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Paper 28
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PLR WORLDWIDE SALES LIMITED,
Petitioner
v.
FLIP PHONE GAMES, INC.,
Patent Owner.

IPR2024-00132
Patent 9,731,202 B2

Record of Oral Hearing
Held: January 28, 2025

Before DAVID C. MCKONE, DANIEL J. GALLIGAN, and
SCOTT B. HOWARD, Administrative Patent Judges.

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The above-entitled matter came on for hearing Tuesday, January 28, 2025, commencing at 1:00 p.m. EST, via Video-conference.

P-R-O-C-E-E-D-I-N-G-S

1:00 p.m.

JUDGE MCKONE: Okay, good afternoon and welcome. We are here for a final hearing in Inter Partes Review IPR2024-00132, Captioned *PLR Worldwide Sales v. Flip Phone Games*.

I will introduce the Panel. First, I am Judge McKone. With me are Judges Howard and Galligan. Let's get the party's appearances. Who do we have appearing on behalf of Petitioner?

MR. GLASS: Good morning, Your Honor. This is Jim Glass for Petitioner. With me on the line is Counsel of Record Rachel McCracken and Quincy Lu.

JUDGE MCKONE: And you'll be doing the speaking today, Mr. Glass?

MR. GLASS: I will, Your Honor.

JUDGE MCKONE: Who do we have appearing on behalf of Patent Owner?

MR. MOORE: Good afternoon, Your Honor. This is Steve Moore with Kilpatrick. With me is my partner Michael Morlock. He and I will divide the speaking.

JUDGE MCKONE: Okay. Great. We set forth the procedure for today's hearing in our oral argument order. According to the order, each party will have 60 minutes of total time to present its arguments. Petitioner has the burden of proof and will go first. Patent Owner will then present opposition arguments. Then, if the Petitioner has reserved time, Petitioner will present arguments in rebuttal. Thereafter, to the extent Patent Owner has reserved surrebuttal time, Patent Owner may present its short surrebuttal.

As we noted in the hearing order, although we are not -- although we are appearing remotely here today and there is no physical courtroom, members of the public do have the option to attend remotely via a public line. So for example, a journalist might be listing in on this hearing.

In the oral hearing order we requested that if there were any concerns about the disclosure of confidential information at this hearing you were to contact the Board. To my knowledge, neither parties indicated that they intend to present confidential information. Petitioner, can you confirm that you do not intend to present confidential information?

MR. GLASS: That is correct, Your Honor.

JUDGE MCKONE: And Patent Owner, can you confirm as well please?

MR. MOORE: That's confirmed. Thank you, Your Honor.

JUDGE MCKONE: Thank you. for clarity in the transcript, and since all the Judges and Counsel are appearing remotely, when you refer to an exhibit on the screen please identify the exhibit number and the page number. And when you refer to the demonstrative slides please identify the slide number.

Counsel should unmute only when speaking. If at any time during the hearing you encounter technical or other difficulties, please try to let the Panel know immediately so that we can make adjustments. And there is also technical support listening in and they will try to keep their eye out for problems as well.

Patent Owner, do you have any questions at this time?

MR. MOORE: No, Your Honors, thank you.

JUDGE MCKONE: Petitioner, do you have any questions at this time?

MR. GLASS: No, Your Honor, thank you.

JUDGE MCKONE: Petitioner, would you like to reserve a certain amount of time for rebuttal?

MR. GLASS: Optimistically, Your Honor, I will say 20 minutes.

JUDGE MCKONE: Okay. Are you ready to go?

MR. GLASS: I am. Let me just share my screen. Confirm that you can see it. Can you see my screen, Your Honor?

JUDGE MCKONE: Yes.

MR. GLASS: Okay. If I may proceed? I'll jump right to the issues, Your Honor, on Slides 3, 4 and 5. I won't belabor this. I've laid out, as kind of a summary or a cheat sheet for Your Honors, the issues that I intend to go through today. I'm not going to hit all of these. I've organized these by topic. So the checking, the usable issue across grounds.

And on Slide 3 I've highlighted the issues that I intend to go through in connection with Claim 1. On Slide 4, the dependent claim issues, which I intend to hit some of these, not all of these. Time permitting I'll try and hit all of these.

On Slides 5 I've laid out the motivations to combine. I probably will not go through all of the motivations to combine, if at all. I think that's pretty well presented in the briefs. I'll likely rely on the briefs for those positions.

But just stepping back to Slide 3. One overarching issue that you'll hear me get back to repeatedly is that Patent Owner's arguments really focus almost exclusively on claim construction arguments that are not based in any

legal framework. What do I mean by that? For example, in the usable, for the usable term Patent Owner urges Your Honors to, I think it's eight, I have seven on here, seven different limitations added into the word usable. There is no discussion of the ordinary meaning, no discussion of lexicography, no discussion of disclaimer.

Even more egregious, we pointed to, and time and again we've pointed to examples in the '202 patent that rebut their construction. That are not covered by their construction. Time and again their response is, well, that's inconsistent with our claim construction so therefore those embodiments are not covered.

So just to give a high level, that's something that I think is an overarching theme, especially with the Claim 1 disputed issues that I'll be saying repeatedly.

So with that I'll jump right to Slide 17. The first issue, Your Honor, is this checking limitation. That the server of Claim 1 has to check on what contents to send to the mobile device based on factors. And there are three factors.

Now we focused on the third one. And we've actually first focused on the first and the third one. That the prior art Hays discloses both checking for the mobile communication device and the service provider of the telecom service.

This, Patent Owner has argued that this is not disclosed by Hays, on Slide 18. They argue that the checking requirement, in ordinary English word, requires four separate limitations. That the check can't be related to the data transmitted.

And I think that kind of play goes hand-in-hand with their fourth requirement. That it can't simply be a compare weights and rank advertisements. And that the check must check, this is another affirmative limitation, that the ad is compatible with not only the user's device but also with the service provider.

Their argument on that point is that's the nature of the invention. Again, no discussion of any lexicography or disavowal in the specification. No discussion of the ordinary meaning. They simply ask Your Honors to import these limitations with no discussion of why they should be imported.

I will point out, I'm not going to spend a ton of time on this point because the checking argument was raised in the POPR. I think that was the only argument they raised in the POPR substantively. And it was rejected at the institution decision. They've offered no reason why. No new reasons why that rationale should be overturned.

One Slide 19, just to address this compatibility requirement, they say it's, I may be getting the exact words wrong, but I think their argument is that it's in the nature of the invention and therefore required by the claims. The claims have no such requirement. Not only do the claims not have any requirement for a compatibility check the specification expressly provides an example where information content is sent to the mobile device without a compatibility check. This is the, let me just pull out a pen. This is the, an embodiment called the initial message.

The initial message is simply content that's sent to the mobile device. In this case it checks to see what kind of service provider you have. And it simply provides an initial message that thanks the user. It's, hey, thank you for using Verizon. No mention of a compatibility check.

I believe Patent Owner's response to this is, again, that's not covered by the claims. It's an express disclosure in the patent specification and there is no indication that is in any way not covered by the claims.

I'll move on to Slide 21. Now, Hays expressly discloses, and it could not be clearer, Hays expressly discloses sending and checking this client type and sending the ads based on that client type. It in facts uses the exact words as the claims. The advertising matching and weighting system, that's the system that sends the ads, calculates the weight of each advertisement based on several factors. One of those factors is the specific client type.

So that is almost verbatim what the claim requires. The claim says, checking what update, what updated video content to send based on one of the factors. That's exactly what Hays describes, based on.

Their response to this is that this is a weighting system. That's what Hays does is it looks at various factors and weights the advertisement. And based on that weighting system it then decides which ad has the greatest weight to send to the client. And that they say is not covered by the claims.

That's an accurate description of Hays, but there is no limitations in the claim that carves out this type of system. The claim simply says, based on factors. That's exactly what Hays discloses.

Unless there is any questions, Your Honor, Your Honors, I'm going to move on to the next point. Again, as I mentioned, this is something that was raised pre-institution. Nothing new on the POR. I'm not going to spend, I prefer not to spend a ton of time on that.

Jumping ahead to Slide 26. The next claim term at issue is this notion of usable. Now Patent Owner focuses, I don't think this makes a difference,

but Patent Owner in their briefs focused on the preamble for use and alternatively usable. The claim term that's at issue here is usable.

There is no arguments in any of the briefs that the preamble is limiting, so the term I'm going to focus on is usable. And it wouldn't really, I don't think it matters. I don't think they're making a distinction either, but just to put a fine point on the arguments.

They argue for seven limitations on this claim term. Each and every one of these limitations they argue must be present in this, must be baked into this notion of useable. Again, no discussion of the, no discussion of the ordinary meaning of the term, no discussion of any lexicography, no discussion of any disclaimer. They actually argue, I think it's at Page 20 of their surreply, they make a statement that claim construction is our burden. The burden is on Petitioner for claim construction. They imply that it's our burden to disprove their claim construction.

That takes *Phillips* and the *Sony v. Thorner* case, and two decades worth of juris prudence on this issue and really flips it on its head. The standard is, we start with the ordinary meaning. Usable is an ordinary English term and we've applied it in the ordinary way that it's used every day.

You start with the ordinary definition of the word and you depart from that ordinary meaning if, and only if, there is lexicography, there is disclaimer or there is disavow. None of that's been argued here. In fact --

JUDGE MCKONE: There is, no, Mr. Glass, who is the, if the claim says usable, usable by whom?

MR. GLASS: It's --

JUDGE MCKONE: Or by what?

MR. GLASS: It's --

JUDGE MCKONE: What is your position on that?

MR. GLASS: Usable by the mobile device.

JUDGE MCKONE: Not usable by the user? Or the --

MR. GLASS: Well, it's, I mean, it's usable by the user by virtue of being used in the mobile device. Does that make, does that answer your question, Your Honor?

JUDGE MCKONE: Yes. And what is your support for that? Is that just how you read the claims or are you --

MR. GLASS: It's a simple reading of --

JUDGE MCKONE: -- claim construction tools?

