

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NEARMAP US, INC.,
Petitioner

v.

EAGLE VIEW TECHNOLOGIES, INC.,
Patent Owner

Case IPR2024-00716
Patent 10,671,648

PETITIONER'S REQUEST FOR DIRECTOR REVIEW

TABLE OF CONTENTS

I.	FACTUAL BACKGROUND.....	2
II.	THE BOARD’S DECISION IGNORES LARGE PORTIONS OF AND MISCHARACTERIZES THE PETITION.....	4
III.	CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Apple Inc. v. Core Wireless Licensing S.A.R.L.</i> , IPR2015-01902, Pap.2 (Sept.12, 2015).....	9
<i>Boart Longyear Ltd. v. Australian Mud Co.</i> , IPR2019-01129, Pap.1 (May 24, 2019).....	10
<i>Boart Longyear Ltd. v. Australian Mud Co.</i> , IPR2019-01129, Pap.8 (Nov. 25, 2019)	10
<i>Elite Performance Footwear, LLC v. Reebok Int’l Ltd.</i> , IPR2017-01689, Pap.2 (June 28, 2017).....	10
<i>Elite Performance Footwear, LLC v. Reebok Int’l Ltd.</i> , IPR2017-01689, Pap.7 (Jan. 12, 2018).....	10
<i>NJOY, Inc. v. Fontem Holdings I B.V.</i> , IPR2014-01300, Pap.2 (Aug. 15, 2014)	9
<i>Samsung Elecs. Co. v. Advanced Touchscreen and Gesture Techs., LLC</i> , IPR2016-00652, Pap.2 (Feb. 29, 2016)	9
<i>Samsung Elecs. Co. v. Advanced Touchscreen and Gesture Techs., LLC</i> , IPR2016-00652, Pap.8 (Aug. 31, 2016)	9
<i>Structural Wrap, LLC v. Sys. Stormseal Pty Ltd</i> , IPR2024-00084, Pap.2 (Oct. 28, 2023)	9
<i>Structural Wrap, LLC v. Sys. Stormseal Pty Ltd</i> , IPR2024-00084, Pap.13 (May 9, 2024).....	9
<i>Twitter, Inc. v. Palo Alto Rsch. Ctr., Inc.</i> , IPR2021-01398, Pap.12 (Mar. 15, 2022)	8, 9
<i>Twitter, Inc. v. Palo Alto Rsch. Ctr., Inc.</i> , IPR2021-01430, Pap.2 (Aug. 25, 2021)	9
<i>Twitter, Inc. v. Palo Alto Rsch. Ctr., Inc.</i> , IPR2021-01430, Pap.9 (Dec. 17, 2021).....	9

<i>Twitter, Inc. v. Palo Alto Rsch. Ctr., Inc.</i> , IPR2021-01458, Pap.11 (Apr. 6, 2022).....	9
---	---

<i>Xerox Corp. v. Bytemark, Inc.</i> , IPR2022-00624, Pap.9 (Aug. 24, 2022) (precedential).....	12, 13
--	--------

<i>Xerox Corp. v. Bytemark, Inc.</i> , IPR2022-00624, Pap.12 (Feb. 10, 2023).....	12, 13
--	--------

