Trials@uspto.gov
571-272-7822

Paper 74
Date: August 19, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DURATION MEDIA LLC,
Petitioner,

v.

RICH MEDIA CLUB LLC,
Patent Owner.

IPR2023-00953
Patent 11,443,329 B2

Before KARL D. EASTHOM, MICHAEL J. FITZPATRICK, and JASON M. REPKO, *Administrative Patent Judges.*

FITZPATRICK, *Administrative Patent Judge*, joined by *Administrative Patent Judge Repko*.

EASTHOM, *Administrative Patent Judge*, dissenting.

JUDGMENT
Final Written Decision
Determining No Challenged Claims Unpatentable
35 U.S.C. § 318(a)
Dismissing-in-part and Granting-in-part Patent Owner's Motion to Exclude

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I. INTRODUCTION

A. Background and Summary

Petitioner, Duration Media LLC, filed a Petition to institute an *inter partes* review of all claims, namely claims 1–10, of U.S. Patent No. 11,443,329 B2 ("the '329 patent") pursuant to 35 U.S.C. § 311(a). Paper 1 ("Pet."). Patent Owner, Rich Media Club LLC, filed a Waiver of Preliminary Response pursuant to 37 C.F.R. § 42.107(b). Paper 6. We granted the Petition and carried out an *inter partes* review. Paper 9.

During the review, Patent Owner filed a Patent Owner Response to the Petition (Paper 35 ("PO Resp.")), Petitioner filed a Reply (Paper 50 ("Pet. Reply")), and Patent Owner filed a Sur-Reply (Paper 56 ("PO Sur-Reply"). Oral hearing was held May 29, 2024. A transcript of that hearing is of record in this case. Paper 70 ("Tr.").

We have jurisdiction under 35 U.S.C. § 6, and this Final Written Decision, issued pursuant to 35 U.S.C. § 318(a), addresses issues and arguments raised during the review. For the reasons discussed below, we determine that Petitioner has not met its burden to prove, by a preponderance of the evidence, that any of claims 1–10 of the '5329 patent is unpatentable.

B. Real Parties in Interest

Each party identifies itself as the sole real party in interest. Pet. 5; Paper 16, 1.[1]

[1] Patent Owner "established a related company, RealVu, Inc. ('RealVu') [to which it] licensed its patents." PO Resp. 21. According to Patent Owner, "RealVu was the industry-facing entity used to sell the viewable ad space to advertisers and publishers." *Id.* at 21–22.

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C. Related Matters

Rich Media Club LLC v. Duration Media LLC, Case No. 2:22-cv-02086 (D. Ariz.) (filed Dec. 9, 2022) involves the '329 patent. Paper 33, 1.

Rich Media Club LLC v. Duration Media LLC, Case No. 2:22-cv-01967 (D. Ariz.) (filed Dec. 9, 2023) involves a related patent that issued during the present *inter partes* review, i.e., U.S. Patent No. 11,741,482. Paper 33, 1.

In addition, there are related applications pending before the Office. Paper 16, 1–2; Paper 33, 1.

D. The '329 Patent

1. '329 Patent Disclosure

The '329 patent is titled "System And Method For Creation, Distribution And Tracking Of Advertising Via Electronic Networks." Ex. 1001, code (54). The prime exemplary electronic network identified is the Internet. *Id.* at 1:63. The '329 patent explains: "From the advertiser's perspective, there are two main tasks to accomplish: 1) creation of an effective ad; and 2) effective placement of the ad. From the ad publisher's perspective there are also two main tasks to accomplish: 1) display of the highest revenue-producing ads; and 2) reducing the amount of work necessary to place, maintain, track and process payments for advertising." *Id.* at 1:67–2:6.

The '329 patent discloses "creating electronic advertisements using licensed digital content, and distributing such advertisements for display at desired network locations." *Id.* at 2:45–48. "The digital content is delivered to designated advertising locations on the network and becomes part of an advertising display composed at the time requested by the network user/ad viewer." *Id.* at 2:55–58.

The '329 patent "provides the ability for both publishers and advertisers to optimize the benefits of creating and distributing advertisements electronically, and manage and track every aspect of the advertisement creation and distribution process." *Id.* at 3:6–10. For example, it "provides ad publishers with the ability to automatically accept placement of advertising at their network locations by providing a display space module, or 'billboard module' that can be easily embedded at the network location where the ad will be displayed." *Id.* at 3:11–15.

The '329 patent describes the use of "correlator code" that "is written to or otherwise embedded on the ad content display page and interacts with the viewer's browser." *Id.* at 8:2–6.

> The correlator JavaScript code on the ad content display page contains the variables and commands to continuously determine what ad content display page area(s) is/are within, or within a pre-defined distance outside of, the dimensions and scrolling position of the viewer's browser, including whether the browser window where the content is rendered is open, minimized, or otherwise covered by another browser window or other application opened by a viewer.

Id. at 12:54–62. "The billboard module may also cease rendering or send additional requests to the ad dispatcher server to select a new ad/content to render in the billboard module, say if the billboard was in view for a pre-determined period of time, or has been scrolled outside the viewer's browser window dimensions." *Id.* at 12:65–13:3.

2. The Challenged Claims

Review was requested and instituted for all of the claims of the '329 patent, namely claims 1–10. Claims 1 and 6 are independent. Claim 1 is

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illustrative and reproduced below with emphasis added to the limitation on which this Decision turns:

> 1. A method comprising:
>
> (a) determining whether a predefined area of an ad content display page that is used to display an advertisement is in view within a visible area of a browser window of a browser configured to be operated by a remote computing device, wherein the predefined area is a portion of the ad content display page, and wherein the ad content display page includes (i) the predefined area configured to display advertisement content, the predefined area being a portion of the ad content display page, and (ii) page content displayed in other portions of the ad content display page, the page content being separate from the advertisement content; and
>
> (b) in response to *a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time*, causing a communication to be sent to one or more dispatcher servers, wherein the one or more dispatcher servers are configured to:
>
> (i) receive the communication;
>
> (ii) cause a replacement advertisement to be selected for display on the ad content display page; and
>
> (iii) cause the replacement advertisement to be served to the remote computing device;
>
> wherein the browser is further configured to render the replacement advertisement in the predefined area.

Ex. 1001, 68:45–69:4 (emphasis added).

Claims 2–5 depend from claim 1, and claims 7–10 ultimately depend from claim 6. *Id.* at 1001:68:45–70:33. According to Petitioner, "Claims 6–10 are drawn towards a system but are substantively identical to [method] claims 1–5." Pet. 19 n.2. We agree. Nor has Patent Owner argued to the contrary.

3. Effective Filing Date of the Challenged Claims

The '329 patent states that its underlying application is a

> [c]ontinuation of application No. 12/384,403 ["the parent '403 application"], filed on Apr. 4, 2009, now Pat. No. 11,004,090, which is a continuation-in-part [("CIP")] of application No. 11/803,779 ["the grandparent '779 application"], filed on May 16, 2007, now Pat. No. 10,380,602, which is a continuation-in-part of application No. 11/643,245, filed on Dec. 21, 2006, now Pat. No. 10,380,597, said application No. 12/384,403 is a continuation-in-part of application No. 12/316,781, filed on Dec. 16, 2008, now abandoned.

Ex. 1001, code (63). Thus, the parent '403 application is a CIP of the grandparent '779 application.

Petitioner argues that certain features of the challenged claims, namely "replacement advertisement" and "predefined period of time," constitute new matter as of the filing of the parent '403 application that was not present in the grandparent '779 application. Pet. 14. As a result, Petitioner argues that the challenged claims' earliest effective filing date is the date on which the parent '403 application was filed. *Id.* That date is April 4, 2009.[2] Ex. 1015, code (22). Patent Owner concurs. *See* PO Resp. 14 ("The '329 Patent issued from a continuation-in-part application that added new matter with a filing date of April 4, 2009.").[3]

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[2] The Petition erroneously refers to this date as "April 3, 2009." Pet. 13–14. We presume that is a typographical error.

[3] The Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112–29, which was enacted September 16, 2011, made amendments to 35 U.S.C. §§ 102 and 103. AIA § 3(b)–(c). The amendments became effective eighteen months later on March 16, 2013, but the amendments do not apply to all applications and patents. Rather, the amendments apply only to applications and patents that contain (or previously contained) either (A) a claim with an effective filing date on or after March 16, 2013, or (B) a specific reference under any of 35 U.S.C. §§ 120, 121, or 365(c) to an

E. Asserted Prior Art

Petitioner relies on the following patents and published application.