MR. GLASS: We are not urging that any claim construction is necessary. I think that's just the plain meaning reading of the claim. And the specification. I mean, it is entirely consistent with the specification, which I'll walk through in a moment.

JUDGE MCKONE: Okay.

MR. GLASS: Moving on to Slide 27. As I just mentioned, the specification gives many examples of ads that are exactly what Patent Owner says is not included in the claims. In fact, every single example in the specification, except for one citation, which I'll get to in a moment, every single example in the specification they say is not covered.

So for example, this is exhibit, this is the '202 patent at Column 6. It explains that a shirt, for example, that has a logo, you can put a logo on a shirt. That is what they refer to as a skin. This is from the '202 patent. They say that is not covered by the claims.

The patent also describes a poster. The poster 225. That, again, is a skin. These are the types of examples that are consistently described in the patent specification over and over again as being advertisements within the system. And their response to this, that is simply not covered by the patent.

Now we have also pointed to, we have also pointed to embodiments in Hays were there is a interactive ad. Let me bring that up for a second. Give me one moment. We, I'm sorry. We pointed out in Hays, Hays describes this embodiment where the end game character drinks a can of Pepsi. And this is on Slide 29.

On Slide 29 we have the advertisement management system in Hays. And this is why, Your Honor, when I said that it's used by the game or used by the user, Hays discloses both. So regardless of where we come out, Hays expressly describes that not only is it used by the system, for example, the code is taken and implemented into the system and displayed, Hays expressly discloses two embodiments, that I'm going to walk through right now, where the ad unit is actually used by the user.

JUDGE MCKONE: Now I'm looking at what you put on the screen here and it says, the game character may move around the screen holding a can of Pepsi and ask player if they would like a drink.

MR. GLASS: Yes.

JUDGE MCKONE: There is no disclosure here, that I see in the screen, of the player, or the character, that is operated by the player actually holding the can of Pepsi and taking a drink, is that correct?

MR. GLASS: I think in context, and I'll point out right now where we get that from. I think in context, if you look at that, if you're looking at a videogame, what their, their interpretation here is that the character in the

game is going to turn to you, break the fourth law and say, hey, go have a can of Pepsi. On its face I don't think that's a viable interpretation. But --

JUDGE MCKONE: Okay. But I ask you if it is, if there is actual disclosure --

MR. GLASS: Yes.

JUDGE MCKONE: -- in here. And you didn't answer that. So do you have an answer?

MR. GLASS: I do. Paragraph 18 of Hays. I have that on the screen. I'm going to go through Paragraph 18 and Paragraph 19. So, again, in context. So Hays explains that in accordance with some embodiments the advertisement delivery scheme and associate facility present advertisements as example, example, example.

Examples used by game characters, so that's game characters, which would include the player characters, including --

JUDGE MCKONE: How do we know --

MR. GLASS: -- for example --

JUDGE MCKONE: How do we know that the game characters include the player?

MR. GLASS: Well, in that previous ad, in that previous portion that I pointed to, when they wanted to refer to computer control characters, the patent specification was very clear. It said bots. Or electronic agents. I'll highlight that for you.

JUDGE MCKONE: Well, but I can see it on the screen, but I can also see game character referred to as, it's referred to as a game character. So why isn't, you know, bot and game character synonymous, and why would player also be looped in with game character?

MR. GLASS: Well I would suggest, Your Honors, that characters is embodying both the player characters and the game characters. And when the patent specification wanted to refer to computer-controlled characters it listed bots or electronic agents and real characters.

But, Your Honors, to the extent there is any ambiguity there, I think if we look at Paragraph 19, I think that's absolutely crystal clear that the player character is using, interacting with an ad unit. This, now again, this is talking about items used, in Paragraph 18 we're referring to items used by game characters, e.g. a brand name soft drink or energy bar. Paragraph 19 goes on to say, some available ad units, so ad units, maybe interactive within the game.

It is not talking about a skin, it's talking about an interactive ad unit. For example, a game character eating a brand name energy bar to boost her power, not its power, her power, the players character in-game. This is a very well-known trop in videogames. Your character is running out of energy, it takes a boost. That's what this is describing.

So you have an ad unit that is a brand name energy bar that the user interacts with. So if Your Honors have any ambiguity or disagree with me on Paragraph 18, I don't think there is any ambiguity on Paragraph 19. This is the user. It's referring to as a her, not an it. There is zero ambiguity in there that the character is eating an ad. Is interacting with an ad unit. It refers to it as an interactive ad unit. It's not interactive because the player, the computer control characters use it, it's interactive because the player character is using it.

Their response to this, I believe their only response to this is, well that's a skin. And skins are not covered by their claim construction.

But I think it's clear that that's not what this is referring to. It says, the ad units may be a brand name energy bar. The interactive brand unit. The interactive ad unit. I'll pause there for a moment, Your Honor. I know you had some concerns over what I walked through. Does that respond to your questions?

JUDGE MCKONE: I think I understand your position. Thank you.

MR. GLASS: All right. So I'll move on. I think I'll move on from that point. Actually, one point I do want to raise. Let me walk through, one thing they did point out in their surreply. I'm going to bring their surreply up on the screen. That's the File 3, the surreply.

We pointed out in reply that there is nothing in the patent specification, nothing, that supports every single one of their requirements for the claims. There is nothing that supports any kind of lexicography or adding eight separate limitations or seven limitations to the claims.

In their surreply they argue, this is at Page 6, the specification likewise consistently describes examples that are "for use" in the game. When they say "for use" their referring to their definition of "for use." And they quote Paragraph 10 of 41 through 45.

Two points. I'll go through the quote. Either they got the quote wrong and the cite right, or the cite wrong and quote right. That's not what's at the patents, at that citation.

It says, newer mobile communication devices may be able to display elaborate content. And they focus on elaborate content. And to them that, that is the key for them to bring in all eight limitations.

I'll go to the '202 patent. I have this somewhere. Excuse me. The '202 patent. If you look at Column 10. First off, I don't think they meant to

cite to this, I think this is an incorrect citation. At Column 10 it doesn't say more elaborate content, it says a more elaborate initial message. I'm only addressing it in case that really is what they meant to cite.

The initial message is what I referred to before. That initial message that says, hey, thanks for using Verizon. That, I don't think they're arguing in any way that that's, we would agree with them that the initial message is content. I don't think that's what their arguing. I think what they meant to cite to was Column 11 at 40.

And again, this is what they cite to as consistent description of content that justifies adding in all of their limitations. And it says, again, in another example, newer mobile communication devices may be able to display elaborate content. That's not lexicography, that's not disavowal, that's not a clear and unmistakable surrender of anything.

And in fact, what is it referring to? It's in an example where we're talking about a skin. A service provider's logo. This is what they say is prohibited by their, by the patent. So again, this is just saying, in context, that you can have more elaborate logos. That's all it's saying. It does not justify bringing in all seven of these limitations.

So there is no consistent disclosure. There is no consistent, clear and consistent disclosure throughout the specification of any of these limitations.

One last point on this issue, Your Honor. Your Honors, excuse me. They also point to the file history. And I don't think we really disagree as to what the file history discussed in Gatto, but just to kind of set the table, Gatto is a patent that describes a lottery ticket that is sent over email. And in that email there is several links. When you click on a link it spawns a browser and you can download something. For example, a screensaver.

Now what they focused on during prosecution history was not whether it's interactive or whether it's a skin or any of those other limitations, what they focused on was that this nature that you're spawning a new program. And this is at 142 to 143 of the prosecution history.

The applicants explain that nothing in Gatto discloses that the screen saver would have been usable inside and is part of the email ticket itself, i.e. the alleged videogame. They argued also that the email itself wasn't a videogame. Rather, based on a typical operation, one of ordinary skill in the art would understand that the screen saver would be activated separately, separately from an outside email ticket. They're arguing that it's a separate program. They go on to say, for the other remaining links that are in that ticket, nothing about Gatto disclosed that the hyperlinks would even be presented inside, or as part of the ticket itself, as opposed to within a separate application therefore it's not usable in.

So despite in the prosecution history had nothing to do with any of the limitations they're urging Your Honors to accept, but simply that when you click on a link it spawns a new application, a web browser. That's not Hays, it's not Levkovitz. The two, Gatto could not be more different than either of those two references. So their citations to the specification do not support their limitations, nor does their citations to the prosecution history.

Your Honors, on that I'll move on to one of the dependent claims. Unless you have any questions on usable?

I'll move on to the dependent claim, Claim 4. I'll get through this rather quickly because I think it's, I think it's easily dispensed with. Patent Owner argues that, so let me take a step back.

This claim requires that content is sent from the server to the mobile device and provides an in-game placement location. There is a lot, there is a lot of arguments they raise. I think a lot of this is clear in the brief so I won't go through all of it.

But primarily they argue that first, I think this is in the surreply, that the location must be an XY coordinate. And it can't be standardized. So it can't be a predefined location.

Going on to Slide 35. This, again, is exactly what the '202 patent describes can be a location. This is at Column 12, 28 through 32. A first location may be where the shirt is, that's exactly one of the embodiments we pointed to in Hays. And the coordinates need only identify the predefined location, so it could be a standard location, rather than the positions along the axis.

So their point that the position, excuse me, the location can't be predefined, it can't be standard, and it can't be XY, it has to be XY coordinates, is directly contradicted by the patents, by the '202 specification. So neither of those are required.

And we've pointed out in Hays where, again, just like the '202 patents, we have a predesignated geometry, that shirt. That's exactly what the '202 patent describes. Also, the Pepsi embodiment where the bot is sent in to meet the player, that's a predefined location.

I will make one point too, Your Honor, on Slide 40. We did also raise a obviousness argument on this point. To the extent that they argue that there was no expressed disclosure of sending the location with the ad unit, we argue that based on Hays alone it would have been obvious. The rationale is, if you have an ad being sent to a server Hays expressly discloses

sending an advertisement, in Paragraph 29, to a specific ad unit. It would have been obvious that if it's not expressly disclosed, which our expert testified that it would be expressly disclosed, it would have been obvious that you would have to include that information.

