

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AYLO FREESITES LTD,
Petitioner,

v.

DISH TECHNOLOGIES L.L.C.,
Patent Owner.

Case IPR2024-00940
Patent 11,991,234 B2

Record of Oral Hearing
Held Virtually: August 22, 2025

Before THU A. DANG, MICHELLE N. WORMMEESTER, and
JOHN A. HUDALLA, *Administrative Patent Judges*.

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

1:00 p.m.

JUDGE HUDALLA: We're going to go on the record. This is the oral hearing at IPR2024-00940. I'm Judge Hudalla. I have with me Judge Wormmeester, and joining us remotely is Judge Dang.

Let's start with appearances. First, from Petitioner.

MR. GASPARO: Good afternoon, Your Honors. This is Frank Gasparo with Venable, Counsel for Petitioner Aylo, and I am joined by my colleague, Phil Sheng.

JUDGE HUDALLA: Mr. Gasparo, are you going to be presenting today?

MR. GASPARO: I will be presenting in part, and my colleague, Mr. Sheng, will handle the other part.

JUDGE HUDALLA: Okay. Thank you. And who do we have today from Patent Owner?

MR. WILLIAMS: Yes. Good afternoon, Your Honor. This is Eliot Williams for Patent Owner, and I'll be presenting again. Also, I think on the public line, I've got a couple representatives from DISH, as well as several other backup counsel from Baker Botts.

JUDGE HUDALLA: Okay. Welcome back, Mr. Williams.

So today, we're going to hear argument in this case. It's going to be one hour per side. Petitioner can go first, and may reserve rebuttal time. Patent Owner can go second, and may reserve a brief surrebuttal. I want to stress that this case has a Protective Order, and so we should not be discussing any confidential information in this public hearing because there is a public line. If, for whatever reason, there's a need to discuss confidential

1 or protected information, if you could just let us know. We'll make some
2 arrangements for that, probably at the end of the hearing, but I don't
3 anticipate that'll be an issue today.

4 Since we're in the virtual environment today, it'd be great if you could
5 let us know when you start speaking -- if you could identify yourself. Also,
6 it's very important to mention what slide you're on so we can follow along,
7 both now and when we're reading the transcript later. And then one thing to
8 help us all hear better, if you're not speaking, if you could put yourself on
9 mute, that would be great as well.

10 So with that -- I don't think we have any other instructions.

11 Mr. Gasparo, would you like to reserve some rebuttal time?

12 MR. GASPARO: Yes, Your Honor. Fifteen minutes, please.

13 JUDGE HUDALLA: Okay. And you may begin whenever you're
14 ready, Mr. Gasparo.

15 MR. GASPARO: Great. Well, good afternoon, again, Your Honors.
16 I'm Frank Gasparo.

17 I will be handling the Leaning prior art as well as, if needed, the other
18 prior art references. Mr. Sheng will handle secondary considerations. It'll
19 come as no surprise, we listened in to the hearing this morning involving
20 petition of Fubo TV, and -- I would like you to know, for the record, we
21 agree with everything that Fubo TV's Counsel stated. You know, we'll take
22 your guidance on how best to -- we'd like to incorporate that transcript and,
23 if possible, the demonstratives into our hearing, so we'll take your guidance
24 on how best to do that.

25 JUDGE HUDALLA: Why don't we -- when we get into the rebuttal -
26 - or -- excuse me. When we get into Patent Owner's presentation, we'll ask
27 Mr. Williams his position on that and take it under advisement.

1 MR. GASPARO: Great. So therefore -- so for efficiency reasons,
2 because of the significant overlap, we don't think it's going to be productive,
3 you know, for me and Mr. Sheng to repeat the same positions that were
4 extensively covered, unless, of course, you have additional questions. We'll
5 be more than glad to answer those. Instead, I'm going to focus on certain
6 issues that were either not addressed this morning or briefly addressed this
7 morning.

8 So in this proceeding, as I mentioned, the issues are in large part
9 consumed within what was discussed this morning, with a few exceptions
10 that I will -- that I will talk about in a moment.

11 The first is the arranging limitation. I think it was only briefly
12 discussed this morning. I do want to make a point or two regarding the
13 phrase to achieve continuous presentation. And then, lastly, I'll address
14 requesting subparts over multiple TCP connections.

15 So I'm going to start on Slide 19. Leaning teaches arranging the
16 streamlets, and that -- that's -- that limitation is found in Claims 1 and 12,
17 specifically 1E and 12E. On Slide 20, we have representative
18 claim language in Claim 1 or limitation 1E. I'll just read it into the record.

19 Arranging the streamlets requested from the, at least, one server in
20 order of ascending presentation time for output to a presentation device.

21 There is very similar language in 12E. So what's not in dispute?
22 What's -- in our view, what's not in dispute is that Leaning teaches naming
23 each subfile indicative of their sequence, so for instance, one, two, three,
24 four, et cetera. Leaning teaches requesting each subfile individually in order
25 of play-out time -- ascending play-out time. Leaning teaches decoding and
26 saving each of those sub files in the buffer, and Leaning teaches playing
27 subfiles using their file names in order of ascending play-out time.

1 So what is in dispute? It's -- it boils down to whether the arranging
2 limitation requires streamlets to be received out of order, as argued by
3 DISH. We think the answer is, no, and even if it does, you know, Leaning
4 teaches it.

5 I'm going to skip to Slide 22, and then I'm going to get back to 21. So
6 I have them a little out of order, but I'll go to Slide 22 first.

7 The claims don't require receiving streamlets out of order and
8 rearranging them, as argued by Patent Owner. I mean, the claims simply
9 recite arranging the streamlets for Claim 1, individually requestable portions
10 for Claim 12, requested from the, at least, one server in order of ascending
11 presentation time for output to a presentation device. The claim language
12 does not recite whether those streamlets must be received in order or out of
13 order.

14 Now, I'll go back to Slide 21.

15 Leaning also teaches receiving subfiles out of order. I just want to
16 note that -- in support of its argument, that Leaning only teaches subfiles
17 being received in order. DISH conveniently omits the word if in a quote that
18 -- with a quote from Leaning to wrongly suggest that there is no expectation
19 of receiving subfiles out of order. Specifically, DISH argues in its Patent
20 Owner Response, what I have up on the screen on Slide 21, there is no
21 expectation that a subfile will be followed by a subfile other than that which
22 immediately follows it in the original sequence. So in other words, files are
23 always received in order. That's DISH's position.

24 This is an incomplete and misleading quote from Leaning. What
25 Leaning actually states is, at the bottom of that slide, if there is no
26 expectation. So therefore, Leaning teaches that there are instances of
27 receiving subfiles out of order.

1 I'd like to now go to Slide 24. And elsewhere in Leaning, Leaning
2 teaches arranging streamlets that are received out of order. I'm not going to
3 go through these two teachings in Leaning. The highlighted language, I --
4 you know, I think, you know, speaks for itself. It refers to using an
5 algorithm to figure out what's in -- what's the order. It refers to -- and it even
6 says, in the second quote, about receiving things out of order, so -- this is
7 further teachings in Leaning to support that.

8 I'm going to next -- I'm going to stay with the arranging limitation, but
9 now I'm going to move to Claim 9, which adds a limitation using the virtual
10 timeline. And that's on Slide 25. So I'll go to Slide 26 now. And here, we
11 set forth the actual claim language, and I'll just read it. Arrange the
12 streamlets requested from the at least one server using the virtual timeline.
13 Same dispute regarding arranging, except here, the question -- the added
14 question is whether Leaning teaches using the virtual timeline, which
15 Petitioner believes -- it believes, yes.

16 Slide 27. Leaning's teachings a virtual timeline is in its description of
17 using menu pages and an index file. As for menu pages, Leaning teaches
18 that -- the quote up top, that the web server -- The web server stores one or
19 more HTML menu pages, for example, menu.htm, containing a list of
20 recordings available with hyperlinks to the corresponding link pages.

21 And then as for the index file, Leaning teaches, The player program
22 will begin by requesting from the directory specified in the link file, the
23 index file. And then later on in that quote, It then begins to request the audio
24 subfiles as described earlier from the first mention rate directory in the index
25 file. So Leaning is clearly teaching using the index file to request subfiles.
26 And after receipt, they're arranging those subfiles in the buffer.

1 On Slide 28, Leaning also teaches if subfiles happen to be received
2 out of order, the index file is used. Here, we could see at the end of this
3 quote, and Leaning on that -- it says at the end, It's followed by a check of
4 the index file if these requests are unsuccessful. And these requests, if you
5 read the rest of the quote, refer to receiving files out of order.

6 So unless there's no questions, I was going to skip to a few points I
7 want to make about the phrase, to achieve continuous presentation. Okay.
8 Great. I'm going to skip to Slide 45. So unlike the patents discussed this
9 morning, the challenged claims here recite digital content, which obviously
10 includes audio. So if DISH's interpretation of to achieve continuous
11 presentation is wrong, which we think it is, or if Petitioner is correct that
12 clearing Leaning's buffer is not required in the audio embodiments, which
13 we think is the case, Leaning's audio embodiments invalidate.

14 In this proceeding, there is no need to rely on Leaning's teachings
15 regarding video. And I think that's an important distinction to make from
16 what we heard this morning. One other distinction is Patent Owner presents
17 no arguments why to achieve continuous playback is any different than to
18 achieve continuous presentation.

19 I'm going to jump to Slide 62.

20 JUDGE HUDALLA: Before you do, Counsel, could I just ask you, is
21 -- on that point, do you agree with Ms. Austin's arguments this morning that
22 we -- the way we should look at that claim construction is the exact same,
23 despite the difference in language?

24 MR. GASPARO: Yes. Correct, Your Honor.

25 JUDGE HUDALLA: Okay.

26 MR. GASPARO: So on Slide 62, so the European Patent Office
27 proceeding was mentioned this morning, and I feel obliged to add something

1 to that. So the EPO -- and it obviously, you know -- this obviously relates to
2 corresponding European patent. Nothing that's in dispute here. But it is
3 corresponding patent with overlapping claim language. The EPO agreed
4 that Leaning teaches to achieve continuous playback or presentation of
5 audio. You know, we have some of the, you know -- some of what the EPO
6 said on Slide 62. The point I want to really make here is that the Patent
7 Owner, DISH, did not appeal the EPO's invalidity decision. So it is now
8 final.

9 I'm going to turn to Slide 65. And I'm going to get into, briefly, the
10 requesting subparts over different TCP connections. Unless there's any
11 questions on -- other questions, Your Honors, regarding to achieve
12 continuous presentation.

13 JUDGE HUDALLA: Not right now. But I am interested in this
14 requesting limitation and the HTTP thing.

15 MR. GASPARO: Okay. Great. So we -- petition is -- position is that
16 Leaning and Gamble, you know, with the knowledge of a person of skill
17 teaches requesting subparts over different TCP connections. On slides 65,
18 we have the claim language. So I'd like to -- again, what I did earlier. So
19 what's not in dispute and the -- and then narrow it down to what's in dispute.