Name	Patent Document	Exhibit
Krassner	US 10,380,602 B2, filed May 16, 2007, issued Aug. 13, 2019	1002
Badros	US 7,725,502 B1, filed June 15, 2005, issued May 25, 2010	1003
Harkins	US 2008/0221982 A1, filed Mar. 6, 2007, published Sept. 11, 2008	1004

Petitioner asserts that each of these references constitutes prior art under 35 U.S.C. § 102(b). *See* Pet. 11 ("Krassner is prior art under pre-AIA § 102(b)"), 12 ("Badros is prior art under pre-AIA § 102(b). . . . Harkins is prior art under pre-AIA § 102(b)."). As we explained in the Institution Decision, none of these references is prior art under § 102(b) because none was patented or published more than one year prior to April 4, 2009. Paper 9 ("Inst. Dec."), 10–11. However, we determined that the record at that time, which record lacked a preliminary response, supported that the references were prior art under § 102(e) because they stem from applications that were filed before April 4, 2009, and "by another" as that term is used in the statute. *Id.* at 11–12 (citing *EmeraChem Holdings v. Volkswagen Grp. of Am.*, 859 F.3d 1341, 1345 (Fed. Cir. 2017); *Ex parte DesOrmeaux*, 1992 WL 457519, *2–4 (BPAI 1992)).

application or patent with such a claim. *Id.* at § 3(n); *see also SNIPR Techs. Ltd. v. Rockefeller Univ.*, 72 F.4th 1372, 1376 (Fed. Cir. 2023) (explaining application of the AIA amendments). On the record presented, neither condition (A) nor condition (B) applies here. Accordingly, we apply the pre-AIA versions of 35 U.S.C. §§ 102 and 103. AIA § 3(n)(1); *SNIPR*, 72 F4th at 1376.

During the review, the parties presented additional arguments about the prior art status of Krassner. Also, Patent Owner disputes whether Harkins is analogous art. We address both issues below.

F. Asserted Grounds

Petitioner asserts that claims 1–10 would have been unpatentable on the following grounds:

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1–10	103	Krassner, Badros, Harkins
1–10	103	Badros, Harkins

II. ANALYSIS

A. Legal Standards

A claim is unpatentable "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." 35 U.S.C. § 103(a). "Obviousness is a question of law based on underlying facts." *MobileMedia Ideas LLC v. Apple Inc.*, 780 F.3d 1159, 1167 (Fed. Cir. 2015). The underlying facts include "(i) the scope and content of the prior art, (ii) the differences between the prior art and the claimed invention, (iii) the level of ordinary skill in the field of the invention, and (iv) any relevant objective considerations of nonobviousness." *Id.* (citing *Graham v. John Deere of Kan. City*, 383 U.S. 1, 17–18 (1966)). An additional underlying fact is whether there was a reason to combine prior art teachings when so asserted. *Id.*

B. Level of Ordinary Skill in the Art

In determining whether an invention would have been obvious at the time it was made, we consider the level of ordinary skill in the pertinent art

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at the time of the invention. *Graham*, 383 U.S. at 17. "The importance of resolving the level of ordinary skill in the art lies in the necessity of maintaining objectivity in the obviousness inquiry." *Ryko Mfg. Co. v. Nu-Star, Inc.*, 950 F.2d 714, 718 (Fed. Cir. 1991). The "person having ordinary skill in the art" is a hypothetical construct, from whose vantage point obviousness is assessed. *In re Rouffet*, 149 F.3d 1350, 1357 (Fed. Cir. 1998). "Factors that may be considered in determining level of ordinary skill in the art include: (1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field." *Daiichi Sankyo Co. v. Apotex, Inc.*, 501 F.3d 1254, 1256 (Fed. Cir. 2007) (citation omitted).

Petitioner proposed that a person having ordinary skill in the art "would have had a bachelor's degree in computer science, computer engineering or electrical (or similar) engineering with about three years of experience in computer science, computer engineering and electrical engineering." Pet. 9. For purposes of deciding whether to institute, we adopted Petitioner's proposed formulation of the level of ordinary skill in the art because it appeared consistent with the '329 patent and the asserted prior art. Inst. Dec. 10.

Patent Owner argues that Petitioner's proposed level of ordinary skill "fails to require experience with internet advertising, which is the entire subject of the '329 patent and the Krassner and Badros references." PO Resp. 8; *see also id.* (arguing that the third reference, Harkins, involves advertising, albeit not internet advertising). As Patent Owner's declarant, Robert Sherwood, explains, under Petitioner's proposal, a person of ordinary

skill in the art of the '329 patent is "someone with no experience in internet advertising or even computer programming" and includes, "for example, someone whose entire career may have been spent designing integrated circuits, with no knowledge of internet advertising." Ex. 2045 ¶44.

We find Patent Owner's argument persuasive. Indeed, it is unclear how Petitioner's proposal accounts for the types of problems encountered in the art or prior art solutions to those problems. *See Daiichi Sankyo*, 501 F.3d at 1256 (identifying these factors, among others, as "a guide to determining the level of ordinary skill in the art"). Nor does Petitioner, in its Reply, address, let alone rebut, Patent Owner's arguments that a person of ordinary skill in the art would have had some experience and/or knowledge in internet advertising. *See generally* Pet. Reply.

Patent Owner proposes that a "person of ordinary skill in the art would have a bachelor's degree in computer science or a similar major involving computer programming (or at least four years of practical computer programming experience) and at least two years of experience (in or out of college) in the field of internet advertising." PO Resp. 12 (citing Ex. 2045 ¶54). We agree that a person of ordinary skill in the art would have some experience in internet advertising, although we fail to see why one year would not be enough to familiarize sufficiently a computer scientist and/or programmer with the types of problems encountered in the art or prior art solutions to those problems.

Based on the competing proposals, arguments, and evidence before us, we adopt and apply the following level of skill in assessing Petitioner's challenges to the patentability of the claims of the '329 patent: a person that would have had a bachelor's degree in computer science, computer engineering, or electrical (or similar) engineering with about three years of

experience in computer programming with at least one year of said experience being in the field of internet advertising.

C. Claim Construction

The claims should be read in light of the specification, as they would be interpreted by one of ordinary skill in the art. *In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010). Thus, we generally give claim terms their ordinary and customary meaning. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) ("The ordinary and customary meaning is the meaning that the term would have to a person of ordinary skill in the art in question.") (internal quotation marks omitted); *see also* 37 C.F.R. § 42.100(b) (stating that claims are construed in IPRs according to the same standard as used in federal court).

In the Decision to Institute, we construed:

- "render" to mean "loading content so that it may be viewed, heard or otherwise perceived by a viewer communicating electronically using a browser";
- "replacement advertisement" to mean "a new ad/content rendered in place of a previous ad/content"; and
- the "in response to" limitation of claim 1's paragraph (b) as limiting, such that the recited "causing a communication" is a required step of the method of claim 1.

Inst. Dec. 7–8. During the review, neither party contested these constructions or proposed any additional constructions. Accordingly, we apply these express constructions in our analysis below.

D. Ground 1 (Krassner, Badros, and Harkins)

Under Ground 1, Petitioner argues that claims 1–10 would have been obvious over Krassner, Badros, and Harkins. Pet. 18–32. Among other

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things, Patent Owner disputes that Krassner is prior art and that Harkins is analogous art. We provide an overview of the references' relevant disclosures and address these threshold arguments before our analysis of Petitioner's challenge to patentability.

1. Krassner (Ex. 1002)

Krassner issued from application 11/803,779, which we describe above as the grandparent '779 application. Ex. 1002, code (21). Like the '329 patent, Krassner is assigned to Patent Owner. *Id.* at code (73). Also like the '329 patent, Krassner discloses "creating electronic advertisements using licensed digital content, and distributing such advertisements for display at desired network locations." Ex. 1002, 4:49–52; *see* Ex. 1001, 2:45–48 (same statement). In fact, Krassner shares a significant amount of disclosure with the '329 patent.

As agreed by both parties, however, the '329 patent includes new matter relative to Krassner. According to Patent Owner:

> The new matter added in 2009 related in part to Rich Media Club's invention of a method to determine if an advertisement on a web page had come within (or was approaching), the viewable portion of a user's webpage in a browser (sometimes referred to as the "viewport"). The ability for publishers to know, for the first time, whether an ad was actually "in view" would ultimately transform the entire internet advertising ecosystem.