Now, in response they don't really rebut our expert, they say this is something that's repeated throughout. I'll address it only once here. They say that we should give, you should give our expert credibility because his declaration, in parts, is the same as the petition. They're urging Your Honors for a per se rule that has never been adopted by this Board. That when there are similarities between the deck or when there's sections that are identical they should be simply rejected.

The only case they cite on that point, the *Xerox* case, does not support them. That case very simply the PTAB found that the petition itself was conclusory. The declaration was simply a copy of the petition. Because the petition was conclusory therefore so was the declaration.

I'll point out that they don't rebut the points our expert made, they simply take a incorrect view of Hays and say, well Hays just blasts out ads to multiple different ad units regardless of their position. Hays expressly discloses, that's sending ads to specific ad units. And that's, again, that's in Paragraph 29.

I will also point out that on this point of the expert they didn't even bother to depose our expert. They didn't take the opportunity to test his positions, or to even ask why there were similarities between the deck and the petition. Instead, hiding behind a rule, a per se rule, that no board, no panel has ever, has ever enforced. Now, I think that's it for Claim 4 on that point.

I'll move on to Claim 5. Your Honors, Claim 5 requires tracking the data that's been uploaded. I think I can get through this pretty quickly as well.

Hays expressly discloses that all communications are tracked and recorded. All. Patent Owner come -- I don't think it can be any clearer than that. Patent Owner comes back and says, well no, when Hays says all its referring to all communications in a session.

Well, a session is the only time in Hays where information is being uploaded to the mobile device. Hays expressly describes that a session begins when a user joined the session, so when you join a game, and it ends when these, when the user leaves. The data is uploaded during the session. There is no other data that's uploaded outside the session. Hays tracks all communications during that session. Again, I don't think that could possibly be clearer. There is no other data to track in Hays.

I'll move on to Slide 48. This is, so slide -- Claim 6 requires displaying at a location based on user interaction. This kind of dovetails Your Honor with what I discussed before. The embodiments in Hays where a bot is sent. So that's the, Hays expressly describes that a bot, a computer controlled character, is sent.

As an advertising unit it's sent to the user and asks, would you like a drink. I think that's pretty clear that that's sending an ad unit to a location based on the user's interaction. Based on where the user is in the game. And the user interacts with it by drinking it.

And in the case, again, I also pointed out, I don't have it on the slide, but in the case of the energy bar, that energy bar is sent to the user, the user

interacts by eating it. I think that's pretty clear that that is displaying it at a location based on user interaction.

I'm going to jump to, I think I'm running a little bit short on time. I would like to make sure I get to a few points in Levkovitz, so I'm going to jump to Ground 3, going back to Claim 4. So just one, one point on this.

We relied on Hughes, I'm sorry, Chu, as a alternative to Hays to show that the in-game location is provided by the server. Patent Owner, on surreply, on Slide 61, Patent Owner pointed to Figure 7.

Now just to be a little clear on this, Figure 7, I don't think there is a ton of, well, there is two points of dispute. We both agree that this is an xml document. We both agree that this is sent between the mobile device and the server. The dispute is, well, does it disclose location and is it sent from the server or is it sent from the mobile device? Patent Owner says, this is sent from the mobile device.

They also say the location is not what the claims require. They say location. They acknowledge that there is a tag in this xml document for location. They say that can't possibly be what the claims require because the location must be an XY coordinate. As I've already gone through, the patent specification, the '202 spec says, explicitly that the location could simply be where the ad is located. Like the t-shirt location. The t-shirt embodiment.

Chu is also expressly clear that this is a xml document that's sent from the server. At Column 14, Line 57, I won't put it on the screen I'll just read it. Chu says that Figure 7 is an xml format structure that may be utilized to send metadata. That's data about the ad. How do we know this?

If you look in this xml document is expressly includes tags to the ads. So this is a jpeg file. This is another jpeg file. And this is an actual text ad. Pennzoil engine go, go with the best. This is not a request from the mobile device, this is the response from the server sending both the ad and the location back to the mobile device.

They focus, I think in their surreply on this ID, which I'm not entirely sure why. I think it's very clear that this is the response from the server, including both the advertisement and the location.

Now, I'm going to move on to Levkovitz. And with the time I have remaining really just point out really two points on this. So again, Patent Owner's argue that Levkovitz doesn't not teach usable. On Slide 81, what does Levkovitz disclose?

Levkovitz is a little bit different than Hays. It discloses the banner ads, it discloses, for example, a pop-up ad. This is a pop-up ad that pops up full screen in-between, for example, levels of play. And we argue that this is usable because it is usable by the mobile device, it's usable by the game. It's implemented into the game and displayed to the user.

This is exactly what the '202 patent specification describes. Data content may be displayed in a pop-up window. It goes on. It's even clearer. Pop-up windows that are spawned from the operation of the game are considered to be in-game for purposes of this disclosure. Very clear disclosure, this is from the '202 patent, pop-up windows are included as ads in-game for purposes of this disclosure. I think Patent Owner would argue, I think they do argue, that this is simply not covered by the claims.

I do have one last point Your Honors before I close. I think this is an important point. On Levkovitz, Patent Owner argues that Levkovitz can't

possibly upload videogame content. Their arguments are that, well, Levkovitz uses WAP exclusively. And WAP, which is a wireless application protocol, WAP is incapable of downloading, is incapable of downloading content.

Now we point out, if you look in Levkovitz, Levkovitz is really broken up into two sections. This first section that we cited to is the gaming section. The second section, I think it starts out around Figure 13, is the WAP browser. And we point that out. We point out that we're really not relying on the WAP browser embodiments.

But in any event, sending data to a browser is downloading. You don't just review it remotely it has to be downloaded in some context. They came back on surreply and said, well that's not the type of downloading that the claims are referring to. Well, I'm not entirely sure what they're getting at, but if we look at Levkovitz, it's very clear that Levkovitz, even under their definition of downloading, Levkovitz expressly discloses downloading a WAP page.

Now, again, to put this in context, their expert said WAP is incapable of downloading content. At Paragraph 375, in some embodiments a WAP advertisement presented before, within a request a WAP page may be associated with one or more user selectable actions. It goes on to list a bunch of these actions. One of them is locally saving the WAP advertisement or a portion thereof for subsequent offline or online viewing of playback. That is as an expressed disclosure as I could possibly imagine of downloading. Uploading.

So, in two contexts. WAP is disclosed, WAP can upload or download information by virtue of being a browser. We don't rely on that embodiment

anyway. And Levkovitz expressly discloses it could not be a cleaner disclosure of downloading content.

One more point on this issue, Your Honor. They also argue that Levkovitz exclusively relies on WAP. It doesn't. Paragraph 382, portions of this discussion herein may be related to WAP advertisements. The invention is not limited in this regard and may be used with non-WAP advertisements in conjunction with advertisements delivered using other wireless communication protocols.

And we don't rely on that, but just to point out that they're incorrect in their interpretation of Levkovitz. Levkovitz is not limited to WAP. And Levkovitz expressly discloses, contrary to what their experts stated, Levkovitz expressly discloses that WAP downloads content.

Your Honors, with that, I know that was a lot. I would like to reserve whatever time I have left for rebuttal, unless there is any questions?

JUDGE MCKONE: Nothing from me at this time. You will have about 24 minutes in rebuttal.

MR. GLASS: Okay.

JUDGE MCKONE: Patent Owner, are you ready to go?

MR. MOORE: I am. Your Honors, I'm going to, this is Steve Moore. I'm going to start off, would you mind if I take a minute to raise my desk and stand up? I just find I think better on my feet than sitting down.

JUDGE MCKONE: That's perfectly fine. And while you're doing that, if you have, think about how much time you want to reserve for surrebuttal.

MR. MOORE: We'd like to reserve 15 minutes, Your Honor, for surrebuttal.

JUDGE MCKONE: Okay.

MR. MOORE: And here, that should work. Okay, thank you. Appreciate that.

So just to be clear on the division, I'm going to address Ground 1 with respect to Claim 1 on the Hays ground. So that is the useable issue and the checking issue. And then Mr. Morlock will address the rest of the issues. And I'm ready to proceed whenever Your Honors are ready.

JUDGE MCKONE: Okay. Will you be displaying your slides or should we follow along on the copies that we have?

MR. MOORE: I will display some. I'll ask Mr. Morlock to help me. And he will display them when I want to refer to them, if that's okay.

JUDGE MCKONE: That's fine. Thank you.

MR. MOORE: All right.

JUDGE MCKONE: Begin when ready.

MR. MOORE: Thank you, Your Honor. Thank you, Your Honors. And we appreciate your time here today and your focus on this important case.

I want to give a brief introduction and then dive into the two issues on Ground 1 that I want to address. All of the arguments in this particular proceeding need to keep in mind, of course, that the priority date for the '202 patent is June of 2007. That is, as we've shown before the first iPhone, before the first app stores, at a time when I certainly recall, and you may as well, that there was not very good bandwidth on cellular to download, particularly video type content, gaming content, wi-fi existed, of course, not as reliable and ubiquitous as it is today.

And of course we all know that what must be applied here in this proceeding is, for the obviousness analysis, is what would a person of ordinary skill art, a POSITA, have known and understood in that era when we were still in the flip phone era just before the dawn of the iPhone era. And I think that that helps understand a lot of the issues in this case.

As we showed in Exhibit 2004, among other places, which is our expert, Dr. Akl declaration, Pages 19 to 24 of that exhibit, he gives a lot of detail about the technical limitations of that era some 18 years ago now. In that wireless carriers, which manage games on multiple devices were unable to update content within the game, rather, typically they just released the new games.

I also want to mention briefly --

JUDGE MCKONE: Now just so --

MR. MOORE: Yes.

JUDGE MCKONE: Just so I understand what you're arguing. Are you contending that a mobile communication device is limited to cellular phones?

MR. MOORE: I think that's the --

JUDGE MCKONE: Or a smartphone.

MR. MOORE: -- example typically that we would think of, but not necessarily, Your Honor. But it has to be a mobile device. So in other words, a portable device that is connectable to a network. And at that era the most common were cell phones because the cell networks were more ubiquitous.