20 What's not in dispute is that Leaning discloses HTTP/1.1, which uses
21 multiple simultaneous TCP connections. What's also not in dispute that
22 Gamble discloses transmitting subparts of files over multiple TCP
23 connections. And lastly, that range requests for subparts of a file were
24 known to a person of skill in the art.

25 So what's the dispute? The dispute is whether requesting subparts of
26 files over multiple TCP connections is taught by Leaning and Gamble with

1 the knowledge of a person of skill in the art, and whether Leaning and
2 Gamble would be obvious to combine. And that's what I'll discuss now.

3 I'm going to -- I'm going to start with Slide 66. This is -- this does not
4 rebut the Petitioner's arguments. The -- instead, they -- they're -- they focus
5 on what I've set forth here in four bullets. They point to this completely
6 irrelevant file-not-found error that indicates in the end of a stream, which is
7 different from a TCP -- a connection error.

8 They ignore the combination. They focus on each reference
9 individually. They incorrectly suggest that, you know, we rely on Leaning
10 alone. And they ignore the use of Gamble and the knowledge of a person of
11 skill. And then they, you know -- they focus on this, that Gamble fails to
12 disclose requesting subfiles. And while they're ignoring our complete
13 position, which is that a POSA would've combined Leaning with Gamble on
14 top of his or her knowledge of HTTP range requests.

15 JUDGE HUDALLA: Mr. Gasparo?

16 MR. GASPARO: Yes.

17 JUDGE HUDALLA: So the way I understand Patent Owner's
18 argument is that, you know -- is that, you know, Gamble says certain things,
19 Leaning says certain things. But you've gone beyond both of them by
20 bringing in this range request. Even though there's a hook in, you know, at
21 least Leaning to use HTTP/1.0 or whatever it is, are you bringing in too
22 much when -- under the guise of a person of ordinary skill in the art?

23 MR. GASPARO: I don't think so. Maybe -- so Slide 69, I think
24 should directly answer your question. And this is -- we set forth here our
25 argument and the relevant cites in the petition. So Leaning teaches
26 requesting subfiles via -- of -- so Leaning opens up through the disclosure of

1 HTTP/1.1. It teaches the use of multiple TCP connections. Gamble teaches
2 that you could transfer subfiles over multiple TCP connections.

3 And this is where we rely on the knowledge of a person of skill in the
4 art to say, you know, a person of skill in the art knowing what Leaning
5 teaches, knowing what Gamble teaches, knowing how one would use HTTP
6 range requests, would modify Leaning to request over those separate TCP
7 connections subparts of a subfile. So it's that -- it's the knowledge of the
8 person of skill in the art on top of Leaning and Gamble, and its knowledge
9 of the use of HTTP range requests to get those subparts of subfiles using
10 Leaning's technology.

11 JUDGE HUDALLA: Yeah. I don't doubt that that's a pretty low or
12 small change in the reference. But I do believe the Patent Owner's argument
13 is that, you know, just because it says HTTP/1.0, it doesn't mean that
14 necessarily includes, say, the entirety of the specification of 1.0, such as,
15 say, the range requests or other sorts of requests.

16 Does either the reference -- does either Leaning or Gamble have any
17 hooks on specific HTTP commands?

18 MR. GASPARO: I don't know. I mean, I don't want to say something
19 I don't -- I'm going to get back to you with an answer to that question. I
20 mean, Gamble is -- I mean, Gamble clearly teaches opening up multiple
21 TCP connections. Patent owner's position is Gamble only teaches
22 transmitting over those multiple TCP connections. It's not teaching
23 requesting over those multiple TCP connections. So that's where you get
24 the, you know, the use of multiple TCP connections.

25 And then I'm not going to repeat what I said earlier. But then on top
26 of that, you know, you've got Leaning through that HTTP disclosure, which
27 a person skilled in the art would know has -- teaches the use of multiple

1 connections, that you can use range requests to get subparts of the files. But
2 I can get you -- I'll try to get you a direct answer to that.

3 JUDGE HUDALLA: Okay. Thank you.

4 MR. GASPARO: You're welcome.

5 And then on Slide 68, I think it's just notable that they -- that DISH
6 did not rebut Dr. Houh's opinions on the use of HTTP requests. And just on
7 -- lastly, on Slide 70, there was this assertion that Petitioner did not set forth
8 the motivation to combine everything I just said. Well -- and that's not true.

9 And first of all, they raised it for the first time in their surreply. They
10 didn't raise it in their response, so it's waived. And they are just completely -
11 - they are completely wrong. And then on Slide 70, we have, you know, an
12 example of where in Dr. Houh's declaration, he addresses the motivation to
13 combine.

14 So unless there is no other questions, I'm going to turn it over to my
15 colleague, Mr. Sheng, who is going to address secondary considerations.

16 JUDGE HUDALLA: Thank You.

17 MR. GASPARO: Thank you.

18 MR. SHENG: Good afternoon, Your Honors. My name is Philip
19 Sheng. And as my colleague mentioned, I'll be addressing DISH's
20 arguments with respect to secondary considerations. I appreciate that Your
21 Honors heard some things about secondary considerations earlier today. I
22 still plan on marching through my prepared remarks and my slides because
23 there are some subtle differences between our patent and the patents that
24 were at issue earlier. And there are some points that I'd like to reemphasize
25 as well.

26 So turning to Slide 72 of Petitioner's Demonstratives. To start us off,
27 I want to, again, address DISH's arguments regarding the relevance of the

1 ITC determination. The ITC determination involved different patents and a
2 different record. Two of the four patents that were at issue in the ITC don't
3 even recite the continuous presentation limitation that's been at issue today.
4 The ITC determination, in our view, is simply not relevant.

5 We -- we've been through these arguments in the Ogdon IPR. The
6 Board correctly held in the Ogdon IPR that the ITC's finding of a
7 presumption of nexus was premised on the respondents there -- the
8 respondent's concessions about an invalidating public use of the Move
9 player. There's no concession here, of course. We have a different record,
10 different patents, different parties, different arguments. And as Your Honors
11 know, at the end of the day, the ITC, its decision is not binding on the
12 Board.

13 So let's move to Slide 73. And let's focus on this record -- this IPR
14 record. Let's see what DISH has to say in this IPR. And, you know, to start,
15 DISH doesn't have much to say because it improperly incorporates by
16 reference broad swaths of claim charts and expert opinions. This isn't the
17 first time DISH had tried doing this. It did the exact same thing in the
18 Ogdon IPRs. It prompted the Board there to say that this is the epitome of
19 improper incorporation by reference in the citations. So those are on the
20 Slide 73 there.

21 But moving to Slide 74, let's set aside DISH's improper incorporation
22 by reference. Even then DISH still fails to show a nexus. There is two key
23 points that I want to cover today. The first is that a patent claim is not
24 coextensive with a product that includes a critical unclaimed feature. And
25 the second is that there must be a nexus to some aspect of the claim that's not
26 already in the prior art.

1 So let's talk about those two things. Let's go to Slide 75. So DISH
2 wants to show coextensiveness of the claims. Remarkably, it had its expert,
3 Dr. Jeffay provide a single claim chart mapping the Move player to Claim 1
4 of the '234 patent. DISH doesn't argue secondary considerations with
5 respect to Claim 1 of the '234 patent, they made that very clear at this cite
6 here that's on the slide. It is only presenting secondary considerations with
7 respect to Claims 12 to 20, and that's the POR at page 37.

8 So DISH, essentially, has no expert opinion with respect to
9 coextensiveness. And the rest of what DISH has to say is attorney argument
10 that's been rejected by the Board already, and we'll get into that. On Slide
11 76, here we see, this is a Move internal document that the Board cited in the
12 Ogdon IPRs, and that is in this record again, that the -- quotes, The secret
13 lies in our use of multiple TCP connections by requesting more than one
14 streamlet at a time, parallel retrieval, efficiency is raised to a near maximum
15 and latency is virtually eliminated. So --

16 JUDGE HUDALLA: Mr. Sheng?

17 MR. SHENG: -- this secret -- yes.

18 JUDGE HUDALLA: Don't we have some claims in this case, though,
19 that recite the multiples TCP connections, I believe, maybe Claim 16 does?

20 MR. SHENG: Yes. Thank you, Your Honor. So let -- let's go to
21 Slide 77. And you're correct that there is a language similar to that, and that
22 is Claim 16. First, I want to make the point that DISH did not assert nexus
23 based on Claim 16. It didn't pivot to Claim 16 until after we had pointed out
24 the flaw of their argument in our reply. So in our view, it's been waived.
25 But even if it hasn't been waived, Claim 16, in our view, doesn't get them
26 there.

1 Claim 16 recites a plurality of TCP Connections. And the critical
2 unclaimed feature was the multiple parallel TCP connections. It was the
3 parallel retrieval. And so in our view, well, it -- Claim 16 -- the reliance on
4 Claim 16 has been waived even so there has been no argument that Claim 16
5 relates to parallel retrieval.

6 JUDGE HUDALLA: Mr. Sheng, maybe you can help us out with an
7 overview of how you view their secondary considerations because I
8 absolutely am attuned to the fact that Patent Owner only provided a Claim 1
9 chart, and yet they're, you know, talking about only Claims 12 through 20
10 have the secondary considerations.

11 So does that lack of a -- any chart for 12 through 20 -- I assume your
12 position is that that cuts out the possibility of a presumption for nexus; is
13 that fair?

14 MR. SHENG: Yes. That is fair, Your Honor.

15 JUDGE HUDALLA: Okay. Going beyond that then, so we would
16 have to look, in your view, to direct nexus evidence of Claims 20 -- 12
17 through 20; is that fair?

18 MR. SHENG: That -- that's correct.

19 JUDGE HUDALLA: Okay. And then now that we're -- I guess we're
20 doing that, you're -- we're talking about critical unclaimed features. So
21 you're -- your position is for 16, at least, they didn't -- this claim is
22 sufficiently different from parallel connections that would cut out a direct
23 nexus argument?

24 MR. SHENG: Well, I think this would be in the context of
25 coextensiveness as well, that there's a critical unclaimed feature, but yeah.
26 No. There is overlap with respect to direct nexus as well. And just to be
27 clear, Your Honor, again, we think it's been waived, you know, they didn't

1 rely on Claim 16. And -- but to answer your question, yes. There are
2 differences that Claim 16's plurality of TCP connections is not the same as
3 multiple parallel TCP connections.

4 JUDGE HUDALLA: Okay. Well, as you're going forward, I'm not
5 going to interrupt you any further here, but if you could make that
6 distinction between presumption and direct as you're going through these
7 slides, that would be helpful because I do tend to have a problem with the
8 presumption at this point based on the way the case is set up. So I would
9 like to hear more about the direct nexus.

10 MR. SHENG: Yep. Very good, Judge. And I'm happy to do that. So
11 let's jump to Slide 79. And so Claim 79, so DISH has to establish a direct
12 linking. They have got to establish nexus by linking secondary
13 considerations to unique characteristics. And I think the unique
14 characteristics -- unique features is probably where there was some
15 confusion earlier. But let's address the direct nexus issue.