PO Resp. 2. This is consistent with Petitioner's statement that "Krassner doesn't disclose 'a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time.'" Pet. 23 (quoting claim 1); *see also id.* at 14–17 (arguing that the claim terms "replacement advertisement" and "predefined period of time" constitute new matter as of April 4, 2009).

a) Whether Krassner is Prior Art Under 35 U.S.C. § 102(b)

We previously determined that Krassner is not prior art under 35 U.S.C. § 102(b) because it did not issue more than one year prior to April 4, 2009; it issued more than ten years later on August 13, 2019. Inst. Dec. 10–11; Ex. 1001, code (45). In a Motion to Submit Supplement Information, Petitioner attempted to obfuscate the distinction between (1) Krassner, a United States patent asserted by the Petition, and (2) US 2007/0265923 A1, a United States patent application publication, which was published November 15, 2007, but which was not asserted by the Petition ("the Krassner publication"). *See* Paper 15, 4 (Petitioner arguing that the Krassner publication contains a "substantively identical disclosure[]" to what is "cited in the Petition" and thus "demonstrates publication over one year before the effective filing date of the '329 patent"). We denied the Motion. Paper 21. Petitioner then filed a Request for Rehearing of our decision, and we denied the Request. Papers 25 and 26.

Yet, in its Reply, Petitioner again argues that Krassner is § 102(b) prior art because another document, the Krassner publication, which was published more than one year before April 4, 2009, contains the same disclosure. In doing so, Petitioner even cites a document that is not of record, "Ex-1017." Pet. 26. In an Updated List of Exhibits, Petitioner identifies Exhibit 1017 as the Krassner publication while acknowledging that it is "not filed." Paper 63.

Petitioner's resurrected argument is based on a fundamental misunderstanding of § 311(b). Section 311(b) provides: "A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and *only on the basis of prior art consisting of patents or printed*

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publication." 35 U.S.C. § 311(b) (emphasis added). Petitioner requested to cancel the claims of the '329 patent on the basis of Badros, Harkins, and Krassner. Pet. 11. Petitioner did not base its request, in whole or in part, on the Krassner publication. *Id.*

Krassner clearly is a patent. It issued on August 13, 2019, far too late to be § 102(b) prior art. Even if we assume Krassner is also a "printed publication" withing the meaning of § 311(b), the same date would apply: August 13, 2019. Petitioner has not presented any evidence that the document that is Krassner was published prior to when it issued on August 13, 2019. That *another* document (the Krassner publication), which published much earlier, may contain the same or similar disclosure is not relevant to when Krassner was patented or published.

In sum, Krassner is not prior art under 35 U.S.C. § 102(b).

b) Whether Krassner is Prior Art Under 35 U.S.C. § 102(e)

Although Krassner is not prior under 35 U.S.C.§ 102(b), we previously determined that the record at institution supported that Krassner was prior under § 102(e) because it was filed "by another" before April 4, 2009. Inst. Dec. 11–12; *compare* Ex. 1001, code (72) (listing Igor Tchibirev), *with* Ex. 1002, code (72) (not listing Mr. Tchibirev as an inventor); *see* Ex. 1002, code (22) (identifying May 16, 2007, as the filing date). As we noted, however, "[s]ubject matter" that is prior art under only 35 U.S.C. § 102(e), (f), and/or (g), cannot serve as prior art demonstrating obviousness of a claimed invention "where the subject matter and the claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person." 35 U.S.C. § 103(c)(1); Inst. Dec. 12–13. We also noted that, to

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invoke this safe haven, "Patent Owner would bear the burden of production to show (1) the date on which the claimed invention was made and (2) that as of that date, the '329 patent and Krassner were 'owned by the same person or subject to an obligation of assignment to the same person.'" Inst. Dec. 13 (quoting 35 U.S.C. § 103(c)(1)).

Patent Owner argues that the safe haven of § 103(c) applies based on common ownership. PO Resp. 13–14. More specifically, Patent Owner argues the following:

> As demonstrated by the face of the patents, USPTO assignment records, and the Second Declaration of Igor Tchibirev, the Krassner reference and the '329 Patent were in fact commonly owned by the Patent Owner, Rich Media Club, LLC. *Compare* EX1001 *with* EX1002 (both listing "Rich Media Club, LLC" as the Assignee); *see also* EX2026 (Second Tchibirev Declaration); EX2015–EX2016 (assignment records).

Id.

Petitioner argues that Patent Owner fails to meet its burden because it has not shown that Krassner and the '329 patent were commonly owned at the time the invention of the '329 patent was made. Pet. Reply 28.

We agree with Petitioner. Patent Owner's arguments do not identify when the claimed invention was made, let alone argue common ownership as of that date. PO Resp. 13–14. Nor does the evidence cited by Patent Owner carry its burden. First, Patent Owner cites to the '329 patent and Krassner to show that they are both assigned to Patent Owner. This does not, and could not, show common ownership at the time the invention was made.

Next, Patent Owner cites to assignment records (Exhibits 2015 and 2016) and to Mr. Tchibirev's testimony, in reference to those assignment records, that "[t]he respective inventors assigned all divisionals,

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continuations, and continuations-in-part of Application Nos. 11/643,245 and 60/753,536, including Application Nos. 12/384,403, 12/316,781 and 11/803,779 to Rich Media Club, LLC on December 19, 2006 and November 24, 2008." Ex. 2026 ¶4.

Exhibit 2016 is an assignment executed December 19, 2006, by four of the five inventors listed on the '329 patent, excluding Mr. Tchibirev. Ex. 2016. Exhibit 2015 is an assignment executed November 24, 2008, by four of the five inventors listed on the '329 patent, excluding Fred Bernstein. Ex. 2015. Thus, Mr. Tchibirev did not assign his interest in what would become the '329 patent until November 24, 2008. And, as Petitioner argues, with persuasive support in the record, the invention that ultimately would be claimed in the '329 patent was made in early 2008. Pet. Reply. 28 (citing Ex. 1020, 54:14–55:13; Ex. 1021, 8:2–9:16).

Patent Owner does not dispute that the invention was made before November 2008. PO Sur-Reply 24. Nor does Patent Owner argue, let alone provide evidence, that Mr. Tchibirev had, at the time the invention was made, an obligation to assign his rights therein. *Id.*; PO Resp. 13–14. Instead, Patent Owner directs us to Mr. Tchibirev's testimony that "'at the time of the invention of the '329 patent, the '329 patent and the Krassner reference were commonly owned.'" PO Sur-Reply 24 (quoting Ex. 2026 ¶5). This testimony, however, is a legal conclusion, which is not supported by the evidence Mr. Tchibirev discusses. It is not persuasive.

On the record presented, Krassner is prior art under 35 U.S.C. § 102(e).

2. Badros (Ex. 1003)

Badros states that "[a]dvertisers and other providers of content on the Internet compete for a user's attention on a webpage." Ex. 1003, 1:12–13. Prior to Badros, content providers had "begun providing multiple advertisements at the top of a page (and in other discrete locations) in a time-multiplexed fashion. . . . For instance, a single banner ad on one page may rotate every five seconds between an ad for a razor and an ad for a new soft drink." *Id.* at 1:31–38. However, these pre-Badros systems would "rotate such time-multiplexed advertisements in a random or otherwise arbitrary order and provide equal time for each ad," which Badros notes was a "drawback[]." *Id.* at 1:42–46.

Badros teaches "time-multiplexing the display of a plurality of electronic documents" based on various criteria. Ex. 1003, 1:50–55. For example, a "plurality of selected documents [may be] displayed at an output device in a predetermined sequence." *Id.* at 1:55–57. "The time-multiplexing criteria may be a variety of criteria related to the selected documents, the source of the selected documents, or other factors such as the selected documents' relevance to a concept and one or more preferences associated with the selected documents." *Id.* at 1:57–62.

"The documents may be displayed at a display source such as a monitor or electronic billboard, and the documents may be displayed in connection with the display of another document such as a webpage." *Id.* at 2:47–51. "For instance, if a user requests a webpage related to water skiing, the system may send the user a webpage related to water skiing that displays a plurality of time-multiplexed water skiing-related ads within a single ad space on the webpage." *Id.* at 2:59–63.

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3. Harkins (Ex. 1004)

Harkins discloses "systems and methods for selecting one or more advertisements for placement with one or more advertising agents and/or in one or more advertising mediums," in which "such placement is based upon the bids placed by one or more advertisers, wherein the bids may be based upon a plurality of criteria associated with the advertising agents and/or advertising mediums." Ex. 1004 ¶4. The prime exemplary medium is a printed receipt at a point of sale. *Id.* ¶9.

> In one aspect of [Harkins], the advertising agents are retail merchants who utilize a common card processing service and the advertisements are text, logos, coupons, or the like printed on the face of a card receipt. In another aspect, the rights to print such card receipt advertisements at particular retail advertising agent locations are auctioned to potential advertisers via an Internet-based auction system.

Id., Abstr.

