

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EARLY WARNING SERVICES, LLC,
Petitioner,

v.

INTELLECTUAL VENTURES II, LLC,
Patent Owner.

IPR2024-01221
Patent 7,314,167 B1

Record of Oral Argument
Held: November 13, 2025

Before KEVIN F. TURNER, JOHN D. HAMANN, and
IFTIKHAR AHMED, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

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The above-entitled matter came on for hearing Thursday, November 13, 2025, commencing at 10:00 a.m. PST, at the Western Regional Outreach Office, 26 S. 4th Street, San Jose, California, 95112.

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

(10:00 a.m.)

JUDGE TURNER: Good morning. This is an oral hearing for IPR2024-01221 involving U.S. Patent 7,314,167 B1. I am Judge Turner.

I'm joined by Judges Hamann and Ahmed. For the benefit of the judges and opposing counsel, as well as the court reporter, please identify yourself when you begin your argument and speak clearly into your microphone. Please do not speak when others are speaking, such as the judges or opposing counsel.

We have the entire record, including demonstratives. When referring to demonstratives, papers, or exhibits, please do so clearly and explicitly by slide or paper number, please. Please also pause a few seconds after identifying it to give us a time to find it in the record. This helps with the preparation of an accurate transcript of the hearing.

Please also bear in mind that the purpose of oral hearing is to present your case based on the arguments and evidence of record. You may not introduce new evidence or arguments at this time.

I note that there don't appear to be any objections to the demonstratives from either side. Please note that we do not permit standing objections to be raised with the opposing parties during their arguments. If an advocate believes that new evidence or arguments are being raised, he or she may make that known to the panel during their principal argument or rebuttal arguments.

Please note that the Petitioner has a LEAP participant. The Petitioner will therefore have 75 minutes of total argument time, and the Patent Owner

1 will have 60 minutes of total argument time. Petitioner and Patent Owner
2 may reserve time for rebuttal or surrebuttal. The Petitioner will go first and
3 present the case. Thereafter, the Patent Owner will argue its opposition to
4 the Petitioner's case. And if there is any rebuttal from the Petitioner, we will
5 hear it after the Patent Owner's opposition. Finally, we will hear from the
6 Patent Owner's surrebuttal, if requested.

7 I will seek confirmation with Petitioner's counsel as to whether there
8 is any clarification needed from the LEAP participant's argument at the close
9 of the Petitioner's arguments. So the Petitioner will have a chance to clarify
10 anything if the record needs to be clarified based on their argument made by
11 the LEAP participant.

12 I will endeavor to provide each party with a five-minute warning
13 through the use of lights, a yellow light during opening argument and a
14 yellow light during rebuttal with a five-minute warning and a two-minute
15 warning during rebuttal and surrebuttal. Once the red light comes on, you
16 should finish up your present arguments or let the panel know you wish to
17 extend your arguments into the pre-arranged rebuttal or surrebuttal time, if
18 available. Please also note that arguments raised during rebuttal and
19 surrebuttal must be in response to arguments raised by the opposing party.
20 Neither period should be used to initiate new arguments.

21 So with all that out of the way, let's go ahead and get to the parties'
22 appearances. Who is appearing on the Petitioner's behalf?

23 MR. KRIEGER: Justin Krieger and Megan Saia.

24 JUDGE TURNER: Okay. And, Mr. Krieger, would Petitioner like to
25 reserve any time for rebuttal?

1 MR. KRIEGER: Yes, Your Honor. Twenty-five minutes, please.

2 JUDGE TURNER: So I have to make sure I do the math. That would
3 be 50 minutes; is that correct?

4 MR. KRIEGER: That sounds right. Thank you.

5 JUDGE TURNER: And who is appearing on Patent Owner's behalf?

6 MR. THEISS: Brandon Theiss for the Patent Owner. And I would
7 like to request 20 minutes.

8 JUDGE TURNER: You want a 20-minute rebuttal. Okay. Before we
9 begin, are there any questions or issues the parties would like to raise before
10 we begin, starting with the Petitioner?

