless earpiece. So, in this particular context, you know, that, you

1 know, any differences that might become alternative, alternate embodiment,
2 alternate species of that particular claim limitation take on sort of a
3 heightened importance and relevance. And so, in that context, we would
4 maybe suggest that the standard for what constitutes trivial or obvious
5 becomes lower. And so, in our case, you know, we have what Dr. Anthony
6 has said is a significant difference, which is the fact that there's a line art or
7 a silhouette or outline, which is disclosed by Hensen-Video, hence the visual
8 representation. And in the inventor's disclosures, we have a 3D
9 photorealistic representation of the earpieces, you know, pretty plainly
10 contemplating two different embodiments. It's not just a color change.
11 Whether or not a color change would be sufficient is maybe a question that
12 we don't have to address here because we have the, you know, that maybe
13 depends on the specific, you know, any other differences that there might be
14 in that context, but we don't have that challenging kind of hypothetical in
15 this particular case.

16 Now, I'll re-emphasize that the Patent Owner, has, you know,
17 there's simply no -- it's Patent Owner who has to satisfy the burden to show
18 that this prior art exception applies because Hensen-Video, on its face is
19 prior art to the '385 Patent. And under this exception, prior art exception,
20 Patent Owner has to make a showing that's sufficient in character and
21 weight to establish, and I think I might've skipped over that slide, so let me
22 go back. It's on slide 18, which is sort of the MPEP explaining what the
23 same subject matter requirement is and explaining that the Patent Owner has
24 to make a showing that the two disclosures are the same. And so, in this
25 case, the Patent Owner has never made the comparison and certainly has not
26 made a showing that they are in fact to the same subject matter despite their

1 acknowledgement that this MPEP guidance is what is sort of governing our
2 understanding of this exception in this case.

3 With that, I'll move on to Patent Owner's remarks regarding
4 Hensen-Kickstarter. Patent Owner has argued extensively that the Hensen-
5 Kickstarter grounds implicitly rely on Hensen-Video, the idea being that it
6 seems to be that Hensen-Kickstarter is not sufficiently functional to teach a
7 POSITA what the smartphone app is supposed to do. So, Patent Owner
8 seems to be arguing that Petitioner is implicitly relying on Hensen-Video for
9 that. To address that, let me go to slide 39 of Petitioner's demonstratives.
10 This is testimony from Patent Owner's expert, Kai Johnson, where he
11 explains that the use of static screenshots, prototypes, mockups, in other
12 words, stationary representations of an app are common in the field. He
13 purports to be an industry expert and in his opinion, this is a common way to
14 explain how apps are supposed to function is by using sample screens,
15 mockups, and so forth to demonstrate the intended functionality.

16 Now, Patent Owner also attempted to -- Patent Owner also relies
17 on Kickstarter blog posts and attempts to differentiate its own reliance on
18 Kickstarter blog posts for the purpose of the 102(b)(1)(B) exception by
19 pointing to the -- primarily to the fact that its disclosures included videos.
20 Now, again, referring back to this slide, it's clear that a video is not a
21 necessary component of a disclosure of a smartphone app to make it
22 enabling or functional or non-functional. And when we look at the key
23 functionality, which is again the visual representation of the wireless
24 earpiece, Hensen, that the disclosures that Patent Owner relies on from its
25 own Kickstarter campaigns provide no detail on the operation or functioning
26 of the visual representations of the wireless earpieces or the battery light

1 indicator. That functionality is assumed because a POSITA understands that
2 battery life indicator on a static mockup is supposed to convey the battery
3 life of the wireless earpieces that are being shown in that same static
4 mockup. Whether or not that screen is flashed up on display in a video or
5 whether it's a static display is immaterial to what a POSITA would
6 understand from that disclosure.

7 I'll note that the Patent Owner attempts to read a lot into how
8 Petitioner chose to frame the Hensen-Kickstarter grounds. I'll point out that
9 there's a number of practical reasons word being there, but a big one for why
10 one might want to compress a ground or find efficiencies that can result in
11 one ground being shorter than another. So, the notion that Petitioner was
12 trying to pull some sort of a fast one by making the Hensen-Kickstarter
13 grounds shorter than the Hensen-Kickstarter, than the Hensen video-based
14 grounds, that's reading a lot into Petitioner's motivations, when in fact
15 there's a number of reasons to arrange the grounds as we get in the petition.
16 And again, Patent Owner had no issue with that particular arrangement in
17 their Patent Owner response. They did the same thing in the Patent Owner
18 response, and it was only in the sur-reply that Patent Owner began to raise
19 this issue and have further elaborated on with you in today's presentation.