"Although § 103 does not, by its terms, define the 'art to which [the] subject matter [sought to be patented] pertains,' this determination is frequently couched in terms of whether the art is analogous or not, i.e., whether the art is 'too remote to be treated as prior art.'" *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992) (quoting *In re Sovish*, 769 F.2d 738, 741 (Fed. Cir. 1985)). "Whether a reference in the prior art is 'analogous' is a fact question." *Clay*, 966 F.2d at 658. "Two criteria have evolved for determining whether prior art is analogous: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved." *Id.* at 658–59.

Patent Owner argues that Harkins is not analogous art because it "is directed to ad placement on the paper receipt issued to a credit card user at a merchant" and "has nothing to do with advertising on the internet." PO Resp. 17.

Petitioner responds that, contrary to Patent Owner's argument, "Harkins teaches that its invention can be used in web pages." Pet. Reply 18 (citing Ex. 1004 ¶30). Although Petitioner's citation is off by one paragraph, Petitioner's response about what Harkins teaches is correct. *See* Ex. 1004 ¶29 ("The present invention may be implemented for provision of virtually any type of advertising (e.g., print, radio, television, Internet, billboard, etc.) via any type of advertising medium (e.g., newspaper, magazine, radio broadcast, Web pages, billboards, etc.) without departing from the scope of the present invention.").

We find that Harkins is from the same field based on its express statement that it is applicable to "virtually any type of advertising" and "any type of advertising medium," including "Web pages." Ex. 1004 ¶29. Further, even if this were insufficient to place Harkins in the same field as the '329 patent, we find that Harkins is reasonably pertinent to the particular problems with which the '329 patent inventors were involved.

In sum, we find that Harkins is analogous art to the '329 patent.

4. Analysis of Claim 1

Claim 1 recites "a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time."[4] Petitioner relies

[4] It should be noted that both parties use various shorthand phrases in reference to this limitation. For example, both parties sometimes refer to the limitation as a "viewability test." *See, e.g.*, Pet. 15; PO Reply 6; *see also* Ex.

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exclusively on Badros for teaching this limitation. *See* Pet. 23 ("[E]ven though Krassner doesn't disclose 'a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time[,]' Badros does." (citing Ex. 1003, 11:22–24, 12:37–40; Ex. 1009 ¶¶67–68)).

The cited portions of Badros state:

- "Some embodiments may apply time-multiplexing criteria for a plurality of documents based on the time during which a document is *actually viewable* on the user's screen." Ex. 1003, 11:22–24 (emphasis added); and
- "For instance, impression module 38 may determine whether a document (e.g., a document containing a link) is actually visible to a user, *and it may track the time duration during which the document is actually visible to the user*." *Id.* at 12:36–40 (emphasis added).

The Petition's citation to paragraphs 67 and 68 of Exhibit 1009 (the first declaration of Trevor Smedley, Ph.D.) appear to be a typographical error. Instead, it appears that paragraphs 70 and 71 were the intended paragraphs. In paragraphs 70 and 71, Dr. Smedley quotes the above-noted excerpts, as well and two additional excerpts, from Badros and concludes that they "demonstrate[] that it would have been obvious to request

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2045 ¶59 (Mr. Sherwood: "I will refer to this claimed feature as a 'viewability test' or 'viewability determination'."). Additionally, Petitioner also refers to it as an "'actually visible' test." PO Reply. 7. Finally, some witnesses refer to it as "geometric viewability" or a "geometric approach to viewability." Ex. 1021, 12:11–13:15 (Mr. Edwards's testimony on cross-examination); Ex. 1020, 58:4–14 (Dr. Tchibirev's testimony on cross-examination).

additional advertisements from a server in response to determining an ad has been displayed for a predetermined time because it discloses tracking the time duration of display and sending a request to a server for replacement advertisements." Ex. 1009 ¶¶70–71 (quoting Ex. 1003, 11:22–24, 12:36–40, 12:48–66, 5:13–21).

Patent Owner argues that a person of ordinary skill in the art "would have understood the discussion of viewability in Badros as referring to a served impression in general or as one that had been served to a viewer or an 'above the fold,' 'good,' or 'high probability' impression with a higher likelihood of falling within the viewable portion of a webpage." PO Resp. 14–15 (citing Ex. 2045 ¶74). In other words, Patent Owner argues that Badros, at best, teaches *an assumption* that an advertisement is viewable based on its premium location within, for example, a webpage, but does not teach a determination that it is actually "in view within the visible area of the browser window for a predefined period of time," as recited in claim 1. *See* Ex. 2045 ¶70 ("[T]he discussion of viewability in Badros would be interpreted by a [person of ordinary skill in the art] as either referring to a served impression in general or an 'above the fold' 'good' 'high probability' impression with a higher likelihood of falling within the viewable portion of a webpage.").

Patent Owner's interpretation of Badros is consistent with Badros's lack of (1) any description of how to determine that a predefined area that is used to display an advertisement has been in view within the visible area of the browser window for a predefined period of time and (2) any claim limitation directed to such a determination, as its witness, Mr. Sherwood, testified. *See* Ex. 2045 ¶62 ("I reach this opinion in part because there is no disclosure in Badros about how to actually run a viewability test."), ¶68

("Badros does not teach or claim a viewable impression and further Badros does not teach how to do a viewability test."). Petitioner's own witness, Dr. Smedley, agreed that "Badros doesn't teach how to do its viewability test." *See* Ex. 2050, 148:9–22 (agreeing with this statement but adding: "that's not a difficult thing to do"). And, none of Badros's claims includes language directed to determining whether an advertisement is actually in view on an output display device. Ex. 1003, 22:40–26:52.[5]

During the hearing, the Board asked counsel for Petitioner to identify any example of such claim language in Badros. Tr. 19:7–10. Counsel for Petitioner identified one purported example, namely the second paragraph of Badros claim 1. Tr. 19:18–19. That paragraph recites the following:

> determining time-multiplexing criteria and space-multiplexing criteria for displaying a plurality of selected documents associated with a concept on a time-multiplexed basis, the time-multiplexing criteria and the space-multiplexing criteria based on at least one of a relevance of each of the selected documents to the concept, a cost per click, or a click through rate associated with each of the selected documents.

Ex. 1003, 22:42–49. Nothing in this paragraph is directed to determining whether an advertisement (or any other content) is actually in view on an output display device.

[5] The Dissent suggests that we are treating these facts (lack of enablement and lack of claiming) as determinative of a lack of description in Badros. We are not. As stated above, we find Badros's lack of any description of how to determine whether an advertisement is actually in view on an output display device as well as Badros's lack of any claim limitations directed to such a determination as being "consistent" with our finding that Badros does not disclose such a feature. In other words, we can rule out the possibility that our understanding of what Badros discloses is contradicted by what Badros enables or claims.

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Perhaps the most troublesome evidence for Petitioner is that its own witness, Dr. Smedley, repeatedly testified on cross-examination that he did not know whether Badros teaches the "determination" limitation of claim 1, despite having considered Badros and offering other opinions about Badros.

> Q. That's exactly my question. Is it your testimony that you do not know whether Badros teaches to make a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time?
>
> A. That's not something that I have given an opinion on.
>
> Q. My question is, as you sit here today, is it your opinion that Badros teaches that or not?
>
> A. That's not something I've given an opinion on here, and I can't formulate that sort of opinion as we sit here. I'd have to – it's something I haven't done, so I'd have to sit down and analyze what he's proposed carefully and it would take longer than we have to sit here today.
>
> Q. I want to know whether Badros teaches, in your opinion, to make a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time?
>
> A. It's not something I'm able to do as I sit here right now.
>
> Q. How long is it going to take you?
>
> A. I don't know.
>
> Q. Well, I actually need an answer to that question because I need to know whether Badros teaches that or not because if it doesn't teach it, I don't see how Badros can invalidate, how your opinion can support the petition.
>
> MR. GREENLEAF: Objection, asked and answered.
>
> A. Is there a question there?
>
> Q. The question is, you do not have an opinion about whether Badros teaches to make a determination that the predefined area

> that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time?
>
> A. That's not something I've given an opinion on and it's not something I'm able to give an opinion on as we sit here today.

Ex. 2050, 50:22–52:19.

With its Reply, Petitioner submitted a second declaration by Dr. Smedley. Ex. 1027. In it, Dr. Smedley testifies that, at the time of his deposition, he "had not yet formed an opinion on whether Badros disclosed" the "determination" limitation. Ex. 1027 ¶9 (citing Ex. 2050, 50:22–52:19). In his second declaration, he testifies that he now has an opinion in that regard, said opinion being that "Badros discloses Patent Owner's 'viewability test.'" Ex. 1027 ¶11. With its Reply, Petitioner also submitted a declaration by Michelle Madansky, Ph.D, in which she testified that "it is [her] opinion that Dr. Smedley accurately characterized Badros and other prior art as disclosing viewability tests." Ex. 1026 ¶4.