Other Authorities

37 C.F.R. § 42.22(a)(2).....	4
------------------------------	---

37 C.F.R. § 42.104(b)(4).....	4
-------------------------------	---

Board’s <i>Consolidated Trial Practice Guide</i> (Nov. 2019)	8
--	---

H.R. Rep. No. 112-98 (2011).....	4
----------------------------------	---

Petitioner Nearmap US, Inc. (“Petitioner”) requests §42.75¹ Director review of the Board’s denial of institution (Pap.9, “Inst.”) based on the Board’s (i) failure to consider the Petition (Pap.2, “Pet.”) in its entirety and resulting refusal to consider the merits of Petitioner’s prior art challenges, (ii) mischaracterization of large portions of the Petition, and (iii) misapplication of clear Office precedent and guidance, which together constitute a clear abuse of discretion. In denying institution, the Board improperly took issue with a long-endorsed claim chart format while ignoring “narrative” arguments in the Petition’s charts and earlier sections (Inst.10-11), penalized Petitioner for complying with but being close to the Petition’s word limit and for the length of its expert declaration, suggesting improper incorporation by reference but pointing to nothing actually incorporated (Inst.13-15), and ignored the Petition’s clear mappings showing the exact disclosures relied on for the only exemplary limitation Patent Owner (“PO”) and the Board actually analyzed (Inst.15-18). Because institution decisions are non-appealable, review of the Board’s arbitrary and unjustified refusal to reach the merits here is important to upholding Congress’s goals for post-grant trials as an efficient mechanism to improve patent quality and reduce costs.

¹ Unless stated, statutory and regulatory citations are to 35 U.S.C. or 37 C.F.R., as context indicates, internal citations are omitted, and underlining is added.

The denial of institution also upends long-settled expectations of both petitioners and patentees regarding acceptable petition format and content. It also contradicts both the express guidance of the *Trial Practice Guide*—which encourages the use of claim charts such as those here—and numerous Board precedents, which endorse this very format and reject criticisms like those relied on by the panel. In arbitrarily departing from Board precedent and guidance and introducing unpredictability, uncertainty, and inefficiency that will prejudice and discourage future petitioners, this decision also raises important issues of law and policy. Director review of this denial of institution is thus warranted, and Petitioner respectfully requests remand to a new panel of the Board for consideration of the Petition’s merits.

I. FACTUAL BACKGROUND

Nearmap’s IPR challenged U.S. Pat. 10,671,648 (“’648”) based on the Harris, Florance, and Salvagio references (EXS1004-1006). After introducing ’648 (Pet.1-4), the Petition described what was known in the art about ’648’s key claimed features—citing specific pertinent teachings of Harris, Florance, and Salvagio (Pet.4-13). The Petition further provided a separate textual overview for all three references (Pet.17-23), and established they were analogous art (Pet.23-26). Then, separately for each challenged claim, the “Petition collect[ed] disclosures from the asserted references and provide[d] a detailed, limitation-by-limitation chart expressly mapping each word of the Claims to the disclosures of each relied-upon reference,” with

additional narrative explanations giving further detail. Pet.26-91.

PO's preliminary response (Pap.6 ("POPR")) ignored the Petition's actual explanations and citations, argued the Petition didn't address the challenged claims "with particularity," and criticized Petitioner's claim chart format as providing no "explanation" or "citations." POPR.6-16. The POPR further suggested the Petition improperly skirted word limits and incorporated by reference Petitioner's expert's declaration—complaining of the (rule-compliant) number of words in the Petition, and the length of Dr. Shahabi's declaration. POPR.13, 17. Tellingly, the POPR never identified even a *single* fact or argument it alleged was improperly incorporated by reference. Finally, the POPR argued the Petition failed to address one particular limitation—regarding "time identifiers...indicative of a *time history*... regarding the *associated geographic point on earth*"—but only by deleting the associated geographic disclosures from each "quotation[]" the POPR acknowledged was mapped. POPR.20-22. Petitioner filed a reply (Pap.7, "Rep.") and PO filed a sur-reply (Pap.8, "Sur-Rep.") addressing this last issue.

The Board denied institution without reaching the Petition's merits. Pap.9. Instead, the Board restated and wholesale adopted PO's criticisms of the Petition's claim chart format as well as the length and supposed incorporation-by-reference of Petitioner's expert's declaration. *E.g.*, Inst.10-14 ("We agree with Patent Owner"). In complaining Petitioner presented charts rather than "narrative discussion"

(Inst.11), the Board ignored not only the detailed narrative explanations in the charts, themselves, but also the Petition’s extensive discussions of the asserted references’ coverage *prior to* the charts. And like PO, the Board didn’t identify even a *single* opinion improperly incorporated from the declaration. Petitioner addresses each of the Board’s criticisms below, showing why the Board’s institution denial is both an abuse of the panel’s discretion and raises important issues of law and policy.