There is certainly nothing in the record, in this case, about any other types of devices. I know in their reply they tried to add in information about

PlayStation and the like, or Nintendo devices I think it was, but that's not of record. And it's also not the type of prior art that could be used in an IPR.

So I think primarily, yes, the focus is on cellular phones because that's what existed. But we're not, to be clear, we're not seeking to narrow the term to only cellular phones, it's just, that's the context of the industry in 2007 and what POSITA's were focusing on rather --

JUDGE MCKONE: Well what I'm referring to, just as far as if there is a claim construction issue as to this term, I'm looking at the challenged patent. Almost the first thing it says at Column 1, starting at about Line 12, mobile communication devices, they include cellular phones, PDAs and other handheld devices capable of communicating with a server. So it seems like, capable of communicating --

MR. MOORE: Right.

JUDGE MCKONE: -- with a server and handheld are the only two real requirements of that term. There is nothing about a cellular network or anything like that, right?

MR. MOORE: I agree with you from the pure legal interpretation of the terms. What our arguments have been though, is that when one places themselves back in 2007 POSITA's were focused on cellular because that was the primary way that mobile gaming occurred.

I'm not trying to narrow the term, the claim term from a claim construction perspective, I'm just trying to bring our minds back to that time and what were the problems that a POSITA were focused on. And I believe in that context, as Dr. Akl explains, for mobile gaming it was primarily cellular. Not to say that mobile device couldn't have a broader meaning. So

that's really what I'm getting at, is where the motivations were, what the considerations were for a POSITA when I make that statement.

I want to briefly mention that the inventors of the Patent Owner, Flip Phone Games, operated a gaming company throughout that time period. They're, I believe, on the public line listening today. They've been active in the gaming industry. And they used this invention to have games involving darts, solitaire, other types of games throughout that period. Including when the ability to update videogame content based on factors, such as recited in the patent, were not as prevalent or did not exist.

The other thematic issue I want to briefly mentioning before turning to the claims, this is not a claim construction dispute. We're not here to ask you to narrow claims at all. We agree that no claim construction is necessary in this proceeding. And it's really Petitioner that is attempting now, at the 11th hour here, to reframe the issues in this proceeding by making it a claim construction. Or trying to. They're setting up kind of a straw argument and trying to knock it down by making it a claim construction issue.

Well we point out in our briefing, in evidence, is that the prior art references at issue lack critical aspects of disclosure. And furthermore, that their expert merely parrots the petition and adds nothing new, whereas we have introduced substantive expert testimony addressing the problems of the 2007 era which they have not challenged.

And so I'm not here to talk about claim construction, I'm here to talk about what the reference is that they rely on don't show and why they can't meet their burden of proof. And I'm also here to tell you that you should simply ignore everything Dr. Zagal --

JUDGE HOWARD: I'm sorry. This is Judge Howard. How is that not a claim construction issue if the whole issue is, for example, what usable means and is something, what requirements it has to be to be usable? That seems to me, by definition, a claim construction argument.

MR. MOORE: I don't, well, I'm happy to turn to that, Your Honor. Let me do that now actually. If we could turn to Slide 7 please, Mr. Morlock?

And I think the short answer is, we are debating whether the claim term has been satisfied, but we don't need to construe the word usable or the phrase being usable to do that. I think the rest of the claim shows us exactly what that means. And we've underlined here, particularly in element 1A and 1C that two times that the patent that is in the body of the claim talks about the videogame content being usable in the videogame.

JUDGE HOWARD: Well let's go --

MR. MOORE: We know that --

JUDGE HOWARD: I'm sorry. Let's go ahead and talk about something specific --

MR. MOORE: Right.

JUDGE HOWARD: -- because you take the position that something can't, if it's something that's just a skin it's not usable. Where is that in the claim language?

MR. MOORE: In what we've, so what we've underlined, first of all, the video content that is updated by this checking step must be usable when the videogame operates. So we know already from the claim there has got to be a videogame already on the mobile communications device. We've got to check for updated video content to be sent to it. And that updated

videogame content must be usable in the game. And as 1C indicates, it must be usable when the videogame operates.

So I think all of that tells us, without the need to explicitly construe the word usable, that when the game is in operation, i.e. it is being played, whatever the updated content is has to be usable. And the skins are not. Because in Hays, all that Hays does is, it already has preestablished the ad units. The available ad units. They're predefined geometry. Those things are already in the game.

The only thing that they're pointing to as the alleged updated content is a brand. For example, Pepsi. Or the brand --

JUDGE HOWARD: That's --

MR. MOORE: -- of an energy bar.

JUDGE HOWARD: -- 1C, where anything in the claim language would prohibit that. And it's something that's being updated into the game. It didn't have the brand before and now it has it. And it's being used by the videogame, that updated date. To me, why doesn't that just meet the language, like, it seems to just meet the language that's there. And if you're trying to say it's not skins, you're trying to say usable when the videogame operates, expect for not it can't be a skin. Yet that seems to me classic claim construction.

MR. MOORE: Well, Your Honor, I respectfully disagree. We're not saying that you should construe the claim to say it can't be a skin, what we're saying is that the game functions the same. It operates the same as the claim requires. Whether that can says Pepsi or Coke, or nothing at all, or a fictional brand, that's what the issue is. And therefore the updated content --

JUDGE HOWARD: But there's nothing in the claim language that says the game has to operate differently once there is updated content.

MR. MOORE: Well it has to be usable. And the user in Hays is not using the ad. The user may see the ad. That's why the ads exist to try to get the user to see it and say, okay, yes, I should go buy some Pepsi or get one out of my --

JUDGE HOWARD: But the claim doesn't say --

MR. MOORE: -- they're not.

JUDGE HOWARD: But the claim here doesn't say usable by a player. It could say, it's usable when the videogame operates. Why isn't that just usable by the videogame?

And at the very least it seems to me that you and the Petitioner have a dispute as to the ordinary meaning of the claim, which means we have to construe it because that's what the Federal Circuit says when there is this dispute on the ordinary meaning of the words. So I don't understand how none of this is claim construction.

MR. MOORE: I understand your point --

JUDGE MCKONE: -- comment --

MR. MOORE: -- Your Honor.

JUDGE MCKONE: -- a little differently here. If you don't want to engage as claim construction, what is your best evidence that being usable when the videogame operates, its ordinary meaning would exclude the skins as you read Hays?

MR. MOORE: Sure. And we've documented this, not only in our briefly but in Exhibit 2004, Dr. Akl's declaration. And we can turn to Hays and look at it.

JUDGE MCKONE: Well, just so we can understand the term. You seem to be saying that the ordinary meaning of usable when the videogame operates is that somehow have to change the function of the game and it's not enough to be just a skin that's applied to an already existing object in the game. What is your evidence that that is the ordinary meaning of the term?

MR. MOORE: Well I can point to some discussion in the '202 patent to support that. Again, we're not engaging the claim construction analysis here, but the issue is, you know, who uses a game? A player uses the game.

And so when the claim talks about something, updated content being usable in the game, that necessarily would mean to a person of skilled in the art that it's usable when the game is being played by the player. And so that's the context in which it must happen. And there is --

JUDGE MCKONE: You can probably tell that we're really focusing, because we're going to be judged on the evidence that you cite to support things so that's why I'm pushing you for evidence. And I'm giving --

MR. MOORE: Sure.

JUDGE MCKONE: -- and I'm giving you the opportunity to show us. So if you don't want to take --

MR. MOORE: Thank you.

JUDGE MCKONE: -- advantage of that you don't have to, but we're giving you an opportunity.

MR. MOORE: Thank you. And I would like to show you a couple of places in the '202 patent. If we could turn to Column 3. Well actually, let me start with Column 6, Mr. Morlock. I'm sorry. Of the '202 patent.

Contrary to what Petitioner says, there are a number of places that talk about that. And what I'm looking for is around Column 10. The paragraph

begins with Column 10 or 11. There are a number of places in the ’202 patent that talks about users interacting with content. One of them is here at Column 6. The areas that begin around Column 11 through about Column 17. And it says --

JUDGE MCKONE: You keep saying column, just for a clear record are you referring to Column 6 starting at Line 11?

MR. MOORE: That’s right, Your Honor. The column in the ’202 patent, Exhibit 1001 I believe it is, Column 6, 11 through 17. And in particular there is language here that talks about, for example, the updated content may be a new background or it may include a new item that the user interacts with in a game. That is the latter part of that. The new item that the user interacts with in a game I think would be content usable when the videogame operates as the claim requires.

JUDGE MCKONE: Are there any --

MR. MOORE: Similar --

JUDGE MCKONE: Are there any examples of this new item that the user interacts with in game? Is there an example, just so that we can understand what the patent is meaning by this term.

MR. MOORE: Yes, Your Honor. If we go to Column 7, at lines, so this is Column 7 of the ’202 patent at Lines 7 through, I guess it’s 13. There is, we can look at that whole paragraph but really I want to focus on the second and third sentences.

In this part of the spec, in the second sentence it says, in other games new weapons, interactive characters, levels, hotspots and other items may be provided as part of the update. In short, any content element used in the mobile videogame may be updated depending on the embodiment.

These are other examples, specific examples, of updated content that is usable, or for us in the videogame, when the videogame operates on the device. And then the last --

JUDGE HOWARD: But it seems to me that you're ignoring the parts of the spec that you don't like that talk about things that would be like just background materials. If you look at the first line in the paragraph it says, other content of the mobile videogame, such as shape, design, coloring of the dartboard or texture or coloring of the background may be updated. Then it goes on to what you said about new items. And then it goes, this content may be used in mobile videogames. Why isn't that last sentence referring to both the first and second sentence? It seems to me that it is. So I don't --

MR. MOORE: Um --

JUDGE HOWARD: -- I don't disagree with you that a new item is clearly something which is usable in the videogame, but this paragraph, as well as the last paragraph you mentioned, seemed to be implying that it can also just talk to background or other types of, just things that you look at and aren't necessarily interacting with.

MR. MOORE: Well certainly you're interacting with the dartboard in the exemplary game so I don't, I didn't mean to exclude that sentence completely. But the key is, is the content element used in the mobile videogame -- I'm sorry.