Dr. Smedley paints his new opinion as timely because, in his first declaration, he had opined that the "determination" limitation was optional, and it was only thereafter that we rejected such a construction. Ex. 1027 ¶10; *see also* Ex. 1009 ¶66 ("It is my opinion that the 'in response to' limitation is an optional step that might be performed only when there is a 'determination' as specified in the limitation."); Inst. Dec. 8 (rejecting the proposed construction). Despite Dr. Smedley's explanation, his new opinion that Badros teaches the "determination" limitation is belated.

As Patent Owner succinctly argues in its Motion to Exclude:

> The "viewability test" claim element was always part of the '329 patent claims and Petitioner always had the burden to meet it with prior art and to present and explain this in its Petition that it chose to file. [Dr.] Smedley and Petitioner decided not to

> proffer any expert opinion on the issue of whether Badros disclosed a "viewability test" with its Petition. This decision was entirely within their control.

Paper 60 ("PO Mot. To Exclude"), 9–10.[6] Patent Owner is correct in this regard and, thus, we grant Patent Owner's Motion to Exclude with respect to the testimony in the second Smedley Declaration and the Madansky Declaration opining that Badros teaches the determination limitation. Paper 60, 9–12.

Petitioner, in its Opposition to the Motion to Exclude, argues that Patent Owner's arguments about the "viewability test" were "surprising." Paper 62, 8. We are not persuaded by Petitioner's argument. The "viewability test" is a claim limitation. Petitioner should have anticipated that Patent Owner would argue that limitation. *See In re Gardner*, 449 F. App'x 914, 916 (Fed. Cir. 2011) ("This court has held that when evaluating claims for obviousness under 35 U.S.C. § 103, all the limitations of the claims must be considered and given weight." (citing *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530 (Fed. Cir. 1983)); *Univ. of Strathclyde v.*

[6] Patent Owner's Motion to Exclude seeks to exclude, in part or in whole, Exhibits 1020–1022, 1025–1030, and 1034–1040, which were submitted with Petitioner's Reply, of which Exhibits 1026 and 1027 are the declaration by Dr. Madansky and the second declaration by Dr. Smedley, respectively. Mot. To Exclude. The Motion to Exclude also seeks to exclude "Exhibits" 1017 and 1018, which are not filed or of record in this case but which are referenced in the Reply. *Id.* For example, Exhibit 1017 is the Krassner publication, which Petitioner unsuccessfully moved to add to the record as supplemental information. *See* Paper 21, 3 n.1 (expunging the Krassner publication and stating that it "need not -- and indeed may not -- be re-filed under a new exhibit number"). Apart from the portions of Dr. Smedley's second declaration and Dr. Madansky's declaration opining that Badros teaches the "determination" limitation, we dismiss the Motion to Exclude as moot.

Clear-Vu Lighting LLC, 17 F.4th 155, 160 (Fed. Cir. 2021) ("An obviousness determination generally requires a finding that "all claimed limitations are disclosed in the prior art'." (citing *PAR Pharm., Inc. v. TWI Pharms., Inc.*, 773 F.3d 1186, 1194 (Fed. Cir. 2014)).

Petitioner argues that "[v]iewability tests were well known for well over a decade prior to the '329 patent's priority date." Reply 9. If that were the case, then Petitioner should have made its argument in the Petition. Section 312(a) of Title 35 is titled "Requirements of Petition," and it specifies that a petition must identify, among other things, "the evidence that supports the grounds for the challenge to each claim, including . . . (B) affidavits or declarations of supporting evidence and opinions, if the petitioner relies on expert opinions." 35 U.S.C. § 312(a)(3); *see also* 37 C.F.R. § 42.104(b)(4)–(5) ("The petition must specify where each element of the claim is found in the prior art patents or printed publications relied upon; and . . . the supporting evidence relied upon to support the challenge."). Thus, "Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g. to make out a prima facie case of unpatentability." Board's Consolidated Trial Practice Guide, 73 (Nov. 21, 2019).[7] Dr. Smedley's testimony in his second declaration, that "Badros discloses Patent Owner's 'viewability test'" (Ex. 1027 ¶11), is clearly evidence to make out a prima facie case of unpatentability. The same is true of Dr. Madansky's testimony that she agrees with Dr. Smedley in this regard. Ex. 1026 ¶4.

[7] The TPG is available at https://www.uspto.gov/TrialPracticeGuideConsolidated.

Nothing prevented Dr. Smedley from presenting his opinion of whether Badros teaches the "determination" limitation in his first declaration. In fact, unlike Dr. Smedley's first declaration, the Petition itself argued both that (1) the "determination" recited in claim 1 need not occur, and (2) Badros nonetheless teaches the "determination." *See* Pet. 22 ("Firstly, this '*in response to*' limitation is non-limiting because it requires a condition precedent [(i.e., the determination)] that need not ever occur."), 23 ("Secondly, even though Krassner doesn't disclose "*a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time*[,]" Badros does."). Dr. Smedley, in his first declaration, could have presented opinions in support of both arguments but only presented an opinion on the claim construction argument.[8]

According to Dr. Smedley, at the time of his deposition, he "had not yet formed an opinion on whether Badros disclosed" the "determination" limitation. Ex. 1027 ¶9 (citing Ex. 2050, 50:22–52:19). Dr. Smedley further explains:

> I testified [in my first declaration] that this limitation was optional. Ex-1009, ¶66. I understand that the Board rejected this opinion. Paper 9, 8. I now address the Board's holding and Patent Owner's false accusation about what I believe. I am willing and able to appear for a second deposition in case there is any confusion about my opinions.

[8] Dr. Smedley's claim construction opinion was not only unpersuasive but also wholly unsupported. He simply stated: "It is my opinion that the 'in response to' limitation is an optional step that might be performed only when there is a 'determination' as specified in the limitation." Ex. 1009 ¶66. The idea that such a self-serving and unsupported opinion gave Petitioner the right to withhold, until its reply brief, evidence about how the prior art allegedly teaches the limitation is objectionable.

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Ex. 1027 ¶10. His new opinion and his offer to be cross-examined regarding it are much too late.

We entered our Institution Decision on August 30, 2023. Inst. Dec. 1. Dr. Smedley's deposition occurred almost two months later on October 25, 2023. Ex. 2050. During his deposition, Dr. Smedley testified that he had seen the Institution Decision. Ex. 2050, 110:13–21. He also testified that he was aware that the Institution Decision had rejected his opinion that the "in response to [a] determination step" was optional. *Id.* at 112:13–19. Despite knowing our claim construction and despite having already studied Badros (*see, e.g.*, Ex. 1009 ¶35), he testified extensively at his deposition that he had no opinion of whether Badros teaches the limitation. Ex. 2050, 50:22–52:19.[9]

Citing Dr. Madansky's declaration, Petitioner argues that "Badros and many other prior art references taught and enabled viewability tests." Pet.

[9] The Dissent posits that "Dr. Smedley's first declaration lacks any testimony on which to cross-examine him about the disputed actually visible limitation." *See infra* (citing 37 C.F.R. § 42.53(d)(5)(ii), which provides: "For cross-examination testimony, the scope of the examination is limited to the scope of the direct testimony."). We disagree. In his first declaration, Dr. Smedley testified that he had reviewed, among other things, Badros and the Petition. Ex.1009 ¶4. Thus, Dr. Smedley had reviewed Petitioner's argument in its Petition that Badros teaches the "determination" limitation. *See* Pet. 35 (citing Ex. 1003, 11:22–24, 12:36–37, 12:38–39). In fact, in his first declaration, Dr. Smedley quotes and testifies about the very same excerpts of Badros on which Petitioner's argument was based. *See* Ex. 1009 ¶70 (quoting Ex. 1003, 11:22–24, 12:36–37, 12:38–39). Further, in his first declaration, Dr. Smedley testified that "all the elements of the challenged claims are unpatentable" and "the references support Grounds 1 and 2 as set forth in the Petition for Inter Partes Review." *Id.* at ¶62. Clearly, Patent Owner's cross-examination of Dr. Smedley about whether Badros teaches the "determination" limitation was within the scope of his first declaration.

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Reply 22 (citing Ex. 1026 ¶¶ 10–21). Petitioner makes this argument in a section of its Reply brief dedicated to rebutting Patent Owner's arguments regarding secondary considerations of evidence. *See* Pet. Reply 20–27. Dr. Madansky's testimony may be proper reply evidence to the extent it addresses secondary considerations and/or enablement,[10] but it is not proper reply evidence to support that Badros teaches the "determination" limitation in the first instance.