II. THE BOARD’S DECISION IGNORES LARGE PORTIONS OF AND MISCHARACTERIZES THE PETITION

The Office’s rules require petitions to raise challenges with particularity, including “a detailed explanation of the significance of the evidence,” §42.22(a)(2), and an explanation of “where each element of the claim is found in the prior art....” § 42.104(b)(4). But the rules don’t require a “narrative” format (indeed, the Board explicitly endorses using claim charts), don’t state that parties will be penalized for submitting papers compliant with but close to the applicable word limits (*cf.* Inst.13 (citing PO complaint that Petition was “mere 15 words shy of the word count limit”)), and don’t impose word or length limits on expert declarations (rather, the Board rejects declarations merely parroting the words of the petitions). The panel’s rewrite of these rules and long-standing practice deprives Petitioner of due process, renders the institution process arbitrary and unpredictable, and frustrates Congress’s stated goal for post-grant proceedings: “improving patent quality and providing a more efficient system....” H.R. Rep. No. 112-98, at 39-40 (2011). Without reaching

the merits, the panel (i) took issue with the Petition’s chart format while simultaneously ignoring “narrative” arguments made in the charts, footnotes, and earlier sections (Inst.10-11), (ii) penalized Petitioner for complying with but being close to the word limit and for the length and word counts of its expert declaration, citing supposed “incorporation by reference” but pointing to nothing that was actually improperly “incorporated” (Inst.13-15), and (iii) ignored the Petition’s chart’s clear mappings showing the exact disclosures relied on for each word of the single limitation of claim 12 the Board discussed in detail (Inst.15-18).

Board guidance has endorsed the Petition’s claim chart format. The Board states “[t]he claim chart discusses all claims and all grounds in a single 64-page claim chart.” Inst.10. But there is no prohibition on presenting arguments in a claim chart—as discussed below, the Board’s *Trial Practice Guide* endorses doing so. And the Petition here provides 11 charts (one for each challenged claim), each reciting the claim language and precisely dividing and matching up the specific portions of each asserted reference that discloses each respective limitation. *E.g.*, Pet.27-53 (cl.12), 53-54 (cl.13), 54 (cl.15), 55- 61 (cl.9), 61-71 (cl.10), 72-82 (cl.11), 83-87 (cl.1), 88 (cl.2), 88-89 (cl.4), 89-90 (cl.5), 90-91 (cl.6). Where applicable, the charts also include obviousness arguments summarizing the relied-upon disclosures and detailing the reasons POSITA would have been motivated to combine the references with a reasonable expectation of success. *E.g.*, Pet.35-38, 62-71, 73-82.

As an illustration of the Petition’s charts, the Board provided this partial excerpt from one of the 10 pages of claim chart addressing ’648’s limitation 12.a:

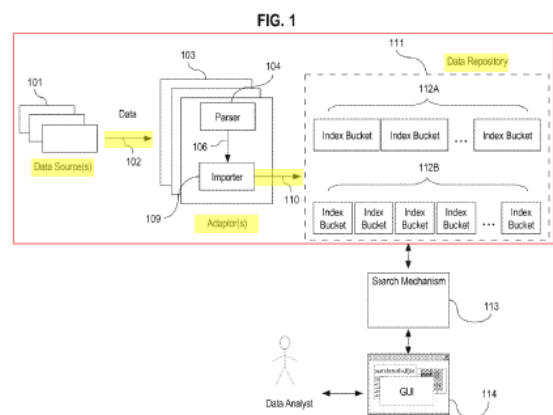
Claim 12	Prior Art
stored on computer-readable storage media, the integrated centralized property database including a plurality of data items, each of the plurality of data items being associated with one or more geographic location identifiers	Harris discloses an integrated centralized property database (e.g., “geo-temporal data may be obtained from potentially multiple disparate data sources and... is received and indexed in a data repository”; “data repository 111 may operate on one or more computing nodes of a cluster of computing nodes”; “a data processing system comprises a data repository 111”; “database” that “store[s]” “geo-temporal data”; “data stored in data repository... may be stored as key-value pairs”) stored on computer-readable storage media (e.g., “indexes may be stored on disk and cached in memory on demand”; “storage media... that store data”; Fig.5 (“computer system” upon which system “implemented,” including storage media including, e.g., “Main Memory” 506, “Storage Device” 510)), the integrated centralized property database including a plurality of data items (e.g., multiple items of geo-temporal data “associated with a geospatial component and a temporal component” (such as “crime reports received within a particular city,” “cell phone call records,” or “data objects