11 MR. KRIEGER: No, Your Honor.

12 JUDGE TURNER: Okay. Patent Owner?

13 MR. THEISS: No, Your Honor.

14 JUDGE TURNER: Okay. Thank you. Petitioner you may begin. I'm
15 going to go ahead and set the clock, and as soon as you see it lit up you can
16 start.

17 MR. KRIEGER: Good morning, Your Honors. And may it please the
18 Board. Justin Krieger on behalf of Petitioner, Early Warning Services, LLC.
19 And with me today are Megan Saia, Nikki Kennedy, and assisting us with
20 our slides is Louie Crumbley.

21 Let's start with slide 2, please. As an overview, my colleague, Ms.
22 Saia, will be presenting today under the PTAB's LEAP program, will be
23 presenting under the LEAP program and will be discussing claim
24 construction and the related motion to exclude issues. When she's

1 completed, I will then spend a few minutes discussing the substantive
2 invalidity grounds presented in the petition in greater detail.

3 Slide 4. As you can see here, Petitioner's invalidity arguments rely
4 primarily on two main references: Wang, Exhibit 1004, and Take An Order!,
5 or TAO, Exhibit 1005. Grounds 1 through 5 are based primarily on the
6 Wang reference, and Ground 6 is based primarily on the Take An Order!
7 reference.

8 Now, just note that the Wang grounds contain two anticipation
9 grounds. There are actually two separate anticipating embodiments in
10 Wang, and so that's why that's presented to you as Grounds 1 and 2. And
11 since this IPR really focuses on two specific claim terms, specifically image
12 capture device and an image having information embedded therein, we are
13 going to really focus on those main issues in our presentation today.

14 Slide 5. The alleged invention of the '167 patent relates to devices
15 and methods for providing secure transactions. Mr. Crumbley, could you
16 please highlight that first claim element in Claim 1? As you can see here,
17 Claim 1 includes an image capture device configured to capture an image.
18 The claim also specifies that the image has information embedded therein.
19 Claim 1 also includes various conventional computer systems like memory,
20 an input unit, a processor that verifies a user based on the input information,
21 an output unit configured to forward an output that's generated by a
22 processor where that output includes a digital signature.

23 Again, Patent Owner's arguments appear to relate primarily to just the
24 first claim feature, the one highlighted here, the image capture device and
25 embedded information. These are the terms at issue in the parties' claim

1 construction arguments. There are additional independent claims; but, for
2 the most part, they contain very similar claim features, and we'll discuss
3 them together.

4 Slide 11, please. With that, I will turn this over to my colleague to
5 address the claim construction and related motion to exclude issues.

6 MS. SAIA: Hello, Your Honors. My name is Megan Saia, and today
7 I will be discussing the claim construction and the related motion to exclude.

8 Slide 12, please. Claims 1 and 19 of the challenged patent recite an
9 image capture device and figure to capture an image. In Claims 23, 39, and
10 43 recite configuring a portable device to capture an image. As my
11 colleague stated, these terms will be construed together here today as they
12 were in Patent Owner's response. In reference to image capture device,
13 we'll refer to both terms.

14 The challenged patent does not define the term image capture device.
15 As such, this term is entitled to its plain and ordinary meaning under the
16 Philips standard. As I will discuss, Patent Owner's construction unduly
17 narrows the plain and ordinary meaning of the term and conflicts with the
18 language of the challenged patent itself.

19 Slide 13, please. Claim interpretation begins with the words of the
20 claim. The term image capture device clearly refers to a device that can
21 capture an image. As argued in the in the petition, properly construed, the
22 term means any device that can capture an image, such as a barcode scanner.

23 Patent Owner narrows the plain and ordinary meaning of image
24 capture device to refer only to an imaging-based barcode scanner which uses
25 a camera and not to a laser-based barcode scanner. As I will show next,

1 Patent Owner's construction is incorrect because it plainly contradicts the
2 specification of the challenged patent.

3 Slide 14, please.

4 JUDGE TURNER: Counsel, let me ask you a quick question. So if I
5 assume that we mean by capture an image, does that mean I have to be able
6 to retain the image?