In sum, the reply declaration testimony of Dr. Smedley and Dr. Madansky offered to show that Badros teaches the "determination" limitation of claim 1 should have been submitted with the Petition. 35 U.S.C. § 312(a)(3). Accordingly, we do not consider it, and we grant Patent Owner's Motion to Exclude with respect to the testimony in the second Smedley Declaration and the Madansky Declaration opining that Badros teaches the "determination" limitation. Paper 60, 9–12.

Based on the totality of the evidence that was timely submitted, we find that Petitioner fails to meet its burden to show, by a preponderance of that evidence, that the prior art discloses or renders obvious "a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time," as recited in claim 1. *See* 35 U.S.C. § 316(e) ("[T]he petitioner

[10] In addition to arguing that Badros does not teach the "determination" limitation, Patent Owner also argues that Badros does not enable it. PO Resp. 40–42. Because Badros is a patent, there is a rebuttable presumption that its entire disclosure is enabled. *See Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1355 (Fed. Cir. 2003) ("[W]e hold a presumption arises that both the claimed and unclaimed disclosures in a prior art patent are enabled."). Thus, it was proper for Petitioner to submit new evidence with its Reply to rebut Patent Owner's lack of enablement argument.

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shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence."). Thus, the Petitioner fails to show, by a preponderance of that evidence, that claim 1 would have been obvious over Krassner, Badros, and Harkins.

5. Analysis of Claims 2–10

Claims 2–5 depend from claim 1. Thus, Petitioner fails to show, by a preponderance of that evidence, that claims 2–5 would have been obvious over Krassner, Badros, and Harkins. *See In re Fine*, 837 F.2d 1071, 1076 (Fed. Cir. 1988) ("Dependent claims are nonobvious under section 103 if the independent claims from which they depend are nonobvious.").

6. Analysis of Claims 6–10

According to Petitioner, and not disputed by Patent Owner, "Claims 6–10 are drawn towards a system but are substantively identical to [method] claims 1–5." Pet. 19 n.2. We agree.

In particular, we note the similarity between the limitation of independent claim 6 corresponding to the "determination" limitation of claim 1. It recites: "determine whether the predefined area of the ad content display page that is used to display the advertisement is in view within a visible area of a browser window of a browser configured to be operated by the remote computing device." Ex. 1001, 70:2–6. Claims 7–10 ultimately depend from claim 6.

Thus, for the same reasons discussed in relation to claim 1, Petitioner fails to show, by a preponderance of that evidence, that claims 7–10 would have been obvious over Krassner, Badros, and Harkins.

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E. Ground 2 (Badros and Harkins)

In Ground 2, Petitioner relies on Badros and Harkins without Krassner.

Because, as discussed above, Petitioner fails to show that Badros teaches the "determination" limitation of claim 1 (and the substantively identical "determine" limitation of claim 6), Petitioner fails to show, by a preponderance of that evidence, that claims 1–10 would have been obvious over Badros and Harkins.

III. CONCLUSION[11]

A preponderance of the evidence fails to show that claims 1–10 are unpatentable. In summary:

Claim(s)	35 U.S.C. §	Reference(s)/Basis	Claim(s) Shown Unpatentable	Claim(s) Not Shown Unpatentable
1–10	103	Krassner, Badros, Harkins		1–10
1–10	103	Badros, Harkins		1–10
Overall Outcome				1–10

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

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IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that claims 1–10 of U.S. Patent No. 11,443,329 B2 are not proven unpatentable;

FURTHER ORDERED that Patent Owner's Motion To Exclude is dismissed-in-part and granted-in-part; and

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

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FOR PETITIONER:

Kevin Greenleaf
Joel Bock
DENTONS US LLP
kevin.greenleaf@dentons.com
joel.bock@dentons.com

FOR PATENT OWNER:

Ragnar Olson
David Berten
GLOBAL IP LAW GROUP, LLC
rolson@giplg.com
dberten@giplg.com

Trials@uspto.gov
571-272-7822

Paper 74
Date: August 19, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DURATION MEDIA LLC,
Petitioner,

v.

RICH MEDIA CLUB LLC,
Patent Owner.

IPR2023-00953
Patent 11,443,329 B2

EASTHOM, *Administrative Patent Judge*, dissenting.

I respectfully dissent from the Majority opinion primarily because, in my view, Petitioner shows persuasively that Badros discloses the viewability test, namely, "a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time." Pet. 23. As Petitioner shows, Badros specifically states that "[s]ome embodiments may apply time-multiplexing criteria for a plurality of documents *based on the time during which a document is actually viewable on the user's screen*." *Id.* (emphasis added) (quoting Ex. 1003, 11:22–24). Badros also states that impression module 38 "may determine whether a document (e.g., a document containing a link) *is actually visible to a user and it may track the time duration during which the document is actually visible to the user*." *See id.* (quoting Ex. 1003, 12:37–40). The Majority agrees that the Petition

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addresses the viewability test by relying, *inter alia*, on the above-quoted disclosures in Badros. *See* Maj. 20.

The Majority recognizes that the parties refer to the disputed clause, *inter alia*, as the "viewability test," or "actually visible" test, or similar phrases. *See* Maj. 19–20 note 4 (quoting PO Resp. 7). As quoted above, this is exactly what Badros discloses. The Majority, however, does not specify clearly why it holds that Badros does not disclose what it says, namely that "a document is actually viewable on the user's screen" or that "a document containing a link[] is actually visible to a user and it may track the time duration during which the document is actually visible to the user." Ex. 1003, 11:22–24, 12:37–40. The Majority repeats Patent Owner's arguments and states they are consistent with what amounts to a lack of enablement of the viewability test in Badros, as outlined further below, without actually reaching all the evidence about enablement set forth by Petitioner. *See* PO Resp. 21–22; Maj. 20–22. In other words, in my view, the Majority commingles reasoning and facts that are relevant to alleged lack of enablement to support its decision that Badros does not disclose the disputed viewability test. *See* Maj. 20–22 & note 5.

The Majority also faults Dr. Smedley's testimony, and reasons it supports Patent Owner, because Dr. Smedley did not answer questions about Badros during his deposition and instead "testified extensively at his deposition that he had no opinion of whether Badros teaches the limitation." Maj. 28 (Ex. 2050, 50:22–52:19). The Majority acknowledges that at the time of his deposition, Dr. Smedley stated he "had not yet formed an opinion on whether Badros disclosed" the "determination" limitation. Maj. 26 (Ex. 1027 ¶ 9 (citing Ex. 2050, 50:22–52:19)); *see also* Reply 7 (arguing that the Response "falsely stated that Dr. Smedley 'does not believe Badros

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teaches' the limitation," where "Patent Owner quoted testimony that Dr. Smedley's declaration did not expressly give an opinion on that limitation" (citing PO Resp. 4; Ex. 2050, 50:22–52:19)).

There is no real dispute here. Dr. Smedley does not testify about the disputed limitation in his first declaration, as he credibly verified repeatedly during his deposition. *See* PO Resp. 9 (quoting Ex. 2050, 173:5–16). As the Majority recognizes, Dr. Smedley did not render an opinion about the disputed limitation because he originally opined that the actually visible limitation in question was an "optional" claim step. *See* Maj. 24; Ex. 1009 ¶ 66 ("It is my opinion that the 'in response to' limitation is an optional step that might be performed only when there is a dtermination as specified in the limitation."); *Ex parte Schulhauser*, 2013-007847, 8 (April 28, 2016) (precedential) (holding that "the broadest reasonable interpretation of claim 1 encompasses an instance in which the method ends when the alarm is triggered in response to the cardiac signal data not being within the threshold electrocardiac criteria, such that the step of 'determining the current activity level of the subject' and the remaining steps need not be reached"). Then, in the Institution Decision, we rejected Dr. Smedley's "optional" claim interpretation. *See id.*

Accordingly, Dr. Smedley's first declaration lacks any direct testimony on which to cross-examine him about the disputed actually visible limitation as disclosed in Badros. The Majority agrees that Dr. Smedley "only presented an opinion on the claim construction argument" in his first declaration. Maj. 27. Yet, the Majority holds that Dr. Smedley should have answered questions about the disputed limitation based on the Institution Decision, the Petition, and Badros, even though he did not directly testify about whether Badros discloses the limitation. *See id.* Even if this holding

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does not violate at least the spirit of 37 C.F.R. § 42.53.d.5.ii, under the circumstances here, the holding does not provide a proper basis for excluding Dr. Smedley's second declaration. *See id.* ("For cross-examination testimony, the scope of the examination is limited to the scope of the direct testimony.").