20 I know that Patent Owner presented its slides 30 to 32 of its Patent
21 Owner demonstratives. For the first time, Patent Owner is purporting to
22 identify specific teachings of Hensen-Kickstarter that are missing from
23 Hensen-Video. That's not in either the Patent Owner response or the sur-
24 reply. I do want to emphasize that by this point in the proceeding, we've
25 had testimonies from both experts. We have all the evidence in petition and
26 all the evidence in the Patent Owner response, all of which supports that

1 Hensen-Video and Hensen-Kickstarter are sufficiently similar to justify the
2 petition's approach to Grounds 4 through 6. You know, essentially no
3 expert in this proceeding has signed off on any argument that Hensen-Video
4 and Hensen-Kickstarter are different in a way that would impact their
5 mapping onto the challenged claims.

6 I think slides 30 through 32 illustrate the risk of sort of relying on
7 this untimely attorney argument, which goes against the weight of the
8 evidence on this record. So, for example, slide 30 of Patent Owner's
9 demonstratives says that there's no disclosure of in Hensen-Kickstarter of
10 using a touch screen interface to interact with the smartphone display. But
11 on page 101 of petition, which is supported by the declaration of Dr.
12 Anthony, explains that Hensen-Kickstarter discloses the same type of
13 touchscreen device, an android smartphone, which is running an android
14 app, the same type of device that's disclosed in Hensen-Video.

15 Slide 31 addresses motivation to combine, which is something that
16 has not been addressed in many of Patent Owner's papers and says that
17 Hensen-Kickstarter doesn't disclose the benefits of using its smartphone
18 device as a remote control unit. I think an initial point is that motivation to
19 combine can come from other references. So, referencing Hensen-Video is
20 nothing inappropriate about referring to Hensen-Video to supply motivation
21 to combine. But more importantly, in the petition we explain and have a
22 section or a motivation to combine specific to Hensen-Kickstarter, including
23 page 107 of the petition, where we note that, for example, the benefits of
24 Hensen-Kickstarter's approach are reflected in the awards that are in the
25 Hensen-Kickstarter page. The app has received certain awards that would
26 have reflected the benefits of its approach.

Slide 32 raises the issue of pulse oximetry. I'll make an initial point that, so for example, for Claim 2 of the Patent, which requires pulse oximetry, we actually rely, we present alternative basis for pulse oximetry features, one of which is based on Hensen Patent, which none of Patent Owner's arguments addressed. But even if we were looking at our alternative mapping, which relies on Hensen-Video and Hensen-Kickstarter, we can see, for example, in Hensen-Kickstarter itself, in Exhibit 1007, the sample screenshots that appear on page three to four, referred to things like heart rate, O2 saturation, these are pulse oximetry measurements. Again, all justifying what we already know from the expert testimony, which is that Hensen- Kickstarter is being sufficient to teach a POSITA what is being conveyed in these respective applications, and it's the same teachings that we rely on for Hensen-Video.

Again, I'll just reiterate as I close up here that we objected to these slides 30 to 32 because the arguments that are being read here are nowhere on the record. But we do want to make clear that substantively they are incorrect as well as the procedural issues.

So, with that I'll move on to a couple of the arguments that the Patent Owner made related to specific claims. First, Patent Owner, I think it was slide 34, Patent Owner's slide 34, addresses Limitation 1F and argues that Petitioner improperly split up the claim language by moving them into different claim elements in the petition. Again, there's -- Patent Owner is reading too much into this. There's a lot of reasons that a Petitioner might split up the claim limitations, and in this case, we have this limitation that's shown on slide 34. Only the first part of that limitation appears in Claims 13 and 14, the other independent claims. They're missing that second part of

1 the limitation. So, as a matter of convenience, it helps to split that up in our
2 analysis of Claim 1. And in addition, there's no argument that the Petitioner
3 hasn't actually satisfied the requirements of antecedent basis because the
4 petition is clear that the visual representation that it's in the pink area when
5 it's mapping the priority of this limitation is the same as the visual
6 representation that's referred to in the orange portion of this highlighted
7 claim limitation.