JUDGE HOWARD: But how -- so it talks about, for example, the coloring of the dartboard. How is the coloring of the dartboard different than what you're referring to as the skin in your arguments?

MR. MOORE: Because in the dart, that's the main item of play in the game, in the exemplary game in the spec. And the coloring may help you see it better. It may help you aim better. I mean, it could have impact on your actual game play whereas an ad, frankly that's just something, I mean, unless you're interacting with it for purposes of playing the game an ad is just something that, you know, is a way to make money that users would not be interacting with typically.

And that's what Hays shows. All that Hays shows is ads in a game. And so, they're not items that the user is using when the user plays the game such as those, even the background of the dartboard I think would qualify there as something the user is interacting with when they're playing the game.

JUDGE GALLIGAN: And so this is Judge --

MR. MOORE: The --

JUDGE GALLIGAN: This is Judge Galligan. I wanted to --

MR. MOORE: Yes.

JUDGE GALLIGAN: -- follow-up on that. Can you give me an example in the '202 patent in which a promotional content would alter the functionality of the game?

MR. MOORE: I don't know if there is, this is as directly showing that, but I will show you the third example in the specification I wanted to mention because I think that, that could apply, although I recognize this is more generic. We can go to Column 3? And this is the paragraph that goes from Lines 5 to 10 of Column 3.

You know, this could be an area where it can be a promotional content, but it also includes, for example, a helpful tip for suggestion. I

know it doesn't say this, but it says if the, you know, the shirt example in the game says, well, Pepsi says you should do this thing to increase your energy or go to Level 2 or whatever, then maybe that's promotional content that is usable in the game. But simply a t-shirt that says Pepsi would not be because it's not usable when the videogame operates it's simply an ad for the user to see and for the way for the game maker to try to make money. But it's not actually being used when the game is operated on the mobile device.

JUDGE GALLIGAN: This is Judge Galligan --

MR. MOORE: But that may be the clearest example I have, Your Honor.

JUDGE GALLIGAN: Yes, thank you. this is Judge Galligan again. So let me follow-up on that because Petitioner points to some disclosure in Hays that says the character may eat a brand name energy bar and get a power boost. So how do you distinguish that disclosure from what you're pointing to here which is to say promotional content may advise someone to drink a Pepsi and get energy?

MR. MOORE: Thank you, Your Honor. I'd like to go to Hays, Paragraph 19, if we can pull it up, Mr. Morlock? And I think there is several bases on which this, that's not applicable.

First of all, Paragraph 19 is in the part of Hays talking about the predefined geometry. What's already on the device, the available ad units. It's not talking about the updated content that is provided through the weighting, advertising, weighting and matching system. And it says, when the game is shipped it may have a fixed set of available ad units. And then it gives further detail about those available ad units that are there when the

game is shipped. One of which is a game character eating a brand name energy bar to boost her power.

Now I don't dispute that if, if Hays were to disclose, which it does not, sending the brand name energy bar itself, the available ad unit as the updated content and then a player character eats it to boost their energy, I would not dispute that that is content usable when the videogame operates. But that's not what Hays is talking about.

Hays is talking about, these are available ad units, part of the predefined geometry and functionality that exists when the game is shipped. And all that is updated is the brand name.

And so, in this example the energy bar would boost the power, whether a brand name is ever updated or not, or changed or simply has no brand name. And so that's why Hays does not disclose what the '202 patent teaches which is updating usable content within the game. Merely brands.

This also, I would note, is not in the petition. This is something that patent, the Petitioner is trying to put in through reply. The only thing in the petition they point to is the Pepsi can example. And that one, I think, pretty clear is, even more clearly is, is something that the user just sees as an advertisement but does not engage within the game. There is certainly no disclosure in Hays that that's the case.

And when we put ourselves in, as Dr. Akl showed us with his expert opinion, when we put ourselves in the 2007 timeframe that makes sense, Your Honor. That that simply wasn't done. And that's why the '202 patent is different and novel over this prior art. They're trying to get us to apply a 2025 mentality because its ubiquitous today, but it's not what was being done in 2007. And it's not what was being done in Hays.

JUDGE GALLIGAN: Counsel, this is Judge Galligan.

MR. MOORE: And then -- yes.

JUDGE GALLIGAN: I just wanted to follow-up. You also mentioned when you were directing us to, I think it was Column 3 or 5 in the patent maybe, that you said maybe an ad would come up and tell a player to do something, that would advantage the player in the game. But isn't that what it says in Paragraph 19 of Hays right there in the screen? A player can enter a code from a product and provide advantages in the game.

MR. MOORE: I mean, it does say that, but again, we're talking about, this is available ad units shipped in the game. There is no disclosure in Hays of that being updated content that is done via the checking step from a server to the game once the game is actually operational and being updated. And that's the difference. All of this disclosure here in Paragraph 19 is talking about what Hays is preloaded with.

JUDGE GALLIGAN: That's --

MR. MOORE: And the only disclosure really of anything that they say is sent in that they relied on in the petition is the Pepsi can example, which is just, you know, a non-player character running around with a billboard essentially in the shape of a can saying, buy Pepsi.

JUDGE GALLIGAN: And this is Judge Galligan. So let me follow-up on that again. Can you scroll up a little bit? And I'm looking at Paragraph 18 --

MR. MOORE: Certainly.

JUDGE GALLIGAN: -- of Hays.

MR. MOORE: Certainly.

JUDGE GALLIGAN: So my understanding, and maybe you'll explain this, but my understanding of these available ad units is that you don't have, there are just the spots where you can display an ad, and they're available, and it says there in Paragraph 18, at the beginning of the game, end of the game and between levels. Am I wrong in thinking that this is what is updated with content that is downloaded in Hays? That these available ad units are updated?

MR. MOORE: No, Your Honor, you're correct. These examples of predesignated geometry could be updated with an ad. A brand name, or you know, whatever the ad may be. So that is correct. And that is what is updated, not the ad unit itself, not any functionality embedded into the ad unit that is already, you know, shipped with the game. The only thing updated is changing an ad from, for example, Coke to Pepsi. Or no ad at all.

JUDGE GALLIGAN: Okay, thanks. I understand your position. One other question I had, just for lack of a better term, claim construction, on this is, do you agree with Petitioner that the usable in the game and for use in the preamble are generally the same so we don't need to decide whether the preamble is limiting if we decide usable?

MR. MOORE: We do agree the Board need not decide whether the preamble is limiting. In fact, I think the more, even more explicit discussion of those claim terms is in Elements 1A and 1C. Particularly Element 1C where it says it's got to be usable when the videogame operates. And so yes, we do not believe that the Board needs to decide whether the preamble is limiting or not.

JUDGE GALLIGAN: Thank you.

JUDGE MCKONE: I had one more question on this topic.

MR. MOORE: Yes.

JUDGE MCKONE: I asked your friend this. Here we have language being usable. How do we, is it your position that this means that the player of the game uses, uses the content or can anything, including the mobile communications device, use the content?

MR. MOORE: Well, we believe it, so, I don't think its enough just for the mobile station communication device to use the content when the game is not operating because the claim requires that the updated videogame content must be usable when the videogame operates. So in other words, when the user is playing the game the updated content must be usable in the game.

That doesn't, we're not taking the position that means that the player itself may have to use it, it could be contents, for example, that the game is using to engage with the player when the player is playing the game. Like for example, if you're updating a new enemy or a new weapon that the enemy has through the updated content.

So we're not saying the player has to be the one using it per se, but it must be used when the game is operating, and the player is playing it. And that's why mere ads don't meet that. You know, an ad would have to be interactive and somehow allow the player to do something in the game for that to happen.

Hays' ads are merely like the static billboards in Levkovitz or like the hyperlink in Gatto. They're really no different and all they do is, you know, all the disclosure is that they do is have a brand name associated with the unit in the game.

Unless Your Honors have any other questions about this issue, which I recognize is a key one here, I think, let me just see if there is anything else I wanted to mention on this. No. The only other point is, I guess on Paragraph 79 with the, of Hays, with the Pepsi can example.

There was some discussion earlier about, you know, Petitioner's Counsel was trying to distinguish when Hays uses characters versus when it uses bots or electronic agents. I just wanted to point out that in Paragraph 79 those bots or electronic agents are characterized as possibly being real characters. So that shows that Hays disclosure of characters doesn't just mean player characters it means any player, any character in the game. And I think the discussion in Hays makes it clear that in this example these are nonplayer characters that are merely holding a can with an advertisement on it. So I just, I wanted to try to respond to that point that was raised early in the argument.

But otherwise, unless there are any other questions on the useability I'll briefly address the --

JUDGE MCKONE: Just one more.

MR. MOORE: Yes.

JUDGE MCKONE: Since you brought Paragraph 79 of Hays up for us. Here it says --

MR. MOORE: Yes.

JUDGE MCKONE: -- that the advertisement management service system may send bots or electronic agents. That seems a lot more than just sending an advertisement. That sounds like it's sending some kind of functional object that wasn't in the game before. Am I reading that wrong?

MR. MOORE: You're not reading the language wrong, but I think that the trouble with that is, that's not saying that the serving is sending it as part of the updated content, it's just saying the whole advertising management service system. I mean, that's what Hays calls his while system, which could include also the predefined geometry and available ad units that are embedded in the game when it ships.

So I don't think that's telling us in that disclosure that the server in response to a request for updated content and the performance of the checking step is sending the electronic bots or agents. They could be preprogramed in the game, it's just the system of Hays as a whole that does that. And what is sent then is the, potentially the advertisement. What is sent from the server.

Do Your Honors have any other questions on the usability issue?

JUDGE MCKONE: None from me.

MR. MOORE: Thank you. just very briefly on the checking step. And again, there's not a claim construction issue. The issue is the deficiency with Hays. The claim, the claim language of the claim requires that the updated videogame content itself must be determined, that is what content to send, based on one of the factors. And Hays doesn't do that.