The Majority reasons that because Dr. Smedley reviewed the Institution Decision, Petition, and Badros, any questions about Badros are within the scope of his direct testimony. Maj. 28 note 9. Even though his review of these documents falls within "the scope of his direct testimony," as discussed above, Dr. Smedley essentially answered that he did not testify directly about whether Badros discloses the limitation in his first declaration. Nevertheless, the Majority attempts to bolster its holding by noting that "in his first declaration, Dr. Smedley testified that 'all the elements of the challenged claims are unpatentable" and "the references support Grounds 1 and 2 as set forth in the Petition for Inter Partes Review.'" *Id.* (quoting Ex. 1009 ¶ 62). Therefore, the Majority reasons that Dr. Smedley's answers about Badros during his deposition provide the "most troublesome evidence for Petitioner." *Id.* at 22. But Dr. Smedley's limited testimony about the "elements of the challenged claims" and the grounds of the Petition (Ex. 1009 ¶ 62) is in context to his testimony that the disputed claim limitation is optional (*id.* ¶ 66), as he specifically signals in the sentence that immediately follows the sentence the Majority relies upon: "However, I provide some additional opinions on the following claim limitations" (*id.* ¶ 62).[1]

[1] The Majority characterizes Dr. Smedley's claim interpretation of the disputed limitation as optional as "wholly unsupported" and therefore reasons that giving "Petitioner the right to withhold, until its reply brief, evidence about how the prior art allegedly teaches the limitation is

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Therefore, contrary to the Majority's holding that Patent Owner met its burden in its Motion to Exclude portions of the Reply evidence (i.e., portions of the second Smedley Declaration and similarly, portions of the Madansky Declaration (Maj. 24–29)), it was proper for Petitioner to submit new evidence with respect to enablement and to the related new argument that "Badros does not mean what it said." *See* Paper 62, 8 ("Petitioner . . . properly responded to [Patent Owner's] faulty enablement argument in case the Board desired additional evidence that Badros truly meant 'actually visible to the user.'"). In other words, to reply to Patent Owner's lack of enablement argument raised for the first time in its Response, it was proper for Petitioner to provide evidence and argument as to how Badros's language, which the Petition largely cites, is enabling. Moreover, Dr. Smedley's testimony in his second declaration replies to a claim construction of the disputed limitation that we adopted in our Institution Decision, as the Majority also recognizes. *See* Maj. 24. For that additional reason, the declarations are proper reply evidence, because they respond to the Institution Decision and the Response, contrary to the Majority's determination otherwise. *See* 37 C.F.R. § 42.23(b) ("A reply may only respond to arguments raised in the corresponding opposition, patent owner preliminary response, patent owner response, or decision on institution.").

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objectionable." Maj. 27, note 8. However, as indicated above, the Board's precedential *Schulhauser* decision reveals reasonable support for Dr. Smedley's claim interpretation (even if *Schulhauser* is distinguishable), the Petition shows where Badros teaches the disputed limitation, and the Reply and Reply evidence merely fill in gaps in response to Patent Owner's arguments, including by addressing Patent Owner's enablement arguments.

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To reach its finding that Badros does not disclose the disputed limitation, the Majority repeats Patent Owner's arguments at pages 14–15 of the Response. *See* Maj. 21 (repeating Patent Owner's argument that a POSITA would have understood that "the discussion of viewability in Badros . . . refer[s] to a served impression in general or as one that had been served to a viewer or an 'above the fold,' 'good,' or 'high probability' impression with a higher likelihood of falling within the viewable portion of a webpage" (quoting PO Resp. 14–15 (citing Ex. 2045 ¶ 74)). The Majority characterizes this line of argument as "Patent Owner argu[ing] that Badros, at best, teaches *an assumption* that an advertisement is viewable." *Id.*

There is nothing in Badros to support this reading. Rather, this is Patent Owner's unsupported theory. *See* Maj. 21 (arguing that Patent Owner's theory "is consistent with" a "lack of" "any description of how to determine" the viewability test and a lack of "any claim limitation" in Badros). Therefore, even without Dr. Smedley's testimony, the Board easily can determine that Badros does not discuss this theory, which Patent Owner advances to undermine the clear language in Badros. *See Belden Inc. v. Berk–Tek LLC*, 805 F.3d 1064, 1079 (Fed. Cir. 2015) (holding "[n]o rule requires . . . an expert [to] guid[e] the [PTAB] as to how it should read prior art"); *VirnetX Inc. v. Apple Inc.*, 665 F. App'x 880 (Fed. Cir. 2016) ("[E]ven if the record contains expert testimony, the law does not require the PTAB to rely upon it."). But to the extent the trial requires expert testimony to shed light on what Badros enables in terms of what it clearly states based on arguments in the Response, Petitioner properly provides reply expert declarations.

As indicated above, to support its conclusion that Badros does not disclose the limitation based on Patent Owner's characterization of Badros

as disclosing a "served impression" (PO Resp. 14) that per the Majority merely provides an "assumption" of viewability, the Majority states as follows:

> Patent Owner's interpretation of Badros is consistent with Badros's lack of (1) any description of *how to* determine that a predefined area that is used to display an advertisement has been in view within the visible area of the browser window for a predefined period of time and (2) *any claim limitation* directed to such a determination, as its witness, Mr. Sherwood, testified. *See* Ex. 2045 ¶62 ("I reach this opinion in part because there is no disclosure in Badros about *how to actually run a viewability test*."), ¶68 ("Badros does not teach or claim a viewable impression and further Badros does not teach *how to do a viewability test*."). Petitioner's own witness, Dr. Smedley, agreed that "Badros doesn't teach *how to do* its viewability test." *See* Ex. 2050, 148:9–22 (agreeing with this statement but adding: "*that's not a difficult thing to do*"). And, none of Badros's claims includes language directed to determining whether an advertisement is actually in view on an output display device. Ex. 1003, 22:40–26:52.

Maj. 21–22 (emphasis added).

These observations primarily adopt Patent Owner's arguments to attempt to show lack of enablement in Badros of the actually visible limitation. *See In re Antor Media*, 689 F.3d 1282, 1287–1288 (Fed. Cir. 2012) (For anticipation, "[e]nablement of prior art requires that the reference teach a skilled artisan to make or carry out what it discloses in relation to the claimed invention."); *cf. In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988)) (listing breadth of claims in a patent as one factor for determining if a *patent* disclosure enables *its claims*).[2] In the next sentence that follows the "served

[2] Prior art references carry a presumption of enablement. *See Antor Media*, 689 F.3d at 1282; *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1355 (Fed. Cir. 2003) ("[W]e hold a presumption arises that both

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impression" sentence that that the Majority relies upon, Patent Owner clearly argues lack of enablement: "Contrary to assertions in the Petition, Badros never explains *how* to determine if the ad was literally viewable, there's no evidence that anyone had actually demonstrated viewable ad technology in 2005, and this feature was not included in the issued claims of the patent." PO Resp. 15. Here, and throughout its Response, Patent Owner consistently and repeatedly argues lack of enablement in Badros (i.e., "how to" carry how the actually visible determination and "actually demonstrate[]" it). With respect to Patent Owner's argument as to what Badros itself "claims," which the Majority relies upon as discussed above, it is not relevant to either what Badros discloses or what it enables. *See Antor Media*, 689 F.3d at 1287–1288. It is not surprising that Patent Owner argues a lack of enablement given that Badros discloses, *inter alia*, "*the time during which a document is actually viewable on the user's screen*." Ex.1003, 11:22–24).

As another example in the quotation above, the Majority notes that Mr. Sherwood testifies that "there is no disclosure in Badros about *how to actually run* a viewability test," and "Badros does not teach or claim a viewable impression and further Badros does not teach *how to do* a viewability test." *See* Ex. 2045 ¶¶ 62 (emphasis added), 68 (emphasis added). As noted above, whether Badros "claim[s]" a viewability test is irrelevant to disclosure or enablement of Badros. But "how to actually run a

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the claimed and unclaimed disclosures in a prior art patent are enabled."); *Apple Inc. v. Corephotonics, Ltd.*, No. 2020-1438, 2021 WL 2577597, at *4 (Fed. Cir. June 23, 2021) (nonprecedential) (holding that in the context of AIA trial proceedings, "regardless of the forum, prior art patents and publications enjoy a presumption of enablement, and the patentee/applicant has the burden to prove nonenablement for such prior art" and that "[i]t was error for the Board to suggest otherwise").

viewability test" or "how to do a viewability test," are both relevant to whether Badros enables the test. As quoted above, the Majority also relies on Dr. Smedley's testimony that "Badros doesn't teach *how to do* its viewability test, " but "that's not a difficult thing to do." Ex. 2050, 148:9–22 (emphasis added). Again, this testimony goes to enablement. *See Wands*, 858 F.2d at 737.