16 You know, I want to note, to start off, that in the Ogdon IPRs, DISH
17 argued that the unique characteristics for a direct nexus was what you -- is
18 what you see here. It's the actively adjusting video quality to the bandwidth
19 available and delivering pieces of content progressively. All right. That's
20 what DISH argued in the Ogdon IPRs.

21 Let's go to the next slide, Slide 80. And the Board in the Ogdon IPRs
22 found that was all in the prior art, that DISH's arguments were fatally
23 flawed. And the Board rejected a finding of nexus. There were over 120
24 claims at issue in the Ogdon IPRs. The Board rejected nexus for over -- for
25 all 120 of them. And for the remaining 60 or so claims at issue here in this
26 IPR, and between this IPR and the Fubo IPRs, DISH, of course, had to pivot

1 to a new argument, right. They completely lost on the 120-plus claims at
2 issue in Ogdon. So we've got to pivot.

3 And so let's go to Slide 81. So in this IPR, DISH points to a different
4 feature as the unique characteristic. They focus on the continuous
5 presentation. So on Slide 81, we -- we've put side by side what they argued
6 in the Ogdon IPRs, and here, where they argue at -- POR at page 41, what
7 they say is the unique characteristic here.

8 Let's go to Slide 82. So a couple issues with that. And first of all,
9 continuous presentation, we argue, wasn't a feature of the Move player. It
10 wasn't a unique characteristic. It wasn't a characteristic at all because
11 DISH's own evidence shows that the Move player stalled. They -- this is
12 from their Move network's technical overview, so what they're handing to
13 customers. It specified what the Move player should do when it experiences
14 stalls.

15 Let's go to Slide 83. But, you know, I think the key here, Your
16 Honors, is that DISH should be held to its arguments that it made in the
17 Ogdon IPRs. They shouldn't be allowed to pivot now, having argued, you
18 know, one feature for so many claims, and having lost that issue now, be
19 able to pivot to a new argument.

20 But even if we were to allow them to do that, there is another problem
21 -- they have another problem is that continuous playback was known in the
22 art. And we know that because Dr. Jeffay admitted -- he testified on behalf
23 of Amazon in another IPR. He made clear that the prior art continuous
24 playback and temporal continuity. Those are the same terms that DISH uses
25 here to try to distinguish the '234 patent over Leaning. And here is Dr.
26 Jeffay using those same terms to describe the prior art on behalf of a
27 different party in a different IPR.

1 JUDGE HUDALLA: Mr. Sheng, can I ask you a question?

2 MR. SHENG: Yes, Your Honor.

3 JUDGE HUDALLA: Just following up on what I think Mr. Williams
4 said this morning. I think he said continuous presentation or whatever the
5 term was this morning could be two subfiles together, as long as there is no
6 interruption between them. If we apply that definition here, I know they
7 might have some problems on the unpatentability front, but would that cure
8 some of the problems here on the secondary considerations front? I mean,
9 you've cited this slide on 82 showing there's some stalls. But okay. So
10 maybe there -- the DISH player or the -- I guess, the Move media player
11 meets their definition of continuous presentation at times. Is that good
12 enough?

13 MR. SHENG: That -- that's a great question, you know. The
14 definition of continuous playback has been sort of a moving target. I mean,
15 DISH, you know, they came out of the gate saying that there can't be any
16 interruptions at all. Then in the surreply, they shifted to say, oh, well, you
17 know, sometimes it can, can't be. You are exactly right that if two subfiles
18 played together were continuous, they have patentability issues. The patent
19 is invalid. And so you know, it -- it's sort of like, a squeeze, you know. If
20 it's invalid, then they get secondary considerations that's not going to help
21 them, you know.

22 It's really, you know -- it comes down to, Your Honor, in our view,
23 what does the term mean? And I think DISH hasn't really provided a clear
24 answer to that. And so I, you know -- I'm trying to answer the question the
25 best I can, you know. Certainly, if two subfiles -- just two were continuous,
26 I mean, the patent is invalid. So I mean, yeah. I think the answer is, yeah.

1 Does that -- did I answer that all right, Judge Hudalla? I'm -- you asked me
2 a --

3 JUDGE HUDALLA: Yeah.

4 MR. SHENG: -- that's a tough question.

5 JUDGE HUDALLA: It is -- it's a tough question. I think there's more
6 to it than maybe what you've suggested here. I mean, we might -- I could
7 potentially see some ways where, you know, maybe the first few factors of,
8 you know, the first three unpatentability factors in our analysis might go for
9 them. And we could potentially be actually looking at these secondary
10 considerations and trying to apply, you know, the same definition of just two
11 files together. Is that good enough? And in that situation, I wonder if
12 maybe some of this evidence might be okay, is what I'm suggesting.

13 MR. SHENG: Yeah. I'm trying to think through a world in which,
14 you know, the patent is valid because it, you know -- Leaning doesn't teach,
15 you know, just two in a row. While at the same time, you know, DISH's
16 Move player satisfied, you know, the continuous presentation limitation. I
17 don't see that world if --

18 JUDGE HUDALLA: I know that's a tough one. But we do -- we did
19 have a few issues this morning that we had to -- we would have to get
20 through to get into the squeeze play, I think. And maybe on -- Mr. Williams
21 can address that when we get to his part as well. But I understand this is
22 kind of a conundrum.

23 MR. SHENG: Yeah. Yeah. No. Thank you, Judge Hudalla. I
24 appreciate that. Let's go to Slide 84.

25 JUDGE WORMMEESTER: Counsel, I just wanted to point out you
26 have about ten more minutes --

27 MR. SHENG: Okay. And you said ten minutes, you said?

1 JUDGE WORMMEESTER: Ten minutes until your rebuttal --

2 MR. SHENG: Thank you. Yeah. Thank you. So let's go to Slide 84.
3 You know, so when we pointed out, you know, that this issue with the stalls
4 in our reply, DISH tries to pivot again. And then in surreply, it pivoted to
5 multiple TCP connections. Again, this is related to Claim 16. We think it's
6 late. And it's only specifically with respect to Claim 16. So it wouldn't even
7 apply to all the claims.

8 But the purpose of this slide, Your Honors, is just to point out that
9 DISH misrepresents what the Board held in Ogdon. It's not true that
10 multiple TCP Connections and HTTP requests were the only rationales for
11 denying nexus in Ogdon. There were a number of other reasons as well, and
12 they're listed here on Slide 84.

13 Let's go to Slide 85. And ultimately, you know, I -- I'll just make the
14 point that all of DISH's secondary considerations arguments fail for the same
15 reasons that the Board found in the Ogdon IPRs. They -- they're the same
16 arguments. Nothing has changed. DISH's slides -- you'll even see a picture
17 of Sling's Emmy Award. I was surprised to see it given that the Board in
18 Ogdon made very clear that that Sling Emmy was awarded for Sling's over
19 the top television service that was launched in February of 2015. The Board
20 made that very clear. I mean, DISH, they're very proud of that Emmy, you
21 know, but it's completely irrelevant to the patent at issue here, which was
22 filed in 2004.

23 Lastly, Your Honor, let me just quickly address -- let's go to Slide 86.
24 I just want to quickly address, you know, the sideshow argument. This is the
25 argument about British Telecom, you know. As a threshold matter, whether
26 BT commercialized Leaning is irrelevant to secondary considerations. We
27 have here the Samsung Electronics case, which makes that very clear, a

1 Petitioner need not show that the invention has been implemented into a
2 prior commercial product to establish obviousness. We have some
3 additional Federal Circuit cases there.

4 But let's entertain DISH's argument anyway. Let's go to Slide 87. As
5 a threshold, you know, another threshold matter that the BT declarant, Mr.
6 Ratcliffe, admitted that at least Leaning's audio embodiment was
7 commercialized. And he admitted that Leaning was licensed. So at least for
8 this IPR, I mean, that's really the end of the argument.

9 Let's go to Slide 88. And I, again, just want to emphasize too that,
10 you know, DISH sent Mr. Ratcliffe, really, on a wild goose chase. They
11 instructed him to search for one product, the Voyager 2000, you know. If
12 you Google Voyager 2000 I can't even -- it doesn't even look like it was
13 related to ABR from what I could tell. And Mr. Ratcliffe clearly didn't do a
14 thorough search of BT's video streaming records because he had no idea --
15 he had never even heard of BT's flagship product, the FastNets product.

16 Let's look at that really quickly. I know it was presented earlier today.
17 Your Honors saw this slide earlier today. There's one thing that I want to
18 emphasize that wasn't emphasized earlier, is that FastNets was released in
19 2003. DISH admits that on page 26 of its surreply. So on page 26 of its
20 surreply, DISH admits that it was released in 2003, you know.

21 DISH makes two points, you know. I raised the 2003 date because,
22 one, in DISH's slide, DISH has a slide that suggests that FastNets wasn't
23 released until 2007. And I think what the argument is going to be is that
24 Leaning was filed in December 2001, FastNets came out in 2007. There was
25 six years in between, you know, and that's relevant to secondary
26 considerations. DISH admits in its surreply that FastNets was released in
27 2003. The more important point -- and let's go to the next slide.

1 The more important point is that, you know, the 2003 date is
2 significant because it predates DISH's patents. So while DISH tries to use
3 British Telecom as support for secondary considerations, we believe British
4 Telecom actually destroys those arguments. Every feature DISH claimed
5 was a unique characteristic was present in FastNets. So on Slide 90, this is
6 from DISH's POR at 37, they are describing what Mr. Major said was the
7 solution that he realized. And he describes the solution as fast startup
8 intelligence shift, different video qualities in response to changing network
9 conditions, continuous playback of content that would not freeze or buffer.
10 This is what the named inventor is saying was his solution.

11 Let's go to the next slide. And here again, this is, you know, just
12 showing where the FastNets' product in 2003 showed all of these features.

13 Let's go to Slide 92. And I want to address this, the -- this push versus
14 pull issue. I mean, this is DISH's only response, right, to the FastNets stuff
15 is that FastNets was a push and the patents are pull. First, you know, we
16 don't know. We don't know whether it was a push or a pull at the end of the
17 day because DISH never had Mr. Ratcliffe look, right? They found this guy
18 across the country and told him to look at one product and, you know, Aylo
19 found this. Mr. Ratcliffe didn't find patents, Aylo found it.

20 And so at the end of the day, we don't know what it is. But if you
21 look at the document that DISH cites in its surreply, I mean, these teach
22 clear features of a pull architecture. So there's a client buffering, and on the
23 right, you see trick modes, right? So trick modes is, you know, you're
24 jumping. It's like what Leaning talks about. You're jumping forward, you're
25 jumping backwards. That is a clear feature of a pull system. Because if it
26 was a push system, server's not going to tell the client what to watch. It's the

1 client saying, look, I want to do a trick mode. I want to jump forward, I
2 want to jump back.