At most Hays uses information about a client type to weight and rank advertisements. And that's done before any request for updated content is received. And then what happens is, when the content, the request for content is received, Hays merely says, okay, for this particular game, market, user, whatever it may be, we've weighted this advertisement as the best one. And it's already weighted based on a number of factors. And so

there is no checking that occurs after the request is received in the Hays system based on any of the three factors in Claim 1.

JUDGE MCKONE: So it's your position that there is --

(Simultaneously speaking.)

JUDGE MCKONE: It's your position that there is some kind of timing aspect to the checking limitation, is that your position?

And if it is, can you tell me where you find that in either the claim language itself or anywhere?

MR. MOORE: Yes. I mean, I think it's in the claim itself which we're showing on the screen here in Claim 1. Receiving the requests for the updated videogame content and then checking what updated video content to send and then uploading updated videogame content. So just from the structure of the claim then I certainly know what the case law is about order of operations. But, I mean, here the claim is explicit that there is a request, they're then checking what to send, and then there is uploading what's been decided upon to send.

And so, yes, we believe that from the plain language of the claim the checking step is after the request is received for updated content. And that's simply not done in Hays.

JUDGE MCKONE: Well I see the checking step appearing under the receiving step in the claim. But what is it about the checking step that somehow depends on what happened in the receiving step so that we can say that it actually must temporally follow the receiving step?

MR. MOORE: Well because without a request for the updated videogame content there won't be any sent. Until, there is not discussion in the '202 patent of, you know, preloading updated content to be sent, rather

what is discussed is the mobile communication device makes a request the, you know, the server, as it were, checks what to send based on these factors, or one of these factors, and then that updated content that has been checked for is sent.

And so, I think that's, throughout the '202 patent specification, that's the only thing discussed. And it's given the logic construct of the claim, there is never any discussion of the patent of doing the checking step at any other point other than a response to or a request for updated content.

And again, Hays offers weights in a different manner. It first does the weighting based on a number of factors and then it decides based on that weight what ad to send.

JUDGE HOWARD: This is Judge Howard. Maybe you can explain to me why we couldn't do the checking and receiving steps in the opposite order than what you've said, and why couldn't, for example, the server system, just on its own, check to see which updates it's going to want to do, determine it's going to do those updates once it receives a request. It then receives the requests, as done by the claim, and in response it then loads. Is there anything in the claim language that would make what I just said outside the scope of the claims?

MR. MOORE: In the claim language itself, I mean, I believe what's clear is we have a request for the updated videogame content must be received. And then they're checking what updated content to send. And I think that necessarily means in response to the request. And that's buttressed by the fact that when we look through the specification in the prosecution history there is never a discussion of an invention where you do the checking step first and then you receive the request and then you send

something. Nor has Petitioner ever argued that that should be the construction of this claim.

So nobody in this proceeding, or anywhere in the patent, has ever suggested that we could do Step 2 before we do Step 1. And I believe based on the plain language of the claim buttressed by the intrinsic record that's simply not what was disclosed. In fact, as shown through our expert testimony that's not, you know, that's not what the folks of, what people of ordinary skill in the art were dealing with in 2007. So there has simply been no discussion or evidence of that in this proceeding or anywhere in the intrinsic record.

Unless -- oh, the last point on this was, much was made earlier by petitioner about the initial welcoming message from the service provider. And, you know, we weren't trying to overlook that we just simply don't think, I mean, that's just a message from the service provider that's not necessarily going to be updated video content, game content that's usable in the game so that doesn't seem to be particularly applicable to this point here.

And I did want to lastly apologize for our error in quotation. I think Petitioner is right. We meant to quote the very similar language in Column 11 beginning at Line 40 rather than the portion of Column 10 that Petitioner's Counsel recited, so we apologize for that error.

Unless there are any other questions I will turn it over to Mr. Morlock. If Yours Honor wouldn't mind just reminding us how much time we've used so far that might help us streamline things.

JUDGE MCKONE: You have about 25 minutes total left. So in ten minutes --

MR. MOORE: Total.

JUDGE MCKONE: -- you'll be in your rebuttal.

MR. MOORE: Okay. Thank you, Your Honor.

MR. MORLOCK: Okay. Thank you, Your Honor. Can you hear me?

JUDGE MCKONE: Yes.

MR. MORLOCK: Thank you very much. Once again, Michael Molock for Patent Owner and I am going to jump in. And I'd first like to address Claim 4.

And I think an important point that has been left out of all of our discussions of Claim 4 have been the actual claim language that requires that the location information has been sent as part of the updated content. The Petitioner has not identified any evidence of that in Hays. During the earlier discussion, what Petitioner discussed was Paragraph 29, which just discusses a handling a request for content, it does not indicate that any location is sent, much less as part of the updated content as the claim requires.

Further, that's just not how Hays operates. Hays is described as an advertising system for targeted advertisements for multiple video games without advertisers having to specify specific game titles in which they would like their advertisements to be placed. I am reading from Petitioner's Slide 11 that is quoting the abstract of Hays.

So this is not something I think Petitioner can credibly dispute, but that's what Hays describes. Again, we have to be in the context of 2007. We're talking about the sorts of games being played on devices in 2007, Tetris, Snake, Darts, Brick Breaker.

I had a flip phone and played all these games, or a Blackberry at one point and played these games in this timeframe. These are the sorts of things

where you can't have an ad that is designed for one game and then put it in all sorts of other games, right.

That's sort of a blog-cast type thing. It does not limit itself to the sort of specific location information that Petitioner has attempted to shoehorn Hays into. That's just not what Hays is, that's not what it does, and that's not disclosed.

Petitioner tries to backdoor into that with a quote to Dr. Zagal that actually specifically point to I believe it is Paragraph 115 of Dr. Zagal and that paragraph almost explicitly quotes the pages of the Petition addressing the exact same point, breaks across pages 24 through 25.

There is no explanation there where Dr. Zagal can add anything to the petition where he can explain why it actually would have been obvious to somehow modify Hays. The simple reason is because it wouldn't have been, that's not how Hays operates as Dr. Akl described.

I would like to address Claim 5. I think what the Petitioner has misrepresented about Hays with regard to Claim 5 is -- If I could back to sharing here. Going back to Petitioner's Slide Number 43, you know, Petitioner talked about sessions and how it all had to do sessions.

Well, I mean we're looking exactly at their quote where he says "track and record all communications," but it's all communications in an active session and a session is just what it sounds like, it's when the game starts and leaves. Like so I load the game up, I'll see things during that certain session, and then could see something else at a different time.

This is just communications within the session. That's not what the claim requires. The claim requires tracking what has been uploaded to the

mobile communication device. That's different than what Hays is describing with its session database.

With respect to Claim 6 --

JUDGE GALLIGAN: Counsel, this is Judge Galligan. Can I go back to Claim 4? I wanted to follow up on something.

MR. MORLOCK: Sure.

JUDGE GALLIGAN: So my understanding of Hays is that there are these, or at least, you know, some disclosures that there are these available ad units and then you can designate or the server might send something maybe in the middle of a game, an advertisement, for instance, to an available ad unit, and I think Petitioner points to the disclosure in the ’202 Patent saying well there is a t-shirt here and there is a poster here and you can send an ad there.

So why is that different? What's the distinction there that I am not seeing?

MR. MORLOCK: Yes, Your Honor. It's this "as part of the updated content." There is no description whatsoever in Hays that if you send something to a specific ad unit that that ad unit is designated within that specific content that you send. That's just not something that Hays ever discloses.

I think the petition essentially acknowledges as much when it points to Dr. Zagal's statement that this would have been obvious, but, again, Dr. Zagal is just quoting the petition. He doesn't describe why you would include it there and there is plenty of other ways this could be done and there is no specific reason that it would be done in the way Petitioner desires beyond wanting to meet the claim.

JUDGE GALLIGAN: Okay. This is Judge Galligan. So if I am not -- I'll have to, you know, look at the fine details of Hays, but if a message comes in and says put a Pepsi ad on the jumbotron, let's say in Hays, that would not meet the claim?

MR. MORLOCK: It's not part of the updated content --

JUDGE GALLIGAN: So the Pepsi --

MR. MORLOCK: -- because there is --

JUDGE GALLIGAN: Yeah. So I guess I am wondering why is that not, a message containing placement data and advertising data why is that not updated content?

MR. MORLOCK: But the content is the actual, the way the petition charts the reference. The content itself is that is the Pepsi ad. There is no indication that there is a specific set of information identifying the location and what Hays is again talking about is a broadcast to multiple games without advertisers having to specify game titles.

So you are not getting the connection of here is the location in the game and you're not getting it with the specific updated content that you'd be transmitting.

JUDGE GALLIGAN: Okay. Thank you.

JUDGE MCKONE: Now can you respond to Petitioner's argument that if we look at Paragraph 29 of Hays here there is discussion of, a list of advertisements for specific available ad units.

If we are getting lists of advertisements and batches of advertisements all intended for different ad units why wouldn't the ad server be sending location information or at least, okay, this ad goes with this ad unit so that the mobile device knows where to put it?

MR. MORLOCK: Thank you, Your Honor, that's a great question. If you go to Paragraph 29, which I am slowly pulling up, it says "Handling initial connections, providing requested list of advertisements for specific available ad units serving media."

There is no indication there that that list, I mean there is no indication that that is tying the specific location at which the advertisement is to be placed, so it's just requested list of advertisements for a specific available ad unit.

There is no indication that there is a specific location. There is no indication that that specific location is included within the actual, well within the content that is transmitted as required by the claim language. Sorry, I'm trying to pull that up.

Yes. "Sending information to mobile communication device as part of the updated context." There is no indication that that list is part of the updated content.

JUDGE MCKONE: So you're not -- It's your view that they are not being sent at the same time, so you send a bunch of ads, multiple ad units to the mobile device, and you're not sending a list of where they go at the same time?

MR. MORLOCK: But it's not -- It's not at the same time, Your Honor, it's as part of the updated content is what the claim requires. There is no indication that that updated content includes within it a placement location as the claim requires.

JUDGE MCKONE: Well along with the advertisements themselves you sent a list of ad units where the advertisements go, why does that not meet the claim limitation?

MR. MORLOCK: That would be closer but that's not what the reference says here at Paragraph 29. What it says is "providing requested list of advertisements for specific available ad units."