At one relied-upon paragraph by the Majority, before Mr. Sherwood reaches his conclusion that "Badros does not teach or claim a viewable impression and further Badros does not teach how to do a viewability test," Mr. Sherwood opines as follows:

> Badros states "impression module 38 may determine whether an ad on a web page of a user's browser is actually visible to the user." I disagree. Badros does not teach the critical distinction between serving an ad to a user's browser and actual viewability or seeing the ad by the user. Ad serving is not ad seeing. According to my experience, at the time Badros was filed, however, the standard for determining whether an ad had been made 'visible to the user' was whether the ad had been served from the server."

Ex. 2045 ¶ 68. This testimony is difficult to understand. Does Mr. Sherwood actually "disagree" with what "Badros states"? Also, the testimony that "Badros does not teach the critical distinction between serving an ad to a user's browser and actual viewability or seeing the ad by the user" is ambiguous at best. Is Mr. Sherwood treating "serving an ad" as similar to "actual viewability"? Or is Mr. Sherwood treating "actual viewability" as similar to "seeing the add"? Even without the ambiguity, this testimony incorrectly assumes that Badros must describe a distinction created by Mr. Sherwood to support its clear disclosure of the disputed viewability test.

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At any event, this testimony and corresponding argument turn on an implicit argument that Badros does not mean what it says, i.e., determining "the time during a document is actually viewable on the user's screen" and "determin[ing] whether a document . . . is actually visible to a user and it may track the time duration during which the document is actually visible to the user," as Petitioner recognizes. *See* Pet. 23 (quoting Ex. 1003, 11:22–24; 12:37–40); Paper 45, 8 (referring to Patent Owner's "clearly erroneous argument that RMC invented the 'viewability test' or that Badros did not mean what it said").

In other words, Mr. Sherwood's distinction turns on the notion that "the standard for determining whether an ad had been made 'visible to the user' was whether the ad had been served from the server." *Id.; accord* PO Resp. 14. This is implicitly a lack of enablement argument, i.e., the argument reduces to the notion that because of some "standard" based on Mr. Sherwood's "experience," an artisan of ordinary skill reading Badros would have envisioned that Badros only enables an alleged "standard" of counting impressions from a server instead of what Badros plainly says it does, determining a document is "actually visible to the user" or "actually viewable on the user's screen" (Ex. 1003, 11:22–24; 12:37–40). *See* Ex. 2045 ¶ 68; PO Resp. 14 (citing Ex. 2045 ¶ 68).

In addition to citing Mr. Sherwood's testimony based on his "experience" to support the standards-based argument, Patent Owner cites other evidence. PO Resp. 14 (citing Ex. 2023, Exhibit 2027 ¶¶ 9–10, Ex. 2053). The cited testimony contradicts Mr. Sherwood and Patent Owner. Specifically, Mr. Edwards, Patent Owner's witness, testifies that "[s]erved impressions would later be *distinguished from 'viewable impressions,'* which are ad impressions known to be actually within the viewable area of a

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user's internet browser." Ex. 2027 ¶ 10. In other words, it stands to reason based on the testimony of Mr. Edwards, that "actually viewable," which Badros discloses and which is similar to "viewable impressions," meant something different than "served impressions," contrary to the testimony of Mr. Sherwood. Finally, Mr. Sherwood's testimony at the cited passage, based merely on his "experience," is unsupported and is entitled to little or no weight. *See Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 12 at 5 (Vidal Feb. 10, 2023), aff'g Paper 9 at 15–17 (PTAB Aug. 24, 2022) (precedential). Patent Owner fails to provide context to the other two relied-upon exhibits, Exhibits 2023 and 2053. *See* PO Resp. 14. In any event, the documents that Patent Owner cites do not discuss the pertinent language in Badros and are of no help. *See* Ex. 2023, 2053.

Moreover, Petitioner shows that Badros expressly distinguishes the "actually visible" method from the served impressions by quoting Badros: "The number of 'actual' (e.g., verified) impressions may be distinguished from the number of times a document *was output to client terminal*. Also, the actual time during which a document was visible on a monitor may be stored." Reply 6 (emphasis added) (quoting Ex. 1003, 15:4–8).[3]

In summary, Patent Owner argues that Badros does not disclose the viewability test primarily because Badros does not enable the test as

[3] In another argument, Patent Owner maintains that the Badros server, absent some communication with a client, cannot determine what actually occurs at the client. *See* PO Resp. 19–21. Petitioner persuasively counters this by showing that Badros employs client-server architecture (in the Petition and Reply) to enable the viewability test. Reply 7–9 (citing Pet. 35–46). Petitioner also cites prior art publications and patents showing that viewability tests were well-known, further contradicting the standards-based and related enablement arguments. *Id.* at 9–10 (citing publications), 14–15 (citing patents).

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evidenced in part by some vague standard that does not address the language of Badros. The Majority characterizes Petitioner as stating that "Patent Owner's arguments about the 'viewability test' were 'surprising.'" Maj. 25 (quoting Paper 62, 8 (Petitioner's "Opposition to the Motion to Exclude")). The Majority states it is "not persuaded" because "Petitioner should have anticipated that Patent Owner would argue that limitation," and as such, any evidence in the Reply about the limitation is too late. *Id.* at 25–26 (noting "Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g. to make out a prima facie case of unpatentability" (quoting Board's Consolidated Trial Practice Guide, 73 (Nov. 21, 2019)). But the Petition meets the prima facie case by quoting the plain language of Badros as the Institution Decision further suggests, and Petitioner's Reply evidence simply responds to new arguments by Patent Owner regarding enablement and the related argument that Badros does not teach what it plainly says (in conjunction with responding to the Board's claim construction in the Institution Decision).

In full, at the quoted passage, Petitioner argues as follows:

> Petitioner rightly presumed the prior art was enabled. Paper 50, 10 (citing *Analog Devices, Inc. v. Xilinx, Inc.*, No. IPR2020-01596, 2022 WL 1157604, at *14 (PTAB April 13, 2022)). Petitioner assumed that the case would focus on "replacement advertisement" limitations, not the clearly erroneous argument that RMC invented the "viewability test" or that Badros did not mean what it said. The rebuttal declarations—routinely entered in IPRs—responded to Patent Owner's *surprising arguments that it invented the well-known "viewability test" and related issues*. The rules allow Patent Owner to argue that Badros, which is directed to a predictable art, was not enabled. Petitioner, too, properly responded to this faulty enablement argument in case the Board desired additional evidence that Badros truly meant "actually visible to the user."

> Nothing about this process is unusual, other than Patent Owner objecting to nearly all evidence submitted in petitioner's reply.

Paper 62, 8. For the reasons noted above, and as argued by Petitioner in its Opposition to the Motion to Exclude as summarized above, I disagree that Patent Owner met its burden in its Motion to Exclude portions of the Reply declarations. Nevertheless, even without the Reply declarations, the Petition and Reply show persuasively that Badros discloses the disputed limitation.

By focusing on the argument that Badros does not disclose what it says by conflating lack of enablement rationale to support its holding, and without actually reaching whether Badros enables the disputed limitation, the Majority does not squarely address the joined issue—whether Badros enables the disputed visibility test. *See Apple v. Corephotonics*, 81 F.4th 1353, 1361 (Fed. Cir. 2023) (reversing and remanding when the Board adopted an argument/issue that the patent owner, Corephotonics, "mentioned in passing only once in the Background section of the Response"). *Corephotonics* noted that in *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364 (Fed. Cir. 2016), "[w]e held that, under the [Administrative Procedures Act], the Board erred in adopting an argument that the petitioner had not sufficiently made." *Id.* at 1362 (citing *Magnum Oil Tools*, 829 F.3d 1381 ("[T]he Board must base its decision on arguments that were advanced by a party, and to which the opposing party was given a chance to respond.")).

During the oral hearing, after the Board asked Patent Owner "*is your major contention* that" Badros's discussion about viewability is "just a mistake" or "it's not enabled," Patent Owner responded that "[w]e're saying—[Badros] certainly says that it's viewable. . . . *but it doesn't explain how that viewability test is accomplished*" (emphases added)). Tr. 67:8–19. By not addressing the "major contention" at trial, enablement, the Majority

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raises an issue under the Administrative Procedure Act ("APA") according to guidance in *Corephotonics*.

Specifically, *Corephotonics* further noted that

> [o]ur decision in *Power Integrations, Inc. v. Lee* is similarly instructive. 797 F.3d 1318 (Fed. Cir. 2015). There, the Board spent a "significant portion of [its] decision" assessing the proper construction of a claim term that the parties did not dispute. *Id.* at 1325. We determined that because so much of the "[B]oard's analysis is focused on a red herring," it "failed to straightforwardly and thoroughly assess the critical issue" outlined by the parties and deprived the parties of an opportunity to respond to the Board's claim construction. *Id.* This, we explained, was a violation of the APA.

Corephotonics, 81 F.4th at 1361.

For the above reasons, I respectfully dissent.

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