3 Let's go --

4 JUDGE HUDALLA: And Mr. Sheng, this is --

5 MR. SHENG: Yes?

6 JUDGE HUDALLA: Just to be clear, the slide you're showing us
7 now, you didn't argue in the papers because this is responding to a surreply
8 argument; is that right?

9 MR. SHENG: Yeah. That -- that's exactly right. And it is something
10 interesting here, Your Honor, is that they cite in our IPR a document from
11 one of Fubo's IPRs. So this document right here isn't even in our record,
12 there was a lot of problems there with respect to this sort of thing that we
13 raised some objections to. But you -- you're exactly right. This is
14 responsive to exactly what -- and this next slide will actually show the figure
15 from this same document that DISH focuses on. They don't present these
16 disclosures here.

17 So let's go to Slide 93. So this is the figure that DISH cites from this
18 document, not the disclosures that I showed from the previous page. Again,
19 this document's from the Fubo IPRs. This figure doesn't say anything about
20 whether or not FastNets was a push or a pull system. But you know, the key
21 that I want to emphasize is at the end of the day, whether BT commercialize
22 this thing isn't relevant. And also, you know, the overwhelming weight of
23 the evidence, just, you know, when you talk about secondary considerations,
24 what FastNets had in 2003, I mean, they -- if at the end of the day, the only
25 difference was push versus pull, I think that's a big problem for DISH.

26 And so you know, that concludes my remarks on secondary
27 considerations. I'm running out of time. We had a Motion to Exclude.

1 We'll submit those on the papers. I think they're pretty straightforward.
2 They're arguments that Your Honors have heard in the Ogdon IPRs. So
3 unless Your Honors have any specific questions with respect to secondary
4 considerations or the motion to exclude, I'm happy to entertain them.
5 Otherwise, I will turn the time over to Opposing Counsel.

6 JUDGE HUDALLA: I don't think we have any questions. I just
7 wanted to mention for the record, too, we're aware of your objections to the
8 demonstratives as well, but I have you at 18 more minutes here --

9 MR. SHENG: Thank you, Your Honor.

10 JUDGE HUDALLA: -- Mr. Sheng. Okay, we can turn to Mr.
11 Williams. And Mr. Williams, would you like to reserve some surrebuttal
12 time?

13 MR. WILLIAMS: Yes, Your Honor. Let me reserve 15 minutes if I
14 could.

15 JUDGE HUDALLA: Okay. And before we get into your time, could
16 I ask you to respond to Petitioner's Counsel's request that the transcript from
17 the morning session be included in this case and also, I guess, just made part
18 of the record?

19 MR. WILLIAMS: Yeah, we have no objection to that, Your Honor.
20 Although I wonder if we should do it in both directions to be consistent?

21 JUDGE HUDALLA: Okay. Well, what I would suggest is, why don't
22 you reach out to Petitioner's Counsel for the morning session? They're
23 probably online today for this one as well. But if you could send an email to
24 the Board and let us know if they have any objections to that.

25 MR. WILLIAMS: Okay. Let me -- I'll make a note to do that. Okay.

26 JUDGE HUDALLA: So with that, you may begin, Mr. Williams.

1 MR. WILLIAMS: All right. Great. And can you see the
2 demonstratives now or not?

3 JUDGE HUDALLA: We can't -- I think maybe Judge Dang might be
4 able to, so you at least got that --

5 MR. WILLIAMS: Okay. That's fine.

6 JUDGE HUDALLA: Yeah, we can --

7 JUDGE DANG: I can see the demonstratives and I can also hear you
8 clearly.

9 MR. WILLIAMS: That's great. Okay. That's great. All right. Well,
10 let me -- yeah, I don't see the need to retread a lot of the stuff we did this
11 morning given the similarities. But there are some things I want to just point
12 out relating to the arguments we made this morning.

13 First is that -- so let's see. With respect to, you know, which claims
14 require this same continuous presentation element. So here, that's in this
15 petition, it's going to relate to Claims 12 through 20. So that set of claims do
16 require that you shift to achieve continuous presentation at the highest
17 available, you know, level or highest level sustainable at the time. That for
18 all intents and purposes, those for claim limitations have the same meaning
19 in this pattern as it does in the ones we spoke of this morning that, you
20 know, the difference between continuous playback and continuous
21 presentation, I think is, you know, not relevant to any arguments in the case.
22 You know, continuous playback and continuous presentation would mean
23 the same thing. Whether you're talking about audio or video, you need
24 essentially, as we talked about this morning, you have to be uninterrupted.
25 That's the clear meaning of that term as it -- as it's been by persons of skill in
26 the arts.

1 So that -- with that, let me just get into what the petition here -- how
2 the petition here treated that element of continuous presentation that's shown
3 on our Slide 25. And as you'll see for this element --

4 JUDGE HUDALLA: So with that --

5 MR. WILLIAMS: Yeah?

6 JUDGE HUDALLA: Sorry to interrupt. Before you get into that,
7 could I ask you to respond to Petitioner's Counsel's argument earlier that
8 they say that this is -- this could be rendered unpatentable just with the audio
9 teachings of Leaning. So basically there's a difference between the two
10 cases in the -- in that this one only recites more generally, I guess, it's media.

11 Could you respond to that and does -- and let us know whether that
12 cuts back on some of your arguments that you talked about this morning?

13 MR. WILLIAMS: So we'll start with the first premise. I think it's
14 true that this claim is broader and that it's not limited to video. I think the
15 term it uses, digital content, if I'm remembering correctly. And I would
16 concede that would include audio.

17 How does that address the arguments we made this morning? It's not
18 -- it's going to affect some, but not all. So I'll try to, maybe as I go through
19 my comments here, I'll sort of explain what I mean by that. But in general,
20 it's our view that even if you were to assume that the Petitioner was relying
21 only on the audio embodiment, which I'm not sure -- I'm not conceding that
22 that's a fair reading of the petition, by the way. Because the petition does
23 certainly map to a lot of things about video and discusses Leaning's video
24 embodiments in some detail.

25 But even if you assume that that's what they intended, that they had an
26 alternative read that was only to audio, we're still going to run into the same
27 problem of the clear buffer problem is still going to be there. Leaning's

1 audio embodiment, it's even more clear in his audio embodiment that he
2 doesn't get rid of the clear buffer step. All he gets rid of is the test to check
3 whether the buffer is empty before he goes through his process of doing the
4 step-up or step-down functionality. So it's not going to -- it is not going to
5 impact the arguments in that sense, because we're still going to have this
6 clear buffer problem, but it will impact some of the, like, reply modifications
7 that have to do with specifics of video encoders. So like, for instance, this
8 whole thing about the I frames and the B frames we talked about this
9 morning would not, obviously, be relevant to audio directly. Okay.

10 JUDGE HUDALLA: Thank you. Yeah. If you could just mention
11 those differences as you go along, that would be great.

12 MR. WILLIAMS: All right. I'll try to do that. But again, beginning
13 with the petition for this element of continuous playback, the kind of key
14 element that's in 12D, there is no discussion -- there's no analysis in the
15 petition at all, and says, you know, the petition reads literally Leaning
16 teaches 12D, C, 1D. Well, 1D doesn't have the continuous playback element
17 so -- or excuse me, the continuous presentation element in it. So there's
18 really nothing in the petition that would explain how this is met other than
19 through Leaning's teachings.

20 Okay. So Leaning -- presumably their argument then is Leaning
21 teaches it. You don't have to modify Leaning to get there, to get the
22 continuous playback. The problem is that, as we're going to talk about, of
23 course, you do have to make some important modifications to Leaning.

24 So moving next to Slide 26, we have there a couple excerpts from the
25 petition, and again, the flow chart that shows up in the petition. As you'll
26 see there again for some of the claim elements, the Petitioner expressly relies
27 on Leaning determining that the buffer is empty. That's a step in the

1 Leaning flow chart that the Petitioner relies on at page 28 of the petition. It
2 also, you know, relies on Leaning's step-up and step-down functions as-is.
3 They don't say in the petition that you would do these, except without the
4 clear buffer steps that are both part of those -- part of both of those
5 functions. They just say, you know, you do Leaning's step-up and step-
6 down functions.

7 And then as we talked about this morning, and I think everyone
8 concedes now, when you clear buffer in Leaning, you're going to run into a
9 discontinuity because anytime that buffer is empty, it's going to have to be
10 refilled. And the time it takes that buffer to refill, nothing could play on the
11 screen.

12 And, in fact, it's at least refilled up to the TP point, right? So Leaning
13 expressly says, I'm not going to play back -- if the buffer is below TP, I'm
14 not going to play anything until it gets to TP. So if the buffer is empty,
15 you've got to wait until that buffer fills up with TP before you're going to
16 start playing back -- TP seconds worth of data, I should say, before you're
17 going to start playing back anything.

18 So there is built in to Leaning's rate change steps, whether you step up
19 or step down, every single time, you're going to have this delay in playback
20 because it's not going to have data to play until it goes and gets the new rate,
21 puts it into the buffer, and then can begin to play it back.

22 So that is still true of the audio embodiment. And it's still a problem
23 with the petition in this case as well, that they rely expressly on those same
24 steps of Leaning, on those same functions as written, without modification.
25 And only later do they now come back and say, well, actually, you wouldn't
26 have to do the clear buffer step at all. So that is a modification that's new.
27 And it's inappropriate to raise a modified version of the reference in a reply.

1 Case law on that is clear, and we've talked about it. You know, in the papers
2 we cite Takeda v. McNeil, but many other cases as well that I think we cite
3 also in our Motion to Strike.

4 Let me move on to -- it's probably useful in this regard to talk about
5 Slide 39 of our demonstratives because we have an excerpt there from
6 Leaning that I think is very enlightening. This comes from -- and if you
7 don't want to look at that, you can look at Leaning, which I think it's at
8 column -- sorry, page 12, around line 30. So this is a key paragraph of
9 Leaning. What is -- what Leaning is talking about here is the size of these
10 subfiles, right? How big they're going to be. And keeping in mind that you
11 need a -- you know, you're going to need a certain number of those sub files
12 in the buffer until it exceeds TP seconds before you're going to start playing
13 back.

14 And so what does he say about the size of these subfiles? He says,
15 Excessively large subfiles are disadvantageous in requiring a larger buffer
16 and in causing extra delay when starting play and/or when jumps or rate
17 changes are invoked. What is the -- what is my point here? My point is that
18 Leaning is teaching you right there that, hey, that clear buffer step that's in
19 my step-down and step-up functions, that's not a mistake. I recognize that
20 by doing that, I'm going to have a delay. My goal is to not make that delay
21 bigger than it needs to be, okay? So he expressly teaches that this is a delay
22 that's inherent with rate changes of any type, up or down. So he's trying to --
23 he's trying to get extra delay out of there, of course, which, you know, kudos
24 to him, but he doesn't get rid of the delay at all. And that's the key feature of
25 this patent. Certainly of Claim 12, is getting rid of that delay so that you can
26 have continuous playback. And Leaning simply doesn't have it.