Inst.11; see Pet.29-38. The Board broadly concluded “[t]here is no argument in the claim chart addressing how Harris teaches these claim limitations, nor is there any narrative discussion of how Petitioner views the disclosures of Harris.” Inst.11. The Board acknowledged, however, the charts include explanatory footnotes, citing Pet.29 n.5, but asserted note 5 relates only to “whether Harris teaches or discloses an integrated centralized property database as part of multiple embodiments....” Inst.11 n.6. However, the cited note 5 is not focused on whether Harris discloses multiple embodiments (that’s what Petition note 4 focuses on). Instead, note 5 contains a narrative explanation of why Harris discloses an integrated centralized property database—the very thing the Board contended was missing from the Petition:

As discussed herein, Harris expressly discloses an “integrated centralized property database,” because Harris discloses, *inter alia*, storing in its data repository geographic location identifiers indicating a particular point on earth (*e.g.*, “one or more numerical values specifying a longitude and latitude,” EX1004, 5:65-6:2). Harris thus expressly discloses this limitation. EX1003, ¶101.

Pet.29 n.5. The Board did not even acknowledge this narrative explanation, let alone explain how it failed to set forth Petitioner’s clear position about this limitation. Nor did the Board ever acknowledge, let alone discuss, the explicit narrative discussions addressing this same claimed feature earlier in the Petition. For example, the Petition expressly called out (Pet.4-6) that Harris disclosed “aggregating data associated with a geographic location identifier and time identifier in a data aggregation system or integrated centralized database”:

- U.S. Patent 9,501,507 (primary reference “Harris” (EX1004), filed December 27, 2012) disclosed aggregating data associated with a geographic location identifier and time identifier, describing “analyzing data *object collections* that include *geo-temporal data*,” which (1) “may be obtained from... *multiple disparate data sources*” like “network traffic logs, bank transaction records, phone call records, crime data, or *any other data that includes both a geospatial and temporal component*”— *e.g.*, “values representing a longitude and latitude” and “one or more values indicating a point in time or range of time”; and (2) “is received and indexed in a data repository.” EX1004, Abstract, 1:21-37, 2:50-67, 3:1-11, Figs.1 (“Data Repository” storing “input data 102” obtained from “Data Source(s),” including “geo-temporal data”; “Adaptor(s)” “configured to ingest geo-temporal data” and “Importer” to produce “key-value pairs 110”), 3; EX1003, ¶¶20-21:



And the Board similarly ignored Petitioner’s introduction of Harris (Pet.18) calling out Harris’ data repository 111, explaining Harris “discloses aggregating data having a geo-spatial component (including a geographic location identifier) and temporal component for querying, including, *e.g.*, ‘computer systems and methods for ***indexing and searching geo-temporal data*** stored in a data repository,’ EX1004, 2:50-53” (citing EX1003, ¶57). Only by ignoring the Petition’s *multiple* narrative explanations of coverage for this aspect of limitation 12.a—both before and in the chart—could the Board reach its erroneous conclusion. *E.g.*, Inst.11. And these errors, concerning straightforward aspects of the Petition understandable when properly considered as presented, illustrate the Board’s abuse of discretion in refusing to address the Petition’s merits.