In the earlier context I mean it's fulfilling requests received from the recipient client for advertisements and associated media. So it's you are receiving a request and then you are fulfilling it. It's not saying that the list includes the location, it's saying I am responding to a request with advertisements.

JUDGE HOWARD: This is Judge Howard. On this point with regard to Paragraph 79, in Hays how do they know to put a Pepsi ad on the soda can but not put a Nike ad on the soda can if they don't go and give location information?

MR. MORLOCK: Well the location information -- It's not that it doesn't provide location information, Your Honor, it's that it has to have location information as part of the updated content. That's what the claim requires. So it's just not enough to say, okay, there is a location.

Now Hays never says that we have to give the location. I see where Your Honor is going by saying, well, how else do you know. There are other ways you could do this. It could be in the order of request, it could be a blast for all available units include a Pepsi add.

There is plenty of other ways that this could be met. It doesn't have to be send Ad Unit A to Location XY, and Hays doesn't disclose any of that.

JUDGE HOWARD: So you think that this would be putting like an ad for a Nike sneaker on a soda can?

MR. MORLOCK: You certainly could.

JUDGE HOWARD: Okay.

MR. MORLOCK: I mean there is no reason that it wouldn't need to be broadcast. That's, in fact, what Hays suggests in its abstract is that you are not specifying specific types of games.

JUDGE HOWARD: And you're going to be asking the person who has the Nike ad if they would like something to drink?

MR. MORLOCK: They --

JUDGE HOWARD: I mean the best way to serve them -- I mean this seems sort of specific, you know, if they could agree with you that essentially if it's just a matter of putting things on t-shirts and jumbotrons and shirts or posters, but if you are talking specifically about, you know, a can of soda or a kind of drink, that you are going to want to only put certain ads in that location because they're asking people if you want a drink, otherwise it doesn't make sense to give somebody a can with a Nike wrapper around it and says would you like something to drink.

MR. MORLOCK: Right, Your Honor, but the point here --

JUDGE MCKONE: And while you're thinking about the answer here of Judge Howard's question, I would say that you are into your rebuttal time.

MR. MORLOCK: Okay. I would like to answer that and then I will jump to a couple other things very briefly. Your Honor, that description though I mean I agree that Hays uses the example of a skin on a Pepsi can, or a can, but there is no indication that location is required.

There is no indication that you wouldn't blast ads that were all for beverages if it was in the context of providing an ad on cans. I mean Hays uses examples of ad placements, you know, and you can fill ad units with any other kind of ad.

There is no specific requirement that it have, you know, that sort of a specific read like you're saying. It's just, it's providing example ad units. You don't have to identify the location and Hays doesn't describe a location or send a location.

JUDGE HOWARD: All right. Thank you.

MR. MORLOCK: I would like to jump briefly, since we're into our rebuttal time, to the location based on user interaction as required by Claim 6. The Petitioner has essentially identified two examples of this and those are, one, this rotation and that rotation has nothing to do with the location at all.

The advertisement is always displayed at a specific location. This is from Table A within Hays, Page 18 of Hays. What it is describing is if you have a building you don't change the storefront of the building when the user is standing there so they can see it. That has nothing to do with the location of display, it's just a building.

The next example of mini games, again there is no indication that the mini game is displayed at a particular location. All the Petitioner has identified is a specific time at which it would be displayed, i.e. at the conclusion of a particular level.

I will jump very quickly to Levkovitz and try and address that. The ultimate point on Levkovitz here is what it's describing is a banner advertisement. None of those banner advertisements are ever described as actually being used, it's just something that is displayed over top of a game and, you know, you don't consider a banner to be something that is usable at all.

Finally, briefly addressing the uploading point in WAP, the claim expressly requires uploading and that is exactly at Paragraph 3 what Levkovitz teaches against. Levkovitz expressly says not to do uploading.

What Levkovitz is talking about is this concept that things are displayed in a web interface as a pop-up.

JUDGE MCKONE: Okay. So I'm not sure the distinction you are drawing here. So if I'm playing a game, we'll say on a mobile phone, and I see an advertisement --

MR. MORLOCK: Right.

JUDGE MCKONE: -- why has that advertisement not been uploaded to my phone? If I can see it, it's there, it must have been uploaded. What distinction are you drawing?

MR. MORLOCK: The distinction here is it's something that the user can see. It's something that is displayed, but Levkovitz says that you don't actually upload this, that that's not what it's doing, that it's just a portal.

You know, the way I think of it is it's like a web game. You're not downloading the full thing, you're playing it via the server.

JUDGE MCKONE: So your argument is that I haven't downloaded all of it? That's the distinction you're drawing, because I certainly downloaded some of it if I am viewing an ad?

MR. MORLOCK: Yes, Your Honor, that's the point, is it's not a full upload and that's exactly what Levkovitz is teaching against.

JUDGE MCKONE: Okay. And what claim requirement or claim language are you pointing to where we have to upload an entire download, however you want to look at it, the entire advertisement?

MR. MORLOCK: And that's where you get to the full context of Element 1(c), uploading the updated video game content and that the video game content is usable. You have to have the whole thing for it to be usable.

JUDGE MCKONE: And what's your basis for saying that?

MR. MORLOCK: Because that's within a computer application, that's how a computer application works, you know. Here we have Dr. Akl describing how WAP functions. That testimony stands unrebutted. Dr. Zagal didn't address WAP at all and WAP is not addressed in the petition.

JUDGE MCKONE: And that's the best evidence is the testimony you talked about from Dr. Akl?

MR. MORLOCK: I apologize, I missed that question, Your Honor.

JUDGE MCKONE: That's okay. And then I will ask whoever is typing please mute. That's your best evidence, Dr. Akl's testimony, there isn't any other evidence you would like to point us to?

MR. MORLOCK: Yes, Your Honor, it's Dr. Akl's testimony. If I may, I think I'm down to -- I'd like to reserve the remainder of our time for rebuttal unless you have questions, which I will, of course, answer.

JUDGE MCKONE: Okay. I don't. Anyone else have questions?

JUDGE HOWARD: This is Judge Howard. I have just one quick question about Hays and Claim 5. If I understand your argument your argument is that under Hays they are only keeping track of what happens during the session and its possibile that the updating can happen outside of a session and, therefore, that wouldn't be tracked?

MR. MORLOCK: Correct. All that Hays describes tracking it describes an active session database and it's describing tracking within that session.

JUDGE HOWARD: Right. And so, for example, if there was an update that happened while the person wasn't using the game Hays doesn't say to keep track of that because it's outside of an active session?

MR. MORLOCK: That's one example, Your Honor, yes. The other thing is if there is a new active session then there is an entirely new set of tracking that occurs, so you don't have a continuous track of this is everything that has been transmitted.

JUDGE HOWARD: Okay. Thank you.

JUDGE MCKONE: So it's your position that Hays describes tracking, what has been uploaded, during a session but since it does not track what is uploaded up outside of the session it does not meet Claim 5, am I summarizing correctly?

MR. MORLOCK: Yes, I think that's a fair short summary, Your Honor. In addition to that there is more that could be uploaded and that the session ends, so you only have -- The claim requires that full tracking sessions are individual snippets of time.

JUDGE MCKONE: Okay. And we have to -- So we're going to construe tracking what has been uploaded to mean all of what's been uploaded over time?

MR. MORLOCK: Yes. I think that's the plain language of the claim here, Your Honor. I don't think it's a separate construction because it's tracking what has been uploaded.

JUDGE MCKONE: Okay. I think I understand your position. I'm not sure that I agree with it. I don't have anymore questions, unless you have anything else. You'll have about 5-1/2 minutes for rebuttal.

MR. MORLOCK: Thank you, Your Honor.

MR. GLASS: Thank you, Your Honor. Let me just share my screen very quickly.

JUDGE MCKONE: And you have about 24 minutes.

MR. GLASS: I doubt I'll be using all of that time, Your Honor, just a few quick points. I'll start where you left off on this notion of the session.

What they are arguing is beyond the disclosure of Hays. There is no dispute here. Hays tracks all communications within a session. The session begins when a user joins, ends when the user leaves.

They have pointed to nothing in Hays where content is uploaded outside of a session. Not in their briefs. I didn't hear counsel say anything if they raised it on surrebuttal, it would be a surprise to me.

There is nothing in Hays of video game content being uploaded outside of a session. So this notion that there could be some data uploaded outside of a session is nothing more than a red herring. There is no disclosure of that in Hays.

I will go to Levkovitz very quickly. I said I didn't understand counsel's position on their distinction between downloading something from a banner, downloading something from a website, and --

JUDGE HOWARD: Sorry, this is Judge Howard. If we could go back to your Claim 5 argument. At least one of the points I understand Patent Owner to be making is yes it tracks everything that is being updated during one session, but once you stop that session and you start a new session it will again keep tracking what has been updated but it hasn't kept track of what was done in the previous session.

Do you agree or disagree with their description of Hays and if you disagree with it is there any support for your position?

MR. GLASS: I don't think that's a requirement of the claim, Your Honor. It says tracking what has been uploaded. That's exactly what Hays does, as it's uploaded it's tracked, so within each session everything is uploaded, everything is tracked, excuse me.

You know, this is a new argument. I haven't read this in the briefs. I am not sure if they are saying there has to be a log from the beginning of time to the end of every single thing that was uploaded, but the claim is talking about content that is uploaded for a video game. That's exactly what Hays describes.

So I don't know off the top of my head if Hays describes keeping a log of everything from the beginning of time, but that's certainly not required by the claims and that would be yet another claim construction issue they are asking you to decide.

In any event, it is a new argument. I would suggest that it's very obvious to have done that through a simple logging procedure. Not something we argued in the petition because it's not something that they argued. Did I adequately answer your question, Your Honor?

JUDGE MCKONE: You did. Thank you.

MR. GLASS: I will go back to Levkovitz. Again, Patent Owner did not even address this Paragraph 375. They said, well, it's a browser, somehow that's not downloading, you are viewing it. You have to -- I think he said there is -- I wrote down as he said it, it can't just be displayed and they relied -- Your Honor, you asked them what's your best evidence. Our expert.