1 So the only way to get there is to modify Leaning. You're going to
2 have to change his teachings. His idea was you would have some delay
3 every time you do a clear buffer. Now you're going to have to explain why
4 you wouldn't. That requires a modification. And the petition never provides
5 the evidence or rationale for it, certainly not in their petition, and even in
6 their reply when they begin to make those modifications, we think the
7 evidence is still lacking.

8 And I'll get to that now unless the Board had a question about that?
9 No. Okay. I guess just before I do, maybe I should pause on the claim
10 construction question. I don't think there was anything came up that was
11 different there than about the cases this morning. Other than, as I
12 mentioned, we think the -- although the two claim terms are slightly
13 different, we think they have the same meaning here. And in both cases, you
14 know, it is not -- it is not a -- this claim -- the way this continuous playback,
15 continuous presentation element works, the point is not that oh, it would be
16 nice to achieve this. This is a requirement to practice the claim. You're
17 going to have to shift rates with continuous playback.

18 Now we'll get -- we'll -- we're coming back when I talk about the new
19 player. We'll talk about again, I think Judge Hudalla asked some questions
20 about this in both proceedings now about how many of these are required,
21 and we'll get to that. But again, you're going to have to have continuous
22 playback for at least some of these rate changes, that has to be true. And in
23 Leaning, it would never be true. So you know, if there's no squeeze play
24 going on here, because Leaning -- every single time, it's clear, he has to
25 change, he has to clear the buffer, it has to refill, that has to cause a delay.
26 So certainly, Leaning as written, which is the theory in the petition, doesn't
27 get you there.

1 All right. Now let's get back into this. The problems with Leaning. I
2 think with respect to playback, I don't have anything further more to say
3 about that than we did this morning. Again, it's the same issue. And again,
4 we have that EP opposition submission where, you know, Aylo, so it's even
5 the same party here or at least their affiliate, you know, has already sort of
6 interpreted what's going on in Leaning as creating this discontinuity. So
7 they agree with that there. There's no -- there's -- I don't think there's really a
8 dispute about it here, that when you have to refill the buffer, there would be
9 a delay. The only question is, you know, would you do it or not? And that's
10 what the -- that's what the whole argument about the modifications are.

11 But the -- just while I'm on the EP opposition, I think I heard a
12 comment that we had let that go. As I understand that, that deadline to
13 appeal has not yet expired. I'd also point out that EPO's decision has several
14 nuances to it that wouldn't be relevant under American law. So the fact that
15 we appealed or don't appeal that decision, I think, is totally irrelevant to the
16 issues before the Board. But I don't believe that, as I understand it, from my
17 client, the appeal deadline has not yet expired.

18 Okay. So let's then move to the reply theories and just very briefly
19 talk about those differences. I think the reply theories here are actually
20 slightly different than in the cases this morning. So I do think it might be
21 worth just mentioning what those are for a moment. I think here they're
22 more explicit. They get into a little more explanation about why they think
23 Leaning's clear buffer instruction is not an optional one.

24 As we just talked about in Slide 39, there is never a any discussion in
25 Leaning about avoiding clearing that buffer. The only discussion there is in
26 Leaning is about not doing the step of checking to see if the buffer is empty
27 before you move to the step-down function. Once you get to the step-down

1 function, it's clear that there's a clear-buffer command, it's written right there
2 into the flow chart. And as I just -- as I just pointed to you in that section, I
3 think Slide 39 it was, you know, Leaning is clear that in a rate change,
4 there's going to be a delay. So the only way to avoid this problem with
5 Leaning is to get rid of that clear buffer step. So it's not Leaning teaching to
6 that, you're going to have to do something extra, you got to bring in some
7 new motivation to get rid of that, show that there's a way to change Leaning
8 to make that work and that a person would've expected success. None of
9 that evidence is in the petition, nor for that matter is there any discussion of
10 expectation of success or what the actual modifications would be in the
11 reply. It's just sort of an assertion that it's there and you could do it, but that
12 is not enough.

13 Okay. They do propose a -- so in their reply, Petitioners here do
14 propose using video cards. So, sort of built into Petitioner's own theory
15 about this case seems to be that you would do -- you would practice this
16 claim through a video embodiment. That is in their reply. And, you know,
17 again, for the same reasons you talked about this morning, Dr. Jeffay
18 explains why, you know, you wouldn't be using a software video codec,
19 which is what they're proposing here as well. Leaning is all about using a
20 video card with a hardware device. And for the reasons we talked about this
21 morning, there would be no reasonable expectation of success that you
22 could, you know, pack in two different bit rates of video data in a video card
23 without doing a reset.

24 As to their second theory, Petitioner here does have a whole theory
25 about encoding subfiles to begin with I-Frames. This is again, a video
26 specific theory of how the modified version of Leaning would practice the
27 claims and it suffers from the same problems we spoke about this morning,

1 which is, you know, when you have compressed files with -- especially in
2 the case of these MPEG files, that would be small enough to -- the person of
3 ordinary skill in the art might possibly expect you could stream them, you
4 would run into the problem of not -- of mis-tracking because you -- you'd be
5 encoding a B file against two different bit rates, which would fail.

6 JUDGE HUDALLA: Mr. Williams, are you on Slide 43 making
7 those assertions or --

8 MR. WILLIAMS: I think we have something like that on Slide 43
9 and 44. I wasn't -- I didn't have the slides up, but do you have a question
10 about that slide, Your Honor?

11 JUDGE HUDALLA: I just am trying to follow the presentation.

12 MR. WILLIAMS: Oh, you're trying to see where I am. Okay. I'm
13 sorry. I will try to tag this more directly to my slides just so you can follow
14 along. But yeah, 44 -- 43 is at one place, but 44 is where you see the B files
15 and the mis-tracking that we spoke about this morning.

16 JUDGE HUDALLA: Petitioner objected, I think to 43, some of the
17 things on 43 not being in the briefing. Do you have a response to that?

18 MR. WILLIAMS: Let me just -- I don't have their objections in front
19 of me, so I have to -- give me one second.

20 JUDGE HUDALLA: I think it's, they said on 43 the -- there's an
21 assertion there, The petition expressly relies on Leaning's teaching of first
22 encoding, then partitioning. They said that's not in the briefs. And I believe
23 they said the Leaning cite at the bottom of that slide is not in the briefing
24 either.

25 If you want to come back to it on surrebuttal that's fine.

26 MR. WILLIAMS: Yeah. I can, but I know we address this in our
27 surreply at 14, 15. So I got to go back and look at our surreply and see what

1 we were talking about there. But I don't believe it's a new -- I don't think it's
2 a new argument. And --

3 JUDGE HUDALLA: Why don't you come back to it on surrebuttal
4 then, and we can talk about it again?

5 MR. WILLIAMS: Yeah. Yeah. But I mean, certainly what's on the
6 petition page 24 is there, you see what it says, but I guess the question is, did
7 we previously cite to their petition in our surreply? I'm not sure, but
8 certainly we made the argument that, you know, Leaning runs into this mis-
9 tracking problem precisely, because once you've -- the problem with doing it
10 in this -- just to be -- let me just -- we can come back to whether this was
11 properly raised or not. But just so you understand what the argument is, the
12 problem that's going on here with Leaning is that Leaning's idea is to take
13 the actual file, whatever it is, and put it into different bit rates, and then split
14 it up. And when you -- and by putting it in different bit rates, I mean, you
15 know, do the compression that you're going to do, whatever it is in this case,
16 of, you know, MPEG or MP3, and then split it up.

17 And with respect to video, that runs you right into this problem of, if
18 you try to go in that order, you're going to -- you're automatically going to
19 get mis-tracking, and it's why Leaning doesn't do that in his bridging files.
20 He has a totally different solution to this problem.

21 Our solution that's in the patent is just to do this in the other order. So
22 you first split the file, and then you encode it at your different bit rates, and
23 then you don't run into any of these problems. So that's the solution. That's
24 one of the solutions, obviously, it's in the patent. It's nowhere in Leaning.
25 And so you're not going to be able to find that anywhere in the prior art that
26 they're relying on.

1 JUDGE HUDALLA: Well, I think it's more if we talk about the
2 possibility of encoding each one as its own kind of frame?

3 MR. WILLIAMS: Right, yeah. Well, and so well that -- that's a -- so
4 then there was a different solution that we talked about this morning where
5 you do this encoding that -- where the frames don't depend on each other at
6 all. And then the order becomes less important, right? Because then you're
7 not going to run into this problem of mis-tracking.

8 JUDGE HUDALLA: Okay.

9 MR. WILLIAMS: Yeah. So there's a couple -- anyway, so there's a
10 couple of solutions that you could think about to this problem I -- you know,
11 sitting here today with hindsight, I can tell you the number of ways you do
12 this. You do it the way, you know, the Move patent suggests, which is slice
13 up the video and then encode those slices into different bit rates. So you do
14 multiple passes of encoding on the -- on those slices. And that way you
15 could have, you know, one file that's at one bit rate, another file's the other
16 bit rate, and the content of those two files would be the same and they could
17 be decoded no problem, right? That's one solution.

18 Leaning teaches a different solution called bridging files where he
19 does -- he doesn't slice and then encode. Instead, he encodes, slices, and
20 then tries to add a feature -- add a new step of creating bridging files to help
21 move between bit rates. And then he mentions there's other ways to do it,
22 like not compressing between frames at all, which avoids the mis-tracking
23 problem. And again --

24 JUDGE HUDALLA: What he says is that --

25 (Simultaneous speaking.)

26 MR. WILLIAMS: Yeah. No, he -- yeah, he does. And as we spoke
27 about this morning, the problem with that embodiment, if you were going to

1 adopt it, is it still runs into the clear buffer. This doesn't solve any of your
2 clear buffer problems. This just makes it so that you can now put into the
3 buffer two different bit rates files and not run into mis-tracking, which is not
4 an idea that Leaning has, right? He doesn't -- he never says, oh, and if you
5 do that, then you can put in two different bit rates into my buffer, right?
6 Leaning is all about -- Leaning works from the premise that man, it's a
7 problem that this buffer could have multiple bit rates. So I'm going to clear
8 it out before I do a rate shift, every time. That's his whole mindset.

9 It's clear from what I just showed you in Leaning's teachings that he
10 never has this idea to eliminate the clear buffer step. If you had adopted his
11 approach of having uncompressed video files, that sentence that you're
12 alluding to, it's possible that you wouldn't have had the buffer problem and
13 you could have got away without clearing the buffer, but Leaning never says
14 that. So that idea has got to come from someone else with some motivation
15 to do that. In our view, that's pure hindsight. And it's certainly not the
16 petition we have in this case, right? If that had been the argument in the
17 petition, we would have had a whole different case, right? It would've had
18 to develop arguments in response to that theory. And we very likely
19 would've had a much different presentation of the evidence, but we didn't.
20 Petitioner was not relying on that theory in the petition. And in any event,
21 even if they were, they still never explained why you didn't do the clear
22 buffer step, right? So they don't -- they didn't provide any evidence or
23 explanation for why you would skip that step, and that's a big problem for
24 them.