The Petition’s format is consistent with the Office’s rules, and the Board’s *Consolidated Trial Practice Guide* (Nov. 2019) expressly encourages “claim charts,” which “can streamline the process of identifying key features of a claim and comparing those features with specific evidence.” *Id.*, 45, 40. In contrast, this panel’s decision wipes away long-settled understandings about how petitions may be structured and set forth evidence. Indeed, over the years, multiple prior decisions have rejected challenges to the claim chart format used here. For example, in *Twitter, Inc. v. Palo Alto Research Center, Inc.*, IPR2021-01398, Pap.12, 44-45 (Mar. 15, 2022), the Board granted institution and a motion to waive word count, instituting an over-

length petition that used the same chart format employed here. There, “Patent Owner argue[d] that Petitioner ‘employs numerous claim charts... with little to no explanation, instead relying on citations to the alleged prior art, extensive references to its expert declaration, and lengthy footnotes.’” *Id.* at 44. The Board rejected those arguments, finding that “[c]ontrary to these arguments, the Petition provides a sufficient showing... including... by providing ‘citations to the alleged prior art.’” In addition, the Petition supplements the claim charts with explanations outside of the charts.” *Id.* at 45 (citation omitted). *See, e.g., Twitter, Inc. v. Palo Alto Rsch. Ctr., Inc.*, IPR2021-01458, Pap.11, 19 (Apr. 6, 2022) (“Although many of the quotations in Twitter’s claim charts are abbreviated and lack specific citations, Twitter adequately directs our attention to the” relevant passages in the art); *Twitter, Inc. v. Palo Alto Rsch. Ctr., Inc.*, IPR2021-01430, Pap.2, 26-81 (Aug. 25, 2021) (instituting, over patentee’s criticism (Pap.9, 2, 15-17), petition 12 words under the limit and utilizing similar chart format); *Structural Wrap, LLC v. Sys. Stormseal Pty Ltd*, IPR2024-00084, Pap.2, 32-82 (Oct. 28, 2023) (instituted, IPR2024-00084, Pap.13); *Samsung Elecs. Co. v. Advanced Touchscreen and Gesture Techs., LLC*, IPR2016-00652, Pap.2, 21-37, 44-59 (Feb. 29, 2016) (instituted, IPR2016-00652, Pap.8); *Apple Inc. v. Core Wireless Licensing S.A.R.L.*, IPR2015-01902, Pap.2, 13-41, 48-59 (Sept.12, 2015) (using chart format similar to Petition here); *NJOY, Inc. v. Fontem Holdings I B.V.*, IPR2014-01300, Pap.2, 13-26, 30-56, 37-43, 46-50, 52-59 (Aug. 15, 2014)

(similar). In, *e.g.*, *Elite Performance Footwear, LLC v. Reebok International Ltd.*, the Board instituted a petition with claim charts far less detailed than those used here—including limitations (*e.g.*, 1.4) providing only an annotated figure from the prior-art reference and a bare citation—explaining that it considered the petition in its entirety, finding that “the citations provided together with the claim charts and other explanation are sufficient, at this stage, to satisfy the requirements of our rules.” IPR2017-01689, Pap.2, 33 (June 28, 2017); *id.* Pap.7, 18 (Jan. 12, 2018); *see also Boart Longyear Ltd. v. Australian Mud Co.*, IPR2019-01129, Pap.1, 20-41, 45-56, 60-88, 89-98 (May 24, 2019) (instituted, IPR2019-00129, Pap.8) (including charts with quotations not accompanied by narrative explanations).

This panel’s unsupported departure from years of precedent and the *Trial Practice Guide* is not only an abuse of discretion: as a policy matter it also presents conflicting instructions to future petitioners who will be unable to discern whether they will be arbitrarily deprived of the opportunity to have their challenges heard on the merits based on unknowable format preferences of particular panels.