7 MS. SAIA: No, Your Honor, that is not our position. Our position is
8 that you can obtain information derived from the image using the image
9 capture device.

10 JUDGE TURNER: So if I capture the image, so I've captured it but I
11 don't retain it; is that fair?

12 MS. SAIA: That is fair, Your Honor.

13 JUDGE TURNER: Okay. Do you have references that would --
14 because I would say that the normal meaning of capture means I have it and
15 then I can do something with it. But you're sort of saying I have it but I
16 don't, I think. I don't mean to put words in your mouth.

17 MS. SAIA: Petitioner's position is that, based on the term image
18 capture device in the challenged patent, the image capture device is any
19 device that can capture an image. And as I'll discuss in a few slides here,
20 the term image is used broadly in the challenged patents or referred to more
21 than just barcode scanner or, sorry, barcodes. Excuse me. And the barcode
22 can be printed.

23 So any device that can capture information derived a printed barcode
24 that can derive the information from the printed barcode, essentially, would
25 be an image capture device.

1 JUDGE TURNER: I'll let you move on, but it does feel like there's a
2 conflict because you're capturing but then you're deriving. It feels like an
3 image capture device, as most broad, it's just capturing an image, and it's not
4 necessarily deriving. Maybe that would come from the rest of the claim, but
5 I'll let you -- you probably have more to talk about. I'll let you go on.

6 MS. SAIA: We do have more to talk about. And I think --

7 JUDGE HAMANN: This is Judge Hamann, actually. Forgive me,
8 I'm trying to understand this construction, too, better than Petitioner puts
9 forward. It seems to me this proposed construction, it just rewords image
10 capture device. It just changes the order of them, so I don't see how that
11 improves upon anything.

12 So really it seems to me that this construction does nothing more than
13 try to say that a barcode scanner is an example of an image capture device.
14 I'm not really certain that's an appropriate way to try to construe a claim
15 term.

16 MS. SAIA: Your Honor, Petitioner is arguing that the claim
17 motivation should be entitled to its plain and ordinary meaning, and we feel
18 that construction is necessary here because Patent Owner is limiting the
19 plain and ordinary meaning improperly.

20 JUDGE HAMANN: Okay. So I'm just trying to understand better.
21 Obviously, plain and ordinary meaning and then also having an explicit
22 construction, but, certainly, there are, you know, cross-purposes, at least I
23 think, in that group that could be described. It just seems to me that this
24 construction, this Petitioner is just trying to say image capture device

1 includes barcode scanner. And, again, I'm not sure that's the appropriate
2 way to frame the claim construction issue.

3 MS. SAIA: I understand, Your Honor. I think it will become more
4 clear as we move on and look at the specification itself that we are arguing
5 the plain and ordinary meaning should not be limited to Patent Owner's
6 construction. But if they do not narrow the plain and ordinary meaning, then
7 I agree, we wouldn't have a claim construction dispute.

8 JUDGE HAMANN: Thank you.

9 JUDGE AHMED: This is Judge Ahmed. Let me go to Patent
10 Owner's key argument, which is, regardless of the meaning of image, the
11 term image capture device was well understood in the art. And persons of
12 ordinary skill in the art used the term image capture device only in
13 connection with image-based readers. Why is that argument wrong?

14 MS. SAIA: That argument is wrong because Patent Owner argues
15 that an image capture device is limited to a camera-based reader or an
16 imaging-based barcode device. And as you stated, Your Honor, Patent
17 Owner does use multiple forms of extrinsic evidence, which we will also
18 touch on in the motion to exclude, to allegedly inform what a person of
19 ordinary skill in the art would have taken this claim term to mean. However,
20 that extrinsic evidence in Patent Owner's construction conflicts with the
21 intrinsic evidence, which is the primary form of evidence to be used in
22 construing a claim.