25 Okay. I think with respect to the other modifications they make,
26 they're very similar to the ones we talked about this morning. So I don't
27 have anything to add. And they both still run to the -- they apply equally to

1 audio or video this problem of, you know, changing the threshold. The
2 playout time doesn't solve the problem, because you -- no matter how or
3 where you set that threshold, you're still going to have a delay while you
4 wait for that threshold to be exceeded as you refill the buffer. And then as
5 we talked about this morning, Leaning never says that clearing the buffer
6 means just playing it out. He's very explicit that that means getting rid of the
7 data in the buffer and then refilling it.

8 JUDGE DANG: Counsel, can I ask you a -- I'm on page 8 of Leaning
9 and it says -- it's under the part that talks about initiation of a rate change.
10 Oh, sorry. Can you hear me?

11 MR. WILLIAMS: Yeah, that's better. Okay. There we go.

12 JUDGE DANG: Sorry. So I'm under the part, initiation of a rate
13 change. If the buffer ever empties, is that first --

14 MR. WILLIAMS: You're at what line? Just what line are you?

15 JUDGE DANG: Oh, I'm sorry. 18, line 18.

16 MR. WILLIAMS: 18. Okay. I see you now. Okay.

17 JUDGE DANG: Okay. So if the buffer ever empties, that means the
18 buffers -- there's zero content, right?

19 MR. WILLIAMS: That's right. Yeah.

20 JUDGE DANG: Okay. So I guess the part that I'm having trouble
21 with is then, what is there to clear in the buffer, right? Because it --

22 MR. WILLIAMS: Yeah. Yeah.

23 JUDGE DANG: So sorry. I'm just having a hard time understanding
24 that.

25 MR. WILLIAMS: Yeah. And it -- and so let's back up. The
26 initiation of rate change is triggered if buffer is empty and the measured rate
27 is less than the current rate, and the measured buffer low percentage exceeds

1 has dropped the threshold. Just I'm going to answer your question, but I just
2 want to back up to make sure you -- we're all on the same page.

3 So what this is describing in text is the same thing that you see on the
4 flow chart, which is on -- this part of the flow chart is on page 10 if you use
5 the numbers at the top of Leaning, or 11 if you're on the PDF pages. And
6 what he's describing there is two up from Input of User Commands. There's
7 this check he does of if buffer fullness equals full, and measure rate is less
8 than current rate, and buffer low is greater than Td, go to step-down.

9 JUDGE DANG: Okay.

10 MR. WILLIAMS: So that's what he's talking about. He's talking
11 about doing this thing. So your question, which I guess is a good one is, if
12 buffer fullness is zero, then what's in it when you clear it? And the answer
13 is, nothing. If it's zero. But the next thing you're going to do if it's zero and
14 the other conditions are met, right, then you're going to go to step-down.
15 And step-down, the first step would be clear buffer, but there'd be nothing
16 there to clear, which I think is what you're questioning about. Which I think
17 is true that it is possible you could get into that state in Leaning where your
18 buffer is empty and you know you need to make a rate shift. So you go to
19 the step-down and you do it.

20 Let's say that happens. You're going to do -- what you're going to do
21 then in the step-down rate is get yourself reconfigured to go to the different -
22 - you're going to set the new rates basically, and then change which URLs
23 you're going to start asking for. And then you're going to go back and ask
24 for the next URL, hit that new rate. And then you're going to wait until the
25 buffer gets filled with enough of the new data rate to start playing back.
26 Because it only starts playing back -- you only get to the playback state if

1 your buffer is above T_p . So if you go through that flow, you're going to
2 have this delay of the buffer getting refilled.

3 Now you might ask, why is clear buffer there if you're always going to
4 check with buffer equals zero? And I think the answer is because he also
5 says you don't have to have buffer equals zero, you could skip that step,
6 right? So he indicates that there's -- it's possibly to eliminate the test of
7 whether buffer fullness equals zero before you decide to step-down, but you
8 still delete the buffer when you go to the step-down. So in that case, there
9 would be something in the buffer, but you're going to clear it because you
10 want to start getting the new data rate. That's how Leaning describes his
11 invention.

12 JUDGE DANG: Okay. Thank you.

13 MR. WILLIAMS: Yeah. And the only place that -- so the only -- so
14 Leaning never ever says, don't do the clear buffer step when you're changing
15 -- when you're changing rates. He never says that or even suggests it. He
16 does say explicitly that you could skip the test of whether buffer fullness
17 equals zero before you go to step-down. But that's not the same thing as
18 saying you don't clear the buffer. He never had that idea. And to do that,
19 you would need a way to -- if you're going to do this invention without
20 clearing the buffer, you got to have a way to stuff different data rates into the
21 buffer and make it work, and Leaning never tries to do that. He doesn't have
22 that solution. It's just not there. So Petitioner is just trying to find it where
23 it's not.

24 Okay. I can't remember if we talked about -- let me just move on to
25 do -- out of order. Let me not do it out of order. Let me just move my
26 outline around. Let's move on to the multiple TCP connection in Claim 16, I

1 think with the was -- how much time is left? Okay. Okay. We have plenty
2 of time.

3 JUDGE HUDALLA: Mr. Williams?

4 MR. WILLIAMS: Yes?

5 JUDGE HUDALLA: Before you do that, I just wanted to, I think, are
6 you done now talking about Claims 1 through 12 on the unpatentability front
7 at this point?

8 MR. WILLIAMS: No. Sorry. Wait. You said 1 through 12?

9 (Simultaneous speaking.)

10 MR. WILLIAMS: I have arguments about -- I have not -- I don't
11 think I've even talked -- I don't think I've begun to talk about Claims 1
12 through 11 yet. So I was going to come back to those next if -- after I finish
13 --

14 JUDGE HUDALLA: Okay.

15 MR. WILLIAMS: -- all the Claim 12 arguments.

16 JUDGE HUDALLA: That's good.

17 MR. WILLIAMS: If -- okay. Yeah. That's what I was just debating.
18 And I just changed my mind to -- I was going to go to Claim 1, but I think
19 maybe let me just finish up the -- these continuous playback claims and then
20 I'll turn to that.

21 Okay. So with respect to the multiple TCP connection requirements
22 of Claim 16. I would say, and we -- by the way, if we're looking for a slide
23 number, we could start to kind of starting at Slide 54. What this claim
24 requires, by the way, is not just multiple TCP connections, but, you know,
25 using them to request sub parts of a streamlet. So basically, you know, the
26 streamlet itself is pretty small. This is like a four second. But, you know, if
27 you're streaming a 30-minute video, you know, the streamlets are four

1 seconds. This is saying, take those four seconds and split those up and then
2 use multiple TCP connections to actually, you know, access parts of that
3 subfile. That's what's going on here in Claim 16.

4 If Leaning doesn't have any notion of that. Leaning request each
5 subfile one at a time. That's what Slide 54 is showing you. Nor does
6 Leaning ever really talk about multiple TCP connections anywhere in his
7 teachings and his -- you know, Dr. Jeffay, in his declaration you'll see talks
8 about this and what was state of the art at the time. So -- and as he explains,
9 you know, by the time of Leaning HTTP supported persistent connections so
10 that you wouldn't have been making repeated requests for new connections,
11 at least not without, you know, doing that on purpose.

12 But in any event, Leaning never talks about this at all. All he says is
13 HTTP with, you know, which, you know, we can see that. We can see that
14 through HTTP, you would also be using TCP, but it never does. He said that
15 you would need multiple TCP connections much less that you would use
16 them to grab subparts of individual files. So I think Leaning is just missing
17 it entirely.

18 And then so let's go to, I guess, Gamble is how I don't know Gamble
19 is how we're pronouncing this secondary reference that a Petitioner raises
20 the issue with respect to this reference. Well, there's many issues with
21 respect to this reference, I guess, but first it's about -- and Slide 56 has sort
22 of the figure one of Gamble. So you can maybe -- so it makes sense if you
23 look at that figure. But this is just a -- this is a peer-to-peer transfer system
24 for large files. So you know, let's say you want to download a matrix from
25 your buddy, that's what this system is about. And what you're going to do is
26 you're going to get the whole file.

1 It's not -- this is not a streaming file system in a way that Leaning is --
2 and it's all about transferring these large files, right? So it's going to take
3 that whole file. It's not going to try to give you an adaptive bit rate version.
4 It's going to give you the whole file and it's going to try to send it to you,
5 you know, as efficiently as it can by splitting it up into TCP, you know,
6 connections that will save some network overhead. So you know, we can
7 see that the idea of multiple TCP connections for a large file is in Gamble,
8 but there's no explanation of how you make that work for these small files or
9 that a person of -- or skill in the art would've expected it to work with these
10 small files of Leaning.

11 And again, if you look on Slide 58, you'll see that, you know, Leaning
12 compared to Gamble what those two teachings are just very different. So --

13 JUDGE HUDALLA: Mr. Williams, that sounds like an incorporation
14 argument to me. I mean, I think they're just using Gamble to bring in the
15 multiple TCP connections, aren't they?

16 MR. WILLIAMS: Yeah, I -- I'm not -- okay. You know, fair enough.
17 But -- so -- and I totally agree with you, it's not appropriate to say we have to
18 bodily incorporate, but you do have to as a Petitioner, explain exactly how
19 you're going to take this teaching of multiple TCP connections for huge files
20 and apply it in Leaning system that's taking these small files and doing them
21 one at a time, you know, as rapidly as it can. Would -- and would a person
22 of ordinary skill in the art have thought that would work? I mean, it's not
23 obvious on the face that they would and Petitioner provides no evidence that
24 it's true.

25 You know, exactly -- you know, where do you put this technique into
26 Leaning system? They don't say, and again, Gamble is not -- it is not a -- it's
27 not a situation where the client is requesting these individual files. It's -- it

1 doesn't even explain where the request comes from in Gamble. It just
2 assumes that you've got a way to make a request for the file, which
3 presumably could have just been some sort of file structure that you see
4 because, hey, it looks like my friend's got this file. You get a copy of it.
5 This is not making -- this is not a client making individual requests.

6 So you've got to somehow bake that idea, you've got to take Leaning,
7 change it, so that it can do the thing that Gamble is teaching. And this is the
8 problem we have with the combination, they just don't meet their burden to
9 show how you would do that or why you would expect success. So it's not a
10 bodily incorporation. I'm not saying you literally take Gamble and have to
11 splice it in, but you do have to do the work as a Petitioner of explaining how
12 the person of ordinary skill in the art would stitch these things together to
13 make a system that would be expected to work.

14 Okay. With respect to the range requests, yeah, we heard some
15 questions about that. Yeah. I think the Board understands our view. This is
16 entirely new theory and the reply with no support at all in Leaning. Leaning
17 never talks about range requests and it -- but again, you would still have the
18 same problem, how do you use this range request idea to implement multiple
19 TCP connections for single files? You need to do -- you need to do more
20 work than just saying there was this thing that existed at the time.