The Board Identified No Word Count Impropriety or Incorporation by Reference. The Board accepted PO’s argument that the Petition failed to address the claim limitations with particularity based, as least in part, on PO’s contention “that Petitioner may be attempting to circumvent the 14,000 word count limit by limiting its Petition to bare quotes that often lack citation. [POPR] at 13 (noting that the

Petition was a mere 15 words shy of the word count limit).” Inst.13 (citation omitted). By adopting PO’s criticism (*id.* (“We agree with Patent Owner.”)), the Board effectively creates an arbitrary, unknown *lower* word limit *different from* the rule, which Petitioner undisputedly followed here. It also ignores that all of the Petition’s quotations *are* cited, in *three places*: (1) in the charts themselves, (2) again in the “expanded-quotation claim charts” attached to the Shahabi declaration (*see* Pet.16), with bold typeface calling out the mapped language within the larger original quote blocks, and (3) again in the declaration’s textual discussion of each limitation.

The Board also adopted PO’s argument that “Petitioner’s reliance on Dr. Shahabi’s declaration is improper” because of its length. Inst.13-14 (“We agree”):

Patent Owner also argues that, to the extent that Petitioner’s specific arguments may be found in Dr. Shahabi’s declaration, that amounts to improper incorporation by reference. Prelim. Resp. 16. Patent Owner asserts that “[e]xcluding Dr. Shahabi’s CV, the Shahabi Declaration is a lengthy 71,911-word, 330-page document.” Inst.13-14.

But the Board never identified any opinions of Dr. Shahabi that were improperly incorporated by reference. Inst.13-15. Instead, the Board simply compared the length of the Petition claim chart for limitation 12.a (which actually spans 10 pages, Pet.29-38) to the length of the corresponding portions of Dr. Shahabi’s declaration, and assumed—without addressing the declaration’s substance—that there must be improper incorporation by reference based simply on that comparison. Inst.14-15. An

actual review of the substance of Dr. Shahabi’s declaration would have revealed that *a third of it*—105 of its pages—is just a full-length claim chart providing *the same mappings, citations, and arguments as the Petition*—as well as the same parenthetical quotations, but in unabridged format, allowing a reader to see all full-length quotes in one place. *Compare* Pet.29-38 (mapping limitation 12.a) *with* EX1003, 269-287. And the body of the declaration includes the citations from the Petition’s claim chart and the same unabridged quotes in Shahabi’s concluding chart (containing quotes from the same portions of the references), along with supporting evidence and technical reasoning supporting his opinions and the Petition’s arguments (as the Board *requires*, *Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Pap.9, 15-16 (Aug. 24, 2022) (precedential) (“*Xerox*”)), *affirmed on sua sponte review*, *id.*, Pap.12, 5. EX1003, 58-88. The Board’s word-counting also fails to account for the complexity of limitation 12.a, which is 86 words with multiple sub-limitations. Pet.95.

Dr. Shahabi’s declaration, like the Petition, addresses every aspect of limitation 12.a, and Petitioner cannot be penalized for its expert’s thorough assessment of the claim limitation when, as required by *Xerox*, Dr. Shahabi provided supporting testimony and technical reasoning. EX1003, ¶¶99-113 (“computer-readable storage media” limitation), 114-125 (“plurality of data items” with claimed characteristics), 126-133 (obviousness over Harris in view of Florance). The Board’s improper focus on the Petition’s length and refusal to analyze the merits of Petitioner’s challenge

due simply to the length of Dr. Shahabi's declaration is an abuse of discretion and arbitrarily imposes unspecified and unknowable word limits on petitions and expert declarations, effectively holding that petitions too close to the word limit or expert declarations that a particular panel feels are too long or too detailed doom a petition. Neither Patent Office rules nor any Board precedent support such a finding.