23 JUDGE AHMED: Okay. Setting aside the motion to exclude, is there
24 any other evidence that rebuts Patent Owner's evidence, including their
25 expert's testimony, saying this is how people understood it: there were two

1 types of scanners, two types of readers, and image capture devices are not
2 barcode scanners, laser scanners.

3 So what evidence do we look to to rebut that evidence from Patent
4 Owner?

5 MS. SAIA: Let's go to slide 14, and I will answer your question.
6 Thank you. So as you can see here, the '167 patent states that the image
7 capture circuit, or device as stated above, may include additional camera or
8 other types of image capture devices. This statement makes it clear that an
9 image capture device is not limited to a camera-based barcode scanner, as
10 Patent Owner proposes.

11 Let's go to slide 15, please. Patent Owner's construction that an
12 image capture device is limited to an imaging-based barcode scanner is also
13 incorrect because the term in the challenged patent, image is not limited to a
14 barcode. As shown here, it's clear that a barcode is only one example of an
15 image and not the only example. An image capture device cannot be limited
16 to a camera-based barcode scanner.

17 The '167 patent also describes that images can contain other elements
18 beyond a barcode. It would be helpful to pull up this quote here, so, Mr.
19 Crumbley, will you please go to slide 19 and blow up the top quote? As you
20 can see here, the image may include one of multiple types of numbers: a
21 unique number; nonce, which is a temporary number; a transaction number;
22 or a random number.

23 It's clear from the challenged patent the term image includes other
24 elements beyond a barcode. As such, a camera-based barcode reader cannot
25 be the only device which is included in the claim term image capture device.

1 Can we go to slide --

2 JUDGE AHMED: I'm sorry. What is the reason to say that -- like, all
3 of these are numbers. What is the reason to say that these could not be
4 embedded in a barcode?

5 MS. SAIA: They are embedded in the barcode in certain
6 embodiments of the challenged patent. For example, as we'll discuss later, I
7 believe my colleague will, and a unique C code. There are bars and lines
8 above a set of human-readable alphanumeric characters or numbers. The
9 image contains both of these components, so a barcode scanner cannot be
10 the meaning of the term image capture device. The term image in the
11 challenged patent is clearly broader than just the barcode.

12 Can we go to slide 16, please? And this Board reached the same
13 conclusion in its institution decision. Simply because the specification
14 discloses image capture devices that could capture two-dimensional
15 barcodes, like a camera-based scanner, as Patent Owner is trying to narrow
16 the claim term to cover, this is our mandate that the claim term be limited to
17 only that device. Instead, it's one embodiment.

18 Could we go back to slide 13, please? For these reasons, based on the
19 intrinsic evidence, an image capture device is any device that can capture an
20 image and is not limited to a barcode scanner, whether that be a laser-based
21 barcode scanner or an imaging-based barcode scanner, as Patent Owner
22 construes the claims mean.

23 JUDGE TURNER: Counsel, is it fair to say that, even if we truncate
24 your construction here and we say that an image capture device is any device
25 that can capture an image and, therefore, we don't want to reach whether a

1 barcode scanner could be that, does the Petitioner's case depend on that, on
2 this narrower construction or because, based on the teachings of Wang and
3 the other base reference, do they only teach a barcode scanner?

4 MS. SAIA: No, Your Honor. As my colleague will discuss, under
5 either construction of the term image capture device, the challenged claims
6 are invalid. The prior art discloses both the laser-based barcode scanner and
7 a camera-based barcode scanner.

8 JUDGE TURNER: Okay. Thank you.

9 MS. SAIA: And I just want to say that, in Patent Owner's expert
10 deposition, this is Exhibit 1048, page 163, line 25, through page 164, line 4,
11 Patent Owner's expert volunteered unprompted that a laser-based scanner
12 could capture an image as the term image is used in the challenged patent.
13 As such, the term image capture device under the intrinsic evidence