21 JUDGE HUDALLA: Would a person of ordinary skill in the art have
22 known looking at that HTTP 1.0 reference about range requests?

23 MR. WILLIAMS: So first of all, I think our view is that Leaning is
24 talking about 1.1 -- Leaning, about HTTP 1.1, not 1.0 because by the time of
25 Leaning --

26 JUDGE HUDALLA: Sorry.

1 MR. WILLIAMS: -- you have already advanced at 1.1, but -- so I
2 don't want to let that go. But I think you're -- the response to your question
3 is we haven't contested that. I don't think we're saying a person of ordinary
4 skill in the art wouldn't have seen it if they had read the HTTP reference.
5 What we're saying is, the Petitioner hasn't provided sufficient motivation
6 that they would've turned to the -- they would've, you know, buried in that
7 spec, known of that feature and thought, aha, I should use that here with
8 respect to Leaning to improve Leaning, especially when Leaning itself didn't
9 ever talk about doing that or have any notion that that would improve his
10 system. So that's got to come from somewhere and, you know, it can't just
11 be because in retrospect it seems like that's a good idea that would get you to
12 the claim.

13 JUDGE HUDALLA: But you would acknowledge that a person of
14 ordinary skill in the art would've known about basic HTTP requests and that
15 sort of thing at the time of the challenged patent?

16 MR. WILLIAMS: Yeah. I know that -- we haven't conceded that
17 making a range request would be the same as a basic HTTP request, but we
18 haven't contested that a person of skill in the art, you know, could have seen
19 a range request if they had looked at the spec.

20 JUDGE HUDALLA: So you're making a distinction between, say,
21 like, a get request and a range request, something like that?

22 MR. WILLIAMS: Yeah. Correct. Yeah. Yeah, correct.

23 JUDGE HUDALLA: What's your basis for that?

24 MR. WILLIAMS: I just don't -- well, I mean, it's not -- it's
25 Petitioner's burden to show that that was within the level of skill in the art
26 and the people would've known about it. And I haven't -- you know, we
27 haven't conceded that they would. All we -- all I've said is that, yeah, I --

1 I've -- I looked at the spec and I saw it when it was in there. So a person of
2 skill in the art presumably would've been aware of it, but I don't -- the way
3 you characterize it as being a basic HTTP request, we haven't conceded that
4 get and range are the same thing, I guess, is what I was trying to say.

5 JUDGE HUDALLA: Okay. I acknowledge that it is Petitioner's
6 burden. I just -- I'm trying to understand why you think there's a difference
7 between the two of them?

8 MR. WILLIAMS: Oh, I just don't think it's automatically true that
9 you do a range request every time you do an HTTP request for a file. That's
10 what I was trying to suggest.

11 JUDGE HUDALLA: Okay.

12 MR. WILLIAMS: I don't think that's the basic -- I don't think that's a
13 basic HTTP request. I think it's -- I think it's an -- I think it's an additional
14 implementation of HTTP that lets you do a more advanced thing with HTTP
15 than a basic HTTP request.

16 JUDGE HUDALLA: Okay. I understand. Thank you.

17 MR. WILLIAMS: Okay. All right. I think I'm now going to turn to
18 the arranging limitation in Claim 1, unless -- I can come back to objective
19 indicia at the end, but just to finish up the claim mapping issues did -- unless
20 you had any other questions about Claim 12 or the dependents? Hopefully,
21 I've covered them all. Okay. Okay. So for the arranging that's in Claim 1,
22 which is -- so our issue here with respect to Leaning, is that Leaning just has
23 no notion and no need for arranging, because it's only requesting one at a
24 time.

25 And as he says, he expects to receive them in order. So there's just no
26 need for him to do arranging. So we don't we don't think you can find this
27 arranging feature in Leaning. It's got to come from somewhere else. Now,

1 Petitioner has pointed to some in reply another portion of Leaning that has
2 another embodiment of Leaning having to do with live video. And what
3 Leaning says there is with live video, if I get -- if I get a file that is clearly
4 older than the one I'm currently playing, I'm going to discard it, which
5 makes sense because it would make -- what else would you do with it?
6 You're already past that point in the video now.

7 That says nothing about arranging the files. He never says that you're
8 arranging the files. He's just using this test to see if I should throw this one
9 out or not. So if you go read those sections of Leaning that Petitioner is
10 citing to, that's all that's going on there. It doesn't solve the problem of
11 where -- you know, where does Leaning teach? You have to arrange these
12 files in order. It's just not there. So that's the problem we think with Claim
13 1. If there's questions about that, I'll just touch upon some of the objective
14 indicia issues.

15 JUDGE HUDALLA: Can I just ask about that? That's your only
16 argument as to Claims 1 through 11; is that right?

17 MR. WILLIAMS: I -- I'd have to go. I mean, I want to say, I think
18 so. I'm not going to -- I don't want to waive anything that's in her POR. I
19 think that's it, Your Honor. But -- and I don't think you're trying to trick me,
20 but I do want to just make sure there was nothing else.

21 I believe that's right. That is our argument with respect to the Claim 1
22 set. It's the missing arranging step, or arranging limitation.

23 JUDGE HUDALLA: Okay. Thank you.

24 MR. WILLIAMS: Yep.

25 JUDGE DANG: And Counsel, you have just under ten minutes
26 before you go into rebuttal time.

1 MR. WILLIAMS: Okay. Yeah. Great. I think we're right where we
2 to be. I was going to move on to objective indicia. Okay. So Judge, you
3 know, I heard your comments about the presumption of nexus. I think I
4 understand where you're coming from. So I'm just going to focus on the
5 direct -- the evidence of direct nexus. Is that -- yeah, I don't know how -- I
6 don't know how we're saying that. If that's the right way to say this in terms
7 of the federal circuit doctrine at the moment. But of the two ways to get to
8 nexus, one is the presumption, and then this is the other one. So I want to
9 talk about the other one.

10 JUDGE HUDALLA: Well, I appreciate that. But before we do, I just
11 want to ask you, since you've only presented say some, you know,
12 coextensive claim chart as to Claim 1, isn't that fatal as to your evidence of
13 presumption of nexus for Claims 12 to 20?

14 MR. WILLIAMS: It weakens the argument. It's not fatal. And let
15 me just explain why. And this is something to do with the way this issue got
16 teed up from the Ogdon IPRs as well. As you recall, those are IPR. The
17 claims in those IPRs did not include the continuous presentation element like
18 Claim 1. As we argued there, the streamlet was obviously incredibly
19 important to the commercial success of the Move player and getting -- you
20 know, creating client different approach with streamlets.

21 We still think that's important. I think it's less persuasive here just
22 given that Leaning obviously gets very, very close to a streamlet, whereas,
23 you know, we don't think that was at all present in the Ogdon IPR. So you
24 know, I don't want to say that it's necessarily fatal to our evidence of
25 presumption because we still think that the streamlet is kind of the key to
26 unlocking all these features. But we certainly agree that the continuous
27 playback feature is certainly much more important in understanding how the

1 claims distinguish over Leaning, which is, you know, the primary reference
2 presented here.

3 JUDGE HUDALLA: Let me ask you a bit of a different way. Do you
4 have any analysis of co-extensiveness as to Claims 12 through 20 in the
5 record?

6 MR. WILLIAMS: Okay. So we have to talk a little about what co-
7 extensiveness means to you, because I think it might mean something
8 different. The way I understand the Federal Circuit's co-extensiveness law,
9 the issue is we as the Patent Owner need to show that the claim essentially
10 reads on our product and that product is not a -- and what's claimed is not a
11 component or subcomponent of that product.

12 In other words, what we claimed here was a media streaming client,
13 and that's what the product is that we're showing was, you know, successful.
14 The fact that there are other unclaimed features, I think, does not
15 automatically eliminate the presumption of nexus. So I think as a matter of
16 law, we were still entitled to rely on Claim 1, even though there is another
17 unclaimed feature of continuous presentation in Claim 12. So we wouldn't -
18 -

19 JUDGE HUDALLA: So you're suggesting we need to go into the
20 Claim analysis and try to parse out things that are common with Claim 12.
21 Is that your suggestion?

22 MR. WILLIAMS: I'm not sure I understood the question. What I --
23 but let me try to answer it this way.

24 JUDGE HUDALLA: Let me --

25 MR. WILLIAMS: Okay.

26 JUDGE HUDALLA: -- rephrase the question.

27 MR. WILLIAMS: Yeah.

1 JUDGE HUDALLA: You've just said you don't, you know -- I'm
2 asking you about your co-extensiveness analysis for Claim 12, let's say
3 Claim 12. You've provided a claim chart for Claim 1, not Claim 12. So at
4 this stage, I'm looking at it and I'm seeing -- saying, I don't see any kind of
5 analysis of co-extensiveness. And I think what you just said to me a
6 moment ago was, oh, wait. There's some -- still some common features in
7 Claim 1 and Claim 12. So you still have some co-extensiveness going on.
8 Is that what you're saying?

9 MR. WILLIAMS: I don't think I said common features, but -- so no,
10 that's not exactly what I'm saying. Let me, try it this way.

11 JUDGE HUDALLA: Let's just start back over with the beginning.
12 Just tell me what your analysis of co-extensiveness is for Claim 12?

13 MR. WILLIAMS: Yeah, the co-extensiveness is that it's the same --
14 so the claim, all of the claims of this patent, Claim 1 and Claim 12, are
15 directed to a media streamer. And that was what the Move client was. And
16 we showed how the Move client --

17 JUDGE HUDALLA: You got to tell us though that it actually
18 practices the claimed invention. So how are you doing that?

19 MR. WILLIAMS: Oh, yeah, yeah, yeah. Sorry. Oh, okay. So your -
20 - okay. So your question is, did I show you that it practiced Claim 12 by
21 being continuous? Is that the question in the claim chart?

22 JUDGE HUDALLA: Your burden to present evidence that the -- if
23 you want to claim secondary considerations or the presumption of a nexus
24 for secondary considerations, you have to tell us that Claim 12 practices the
25 claimed invention. You have not provided any evidence of that as far as I
26 can tell. So to me, that's fatal to your co-extensiveness argument. I'm

1 asking you what's -- what evidence are you suggesting that you still have in
2 the record?

3 MR. WILLIAMS: Yeah. Okay. Well, so the claim chart, we if
4 you're asking about the claim chart in particular, we have a claim chart that
5 shows Claim 1 is met by the Move player. The addition in Claim 12 has to
6 do with continuous presentation. The evidence we have for that, I'm going
7 to get to, that I would also point you to as being direct evidence that shows
8 the people that -- the product, the Move product, the thing that people liked
9 about, it was exactly this feature, the continuous playback feature. So that's
10 going to serve both purposes. It's going to show you both that it -- there's
11 direct evidence between the evidence we're pointing to and the claim feature.
12 But it's also going to show you that the Move patent practiced continuous
13 playback.