Nor does Office policy permit this: not only does this outcome deprive petitioners of the ability to know whether their petitions will be arbitrarily rejected without consideration of their merits, but it is also contrary to clear Board precedent *requiring* expert declarations to provide additional supporting evidence and technical reasoning *beyond what is in the petition*. In its precedential decision in *Xerox*, Pap.9, 15-16, the Board denied institution where the “only evidence” for a key assertion was expert testimony that:

merely repeats, verbatim, the conclusory assertion for which it is offered to support. . . . Dr. Jones does not cite to any additional supporting evidence or provide any technical reasoning to support his statement. Thus, the cited declaration testimony is conclusory and unsupported... and is entitled to little weight.

See also id., Pap.12, 15. But following the panel's decision here, petitioners face an impossible “Goldilocks” conundrum: they can't be sure whether their expert declarations will be deemed too short (running afoul of precedential *Xerox*'s clear requirements), too long (violating the apparent word and length limits set by the panel here),

or just right such that their petitions are considered. Director review is necessary to provide guidance to the Board and all parties on this important issue.

Petitioner’s detailed mapping of the “time history limitation” (portions of 12.a and 12.c). PO (at POPR.20) refers to a portion of limitations 12.a and 12.c—“indicative of the time history of an associated data item regarding the associated geographic point on earth”—as the “time history limitation,” and “attempts to step through” this “one limitation” to argue the Petition failed to address it. Inst.15.

But PO had no trouble identifying the Petition’s argument: PO bulleted each of the six phrases from Harris that the Petition mapped and quoted for this limitation in 12.a. POPR.21 (citing Pet.32-33). Instead, PO argues that “[w]hile each of these passages generally refers to time-related data, the Petition never explains how any of these features are ‘indicative of a time history.’” POPR.21. But to make this argument PO affirmatively deleted from each quoted phrase the language the Petition quoted to link each temporal component of Harris’s data items to the corresponding geospatial component. *Compare* POPR.21 *with* Pet.32-33; Rep.1-2.

Petitioner explained this in its Reply, highlighting *the portions of the mappings that the POPR selectively deleted* to support PO’s argument. Rep.1-2. The Board misapprehended this, finding “Petitioner did not provide an explanation in the Petition that would lead us to understand that we should pick out the highlighted terms from the listing provided in Petitioner’s claim chart.” Inst.18. The point of the

highlighting was not to indicate what part of the mapping to consider; the *whole* mapping was to be considered; the highlighting merely showed what PO improperly *excised* to argue it was incomplete. Rep.1-2. Nothing beyond the Petition (including this Reply highlighting) was needed to understand its mappings—as PO’s own bulleted list (POPR.21) reveals when its improper deletions are undone, the Petition’s arguments were clear from the mappings themselves, such as “all activities within a single city block within the past five years to all activities within an entire city within the past five hours.” Pet.32-33; POPR.21. Further, the Petition provided additional narrative explanations of these teachings in and *before* the charts that the Board *also* improperly ignored. Pet.58 n.14; Rep.3. The Petition’s “Background of the Art” explains, *e.g.*, that Harris discloses “aggregating data associated with a geographic location identifier and time identifier” including “data that includes both a geospatial and temporal component.” Pet.4-5. And its Harris overview explains Harris’s system includes “geo-temporal data indicating a particular point on earth and indicating a point in time or range of time.” *E.g.*, Pet.17-19 (describing “data includ[ing] both a geographic location identifier... and a temporal component”).

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests remand to a new panel of the Board for consideration of the Petition’s merits.

Respectfully submitted: /Megan Raymond/

November 8, 2024

CERTIFICATE OF PAGE COUNT

The undersigned certifies that the foregoing PETITIONER'S REQUEST
FOR DIRECTOR REVIEW complies with the 15-page limit set forth in 37 C.F.R.
§§ 42.24(a)(1)(v) and 42.75.

Dated: November 8, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served in its entirety on the Patent Owner (“PO”). Pursuant to agreement with PO’s counsel, the copy has been served on November 8, 2024, by causing the aforementioned document to be electronically mailed to the following attorneys for PO listed below:

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Dated: November 8, 2024

Respectfully submitted,

By: /Sayem Osman/
Sayem Osman