8 And again, I presented a slide earlier on the fact that a functional
9 property of the wireless earpieces is something that the applicant during
10 prosecution has acknowledged is an embodiment within the scope of this
11 claim language. And then the Patent Owner's argument suggests that our
12 unit that the Patent Owner made during prosecution.

13 Turning to Patent Owner's arguments regarding Claim 3 on slide
14 37 of Patent Owner's demonstratives, again, Patent Owner, for one, is only
15 pointing, this is one of several claim elements where Petitioner offered
16 alternative mappings, one based on Hensen Patent, one based on Hensen-
17 Video. Patent Owner never addresses the argument that's based on Hensen
18 Patent. And then the argument based on Hensen-Video is incorrect because
19 the petition does explain and shows actually a screenshot that shows a
20 waveform representation of the user's heart rate data. Even under Patent
21 Owner's interpretation of Claim 3 as requiring some sort of storage and
22 tracking over time of the user's heart rate data, Hensen-Video discloses that.

23 Finally, Patent Owner presented on slide 38, Patent Owner's
24 demonstratives, again, the petition, you know, number one, there is not
25 support that this limitation requires all three of running, biking, and
26 swimming. And then the petition addresses the scenario where even if

1 Patent Owner argued that all three of running, biking, and swimming were
2 required, that would have been well understood running, biking, and
3 swimming were -- are the three elements of a triathlon. And the, you know,
4 so a POSITA would have readily understood, okay, I have Hensen-Video's
5 smartphone app, it discloses running and cycling, there would be
6 circumstances where it would be readily adaptable to also carry out
7 swimming out as one of those three elements.

8 With that, I think I've covered Patent Owner's arguments. So, I
9 believe I will rest there unless there are further questions.

10 JUDGE BEAMER: Hearing none, Patent Owner, you have 18
11 minutes.

12 MR. JARRETT: Thank you, Your Honor. Your Honors,
13 Petitioner's reliance on Hensen-Video is fatal to all of its obviousness
14 grounds. First, Hensen-Video is not prior art to the '385 Patent, as we
15 explained in our presentation. This eliminates Grounds 1 through 3 of
16 Patent Owner's petitions right off the bat. Under § 102(b)(1)(B), Bragi's
17 inventor prior public disclosure disqualifies Hensen-Video's prior art.
18 Bragi's disclosure was made less than one year before the Patent, '385
19 Patent's priority date. And Bragi's inventor disclosure discloses the same
20 subject matter of Hensen-Video relied upon by the Petitioner for its
21 obviousness grounds, all of its obviousness grounds, 1 through 3 explicitly
22 and 4 through 6 implicitly. And Grounds 4 through 6, Your Honors, seek to
23 incorporate the teachings of Hensen-Video into Hensen-Kickstarter.
24 Petitioner wants the Board to believe the teachings of these two references
25 are identical. They're not. We've shown that they are not identical. The
26 references are not interchangeable. For example, if you take the petition and

1 you take a red pen and you cross out every reference in Grounds 4 through 6
2 to Hensen-Video, you're left with nothing but some unexplained
3 screenshots, markups, and relying on a five page marketing blog post of an
4 unfinished application. There is no motivation to combine that, that
5 barebones disclosure with Hensen Patent itself. It's clear Petitioner needs to
6 rely on the teachings of Hensen-Video as they're evidenced by Grounds 4
7 through 6 and they're heavy reliance on Hensen-Video, and Kickstarter's
8 priority date. So, Petitioner's Grounds 4 through 6 are simply asking the
9 Board to take Hensen-Video and stamp it with an earlier priority date. This
10 is improper. The Board should reject Grounds 4 through 6 on these
11 grounds -- on this basis and reject Grounds 1 through 3 because Hensen-
12 Video has explicitly disqualified its prior art under § 102(b)(1)(B).

13 Thank you for your time and attention, Your Honors. Pending
14 your questions, this concludes Patent Owner's presentation.

15 JUDGE BEAMER: Okay. Thank you. Thanks to both parties for
16 their thorough presentation. We'll take this under advisement and let's close
17 the record. Does the reporter have any questions?

18 COURT REPORTER: Actually, I do not have any clarifying
19 questions at this time. Thank you.

20 JUDGE BEAMER: All right. Thank you, everyone.

21 (Whereupon the above-entitled matter went off the record at 3:13
22 p.m.)

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