Their expert didn't consider this. It says quite clearly "locally saving the WAP advertisement or a portion thereof for subsequent viewing." I don't know how they argue that's not downloading. I will leave it at that.

You know, on this point that Levkovitz doesn't disclose using, again that goes back to their banner ads can't be used. I pointed out before that that's exactly what the ’202 Patent discloses. They are arguing that that disclosure should not be considered part of the claims.

On this notion that -- I'll go to Slide 37. On this notion that Hays only blasts out ads to various ad units, I think, Your Honor, you got it right, you have to provide a location and that's exactly what Paragraph 29 states.

Paragraph 29 states in Hays that in some embodiments they advertise them "sort of may fulfill request received from the advertisement's recipient for ads." As part of that it includes a list of ads for specific ad units.

Your Honor, you hit it right on the head, it doesn't make any sense to put an ad for Nike on a Pepsi can and ask the user to have a drink. Counsel said that makes sense. It's the farthest thing from logical.

I will point out that in addition to this we argue that it would have been obvious based on the disclosure in Hays. We also argue it would have been obvious based on Chu, which counsel did not address.

I think I had one other point on this. Right. I'm sorry. We pointed out Chu, how Chu expressly discloses sending the ad with the location. Counsel did not address that all.

I will go back to the issues of -- I just want to hit on this notion of "usable." And to take a step back, I think Your Honors get the issues, Patent Counsel, they are seasoned patent lawyers, they know this is a claim construction issue.

They attempted to dance around it and say it's not a claim construction issue, but they are saying that the prior art is not covered by the claims because the claims require certain aspects. That's claim construction.

They are asking you again to include -- Let me just -- I don't know that I even have to get to this at this point. Cannot be skins. How is that not a claim construction issue. Must affect game play. How is that not a claim construction issue? Must allow interaction by the user.

The claim requires nothing of any of these limitations. It simply requires usable in the video game period. They are trying to bring in eight or seven different limitations on this on checking four separate limitations and now actually argue it's not a claim construction issue.

I think counsel said that I raised this as a claim construction issue for the first time today. That is not true. In their surreply at Page 20, I mentioned this in the beginning of my presentation, they criticize us and incorrectly stated that claim construction is Petitioner's burden, again implying that it is our burden to explain why their limitations were not parts of the claim.

They knew that this was a claim construction issue. They didn't address in their papers and they are attempting to say that I'm raising this for the first time on oral argument.

I will point to order of the steps. I don't think there is any requirement for order of the steps in the claims, whether there has to be a check, whether there has to be a check before sending the information, and even if there is a requirement, I'll get to it, Hays expressly discloses it.

This is an example on Slide 19 of sending updated content. It's an initial message. Of course they argue the initial message can't be content. Well it's content that is sent to the mobile device and it's updated.

The initial message, there is no check in here, there is no description of a check in this section. It is agnostic as to when the check occurs and there is no requirement. They certainly haven't argued that there is any requirement in their briefs. This is a brand new argument we are hearing for the first time today.

I will also point out that Hays at Paragraph 40 -- Let me bring this up. Hays at Paragraph 40 expressly states "At some embodiments the advertisement recipient/client requests advertisements for delivery." There is a request. "The advertisement request handler forwards this request to the advertising matching system and waiting system." That's the check.

That's where the advertisement system, the waiting system, checks to see if it checks on the user's mobile device, on the internet provider, et cetera. So to the extent there is a requirement for an order, which there isn't, it's expressly disclosed by Hays.

I will also point out, Your Honors, they pointed out on reply Column 6 and Column 7 in their presentation. They pointed to Column 6 and Column 7 of the ’202 Patent as supporting their claim, they didn't say claim construction, but that it's supporting their positions that the claims exclude Hays.

Two points. Those citations are citations that are used for the very first time today. Those were never cited in their reply, never cited in their POR. Brand new citations. I will point out that -- But it doesn't matter because those are just examples and I agree those are examples of interactive

advertisements, but that begs the question why are we limiting the claims to require eight separate limitations based on an example.

That should ring a bell for any patent litigator. We are reading in an example into the claims and now those examples don't even meet all of their requirements. So where are we left with their positions?

It's a non-claim construction argument that eviscerates three quarters at least of the ’202 Patent, but it's not a claim construction argument, but we should narrow the claims by those two arguments, those two examples, which they never cited in any of their briefs. Again, this is a claim construction argument.

One last point I want to address is this notion of pre-loaded ads, and that's in Hays at paragraph, this is a Hays Paragraph 19 issue. Let me get there for a moment. I want to be clear about this. They implied, counsel I think implied that, well, Hays is pre-loaded with ads.

I just want to make clear, I don't know if that's exactly what he said, but Hays is not pre-loaded with ads. Hays comes in some embodiments pre-loaded with ad units. What are ad units? They are units where just like the ’202 Patent you can put an ad there.

So that's not saying that there is no updated content. The ad still has to be brought over and sent from the server to the user's mobile device. In this case it is a game character eating a brand name energy bar.

They suggested, well, that energy bar would have been eaten regardless without the ad. That's not in Hays. The only disclosure in Hays is of eating that energy bar with the ad on it. So there is no -- Of course it impacts game play. Of course it's interactive. It absolutely says that it's

interactive, so this meets even their very narrowed claim construction for the term.

Oh, and one last point, again, counsel didn't address this on Slide 35. This notion that pre-defined ad units are not permitted under their claim construction, is again flatly refuted by the ’202 Patent. The ’202 Patent says in an embodiment the coordinates need only define a pre-defined location. That's exactly what they say Hays is doing. Again, couldn't be clearer.

So, again, Your Honors, I will just end with this, we have, of course, this is claim construction. Their positions on checking, their positions on usable, their positions on location, they are all claim constructions.

They are trying to run away from it because they haven't done the proper analysis. They haven't given Your Honors the tools you need to determine whether these claims should be limited to the limitations they argue.

What we have is we have applied the claims as ordinary language, ordinary words, in a manner that is consistent with the specification. There is nothing in our mapping that requires you to ignore the ’202 Patent.

We are not requiring any limitations on these words. Their claim construction requires that you import into a three letter word, use, or usable, eight separate limitations, four limitations for checking, and it requires you also to ignore the vast portions of the ’202 Patent.

I would suggest under Phillips that maybe it's not the patent spec that got it wrong, it's their claim construction that should be rejected. With that, Your Honors, I have nothing further unless you have any questions. I will close out for Petitioner.

JUDGE MCKONE: Nothing further from me. Anyone else?

(No audible response.)

JUDGE MCKONE: Thank you.

MR. GLASS: All right. Thank you very much, Your Honors. Petitioners appreciate your time and attention to this matter.

JUDGE MCKONE: And Patent Owner you have about 5-1/2 minutes of surrebuttal when you're ready.

MR. MOORE: Thank you, Your Honors. I'll start. If we could go to Hays Paragraph 19. What was just pointed out about the game character eating the brand name energy bar, I mean that's just describing the available ad units that are shipped, that are the fixed set of available ad units in the game.

That's what this whole area of Hays is describing. There is nothing in Hays about that aspect being transmitted later as updated video game content. It simply was fixed in the game. I think I have covered that in more detail. You can take that down.

I mean Petitioner's counsel can say it 25 times if he likes that we are engaging in claim construction. We obviously disagree and believe we are applying the ordinary meanings of these words, particularly not just the word "use" or "usable," but the requirement that there be updated video game content that is usable when the video game operates and what that would be understood in the context of this game as being something that has to happen when the game is played and actually affects the game and that simply an ad is not that.

So I don't think we had to engage in claim construction. In any event, they never engaged in claim construction either. It's only here at the oral hearing that I am hearing a lot of discussion about claim construction from

them. I think it's a bit of an attempt to mask the deficiencies in the references rather than any legitimate legal issue.

The last point I'll make and then I'll turn it over to Mr. Morlock to close us out is they introduced Paragraph 375 of Levkovitz today. It's ironic that they are complaining that we are raising new issues, that's not in their papers anywhere.

They never relied on Paragraph 375. They do it now here and try to make, you know, then try to fault us for not addressing it when they don't rely on it. In any event, that's just talking about -- I pulled it up when he was talking, that's just talking about user-selected actions that perhaps a user may later want to download something for offline use. That has nothing to do with uploading updated video game content.

It's simply one of a laundry list of options that a user could perform later on and that's probably why they didn't rely on it in the actual papers and they are just trying to do it today.

That's all I have. Mr. Morlock may have one or two points to finish this off, but I would like to thank Your Honors for your questions today and for your consideration of this matter.

MR. MORLOCK: If Your Honors can hear me I will very briefly address Chu. Your Honor, I am displaying now Figure 5 of Chu and exactly as we have argued in our papers, Chu describes that the local device determines the location and makes a request. That's what is shown in Figure 5, Query to Transport Advertising Server for Ad Campaigns for a Specific Location.

Petitioner knows this. Petitioner's petition cites Chu at Columns 14 through 15. It's 14 Line 20 through 15 Line 5. That's at Page 39 of their

petition. That very specific cite that they provide that's the only cite to Chu in the petition.

It specifically says at Column 14 at Line 30 "Game clients must pass the server information such as, but not limited to, the location identifiers that uniquely identify an ad within a game." So all of this discussion of metadata, about the location of an ad, Chu expressly says what that is, it's the local device making a specific request for an ad at a specific location.

This concept that the server itself is transmitting the location, well actually it says "part of the updated content." That's not what Chu describes, Chu describes the opposite.

Unless there are other questions I thank Your Honors for your time and consideration to this. We very much appreciate the time to present our client's arguments for you.

JUDGE MCKONE: All right. Well thank you very much. Thanks to both parties. This has been very helpful. We are understand your position much better now. We are adjourned, although I will ask counsel to stay on the line for just a moment in case the court reporter has any questions and some spellings or anything else.

MR. GLASS: Thank you, Your Honors.

MR. MEYERS: Thank you, Your Honor.

(Whereupon, the above-entitled matter went off the record at 2:54 p.m.)

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