14 JUDGE HUDALLA: I don't want to get to direct evidence yet. I'm
15 still talking about presumption of nexus.

16 MR. WILLIAMS: Yeah.

17 JUDGE HUDALLA: Okay. You just shifted to direct evidence. I --
18 let's just talk about presumption. To me you presented no evidence of co-
19 extensiveness for Claim 12.

20 MR. WILLIAMS: Yeah. And so --

21 JUDGE HUDALLA: Either you show me the -- show us the evidence
22 or you consider it conceded. I mean, that's what I'm trying to get at.

23 MR. WILLIAMS: Okay. I'm relying on the same piece of evidence
24 to show you two different legal theories. Okay. I'm relying on the fact that
25 people talked about the fluidity and our product didn't stutter as evidence of
26 co-extensiveness. And I'm also using it to show direct evidence -- direct
27 nexus evidence, and there's no -- nothing incoherent with that theory. It's

1 perfectly fine to use the same piece of evidence to show you that nexus is
2 satisfying either one these legal theories.

3 JUDGE HUDALLA: All right. Well, I --

4 MR. WILLIAMS: So, it's true that there's only one claim chart for
5 Claim 1 and a feature that's missing from Claim 1 is continuous playback.
6 And I have other evidence that's not the claim chart that shows you how we
7 get that into the -- how we get there.

8 JUDGE HUDALLA: Well, that sounds an awful lot like you're
9 expecting us to do the work for you, but I'll keep listening.

10 MR. WILLIAMS: Okay. Well, I -- okay. And I take the point and
11 again, I was prepared to move directly to direct evidence, but, you know,
12 you did want to talk about it. I think it was -- it's a great question. It's an
13 interesting issue in the case. I totally agree. But I do want to make very
14 clear that we think the law on this is in Patent Owner's favor. And that all
15 we have to do is show that, you know -- the case laws that -- really the case
16 law in co-extensiveness, what that case law tells you is things like, I can't
17 show you that a car was successful if my patent is about the cup holder or
18 the windshield wiper. I got to show you that they're coextensive. It doesn't
19 mean I have to show you every claim element is -- of all of my claims are
20 present in the product. So I think that's maybe where we have slight
21 disagreement, but in -- but I think it's probably makes the most sense to use
22 the rest of our time to just talk about the direct evidence for a minute.

23 So for this, for instance, we would look to Slide 88 and here we have
24 industry praise focusing on the fact that there was no buffering or stalling the
25 Move product and provided dramatically better viewing experience. We
26 have people talking about how the broadcast looked shockingly good, and
27 how people were surprised that it came so fast, that viable streaming HD

1 technology was coming faster than these people thought. These are all
2 people who are in the industry, who were writing about the industry at the
3 time who were surprised by the product.

4 Similarly, we've showed other evidence. For instance, on Slide 83 of,
5 you know, Level 3, who was a gigantic player in the streaming market who
6 when they saw our product was just, you know, amazed and said, you know,
7 everyone else has the same bandwidth, but they don't get the results you do.
8 And as we talked about, of course, you know, Level 3 wound up partnering
9 would move to stream for its clients.

10 So you know, lastly, when we look at -- just to kind of get through the
11 evidence as quick as we can here, I think Slide 79 has another article talking
12 about how when a ESPN and ABC adopted the technology, people were
13 pressed by how fluid the stream looked and how quickly the product would
14 get the files onto the client and streaming at a high-definition level.

15 JUDGE HUDALLA: Is any of the evidence different than Ogdon
16 IPRs?

17 MR. WILLIAMS: Of the evidence I just showed, I don't think so. Is
18 there is that your question or was there any new evidence in this record? I
19 don't --

20 JUDGE HUDALLA: Yeah. I guess I'm trying to figure out what's
21 different if the -- if anything, between what you're putting forth here in this
22 case versus the Ogdon IPRs?

23 MR. WILLIAMS: The only minor differences are, I think in the
24 Ogdon IPRs, we had some evidentiary disputes about the testimony of one
25 or two of the other witnesses. And I -- and so there may be some additional
26 deposition testimony that's in this record that wasn't in the Ogdon IPRs.
27 There were some additional depositions taken in this case, but I don't think it

1 -- I guess -- well, yeah, there was some additional deposition taken here
2 that's in -- that's in the record that wasn't in the Ogdon IPRs, but I think that's
3 it. In terms of the like paper documents, I think they're all the same.

4 JUDGE HUDALLA: Thank you.

5 JUDGE DANG: You are about a minute into your rebuttal.

6 MR. WILLIAMS: Yeah. Yeah. I just wanted to touch on two other
7 things and then I'll take whatever time I have left. So one has to do with the
8 Move player. And again, we talked about the -- you know, there is no --
9 supposedly there's some squeeze -- Petitioners think they have some squeeze
10 play going on here with respect to the Move player. But, you know, the law
11 on this is clear that you don't have to practice the claims.

12 Like, especially with a claim like this. This requires continuous
13 playback. You only have to do it once to practice the claims. And so the
14 fact that the Move player would, you know, handle the fact that it could
15 sometimes be discontinuous because, you know, the internet dropped out for
16 a minute or power went out or some crazy thing happened. It doesn't show
17 that it doesn't set -- that the Move player didn't satisfy the claims.

18 In fact, the direct evidence shows the opposite. It shows everyone
19 who watched the Move player was impressed by how smooth and fluid it
20 was without the buffering or stalling. So it's clear that at least some of the
21 time it did. That's all that the claim requires. The problem for Petitioner is
22 that as we talked about, Leaning can never have a continuous playback
23 during a rate change because it's always going to have to clear the buffer and
24 refill it every single time.

25 And we cite, you know, we cite case law for that. That's in the brief.
26 I think it's the Bell case. And then I probably one other one I don't
27 remember off the top of my head, but they're in the briefs. I think the Board

1 is well aware of the law. And then just the last thing with respect to
2 Leaning. Just to be clear, you know, we never limited anyone's testimony to
3 the Voyager 2000.

4 The question as shown on Slide 108, the question that we put to BT
5 and his representative was, did you ever commercialize the Leaning patent?
6 And the answer we got to that is unequivocal, not with respect to video.
7 They never did. There's no evidence that they did. And certainly, you
8 know, all the evidence on FastNet that we have available to us that was put
9 in front of the witness during his deposition, which, for whatever reason the
10 Petitioner here didn't put into the record after they finished the deposition,
11 shows that in fact what was going on with that FastNets product was a
12 server-driven approach, right? The clients didn't make requests for bit rate
13 changes. It was the server that did, which is obviously not what's in Leaning
14 or in our patents.

15 So anyway, unless the Board has any other questions, I'd like to
16 reserve the remaining 11 minutes, I suppose.

17 JUDGE HUDALLA: I think we're okay. Thank you, Mr. Williams.
18 I'll even give you a 12 today because I'm feeling generous.

19 MR. WILLIAMS: Thank you, Your Honor.

20 JUDGE HUDALLA: Okay. Mr. Gasparo, I think we had 18 minutes
21 left. And you can begin when you're ready.

22 MR. GASPARO: Yeah. I am going to take about one minute unless
23 you have questions. So just to make sure the record is clear, my
24 understanding is that EPO appeal deadline was July 27th. And that's why I
25 stated that the deadline has expired and it's no longer appealable. I just want
26 to -- I'm going to answer your question that I left outstanding, Judge
27 Hudalla, but I want to reiterate that there was no motivation to combine

1 arguments or lack of motivation to combine arguments in the Patent Owner's
2 response or Dr. Jeffay's declaration.

3 So as for the support for our position of Leaning with Gamble as well
4 as the knowledge of a person of skill in the art, I would direct you to Dr.
5 Houh's declaration, Paragraphs 122 and 123, and that's the declaration two
6 Petitioners petition. And that remains unrebutted. Dr. Jeffay had, as I said,
7 no declaration in response to those points.

8 We have nothing further to add regarding secondary considerations or
9 the -- Leaning or any other priorities. So unless Your Honors have any
10 additional questions, we'll sit down, and perhaps after Opposing Counsel
11 says whatever he is going to say, we may have something else, but probably
12 not.

13 JUDGE HUDALLA: What exactly do you mean by you may have
14 something else? This is your last opportunity to speak.

15 MR. GASPARO: Then we rest.

16 JUDGE HUDALLA: Okay. I didn't quite know what you were
17 alluding to then.

18 MR. GASPARO: We rest, Your Honors.

19 JUDGE HUDALLA: Okay. Thank you, Mr. Gasparo.

20 MR. GASPARO: Thank you.

21 JUDGE HUDALLA: We'll turn then back to Mr. Williams. You
22 have 12 minutes. You may begin.

23 MR. WILLIAMS: Sorry. My -- everything on my screen just
24 disappeared. So give me one second. Okay. Right. Well, I don't think
25 there was much in response to that that I wanted to address. I'm not an
26 expert on the EPO opposition date, I have to say. But as I said, my client is

1 under the impression that the deadline is still not run. So we seem to have a
2 disagreement there.

3 As respect to nexus, I just wanted to make sure in what I said that I
4 wasn't -- I didn't mean to suggest that the only additional evidence I had
5 besides the claim chart that gets me to the continuous playback was one or
6 two documents I showed. But I think the Board understood what I was
7 saying. We're doing the POR cite to some -- several documents that talk
8 about how the player achieved continuous playback with fluidity. And, you
9 know, we obviously intend to rely on all those for the reasons that I was
10 articulating my prior answer.

11 And, you know, just in short, I would say I think what we've got here
12 is a situation where, you know, this petition was filed without giving really
13 proper consideration to the continuous playback element of Claim 12 and its
14 dependents. And trying to, in reply, change the theory of the petition from
15 Leaning discloses continuous playback to Leaning would disclose
16 continuous playback if you made a modification to it that would, you know,
17 require further explanation of exactly why you made that change, how
18 Leaning would be expected to work, what the motivation for making that
19 change was, and why a person would've expected success. Those are all
20 burdens of the Petitioner that the petition didn't meet. And as we pointed
21 out, we still don't think they haven't met them in reply either. But unless the
22 Board had any other questions, I am willing to cede back the additional time.

23 JUDGE HUDALLA: Okay. Thank you, Mr. Williams. That
24 concludes today's hearing. We will look back at the record here. And if you
25 could let us know about the issue, Mr. Williams, about the transcript with
26 the morning's Petitioner, that would be great.

1 MR. WILLIAMS: Yes, I will reach out to them and we will email the
2 Board.

3 JUDGE HUDALLA: And if you could include Mr. Gasparo's group
4 as well in that. Okay.

5 MR. WILLIAMS: Yeah. I'll include the joint counsel and the -- and
6 the Aylo counsel.

7 JUDGE HUDALLA: That's great. Thank you. With that, the case is
8 now submitted, and we are adjourned. If you could stay on the line here for
9 the court reporter, see if he or she has any issues. That would be great. So
10 we'll go off the record.

11 (Whereupon, the above-entitled matter went off the record at 2:40
12 p.m.)

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Patent 11,991,234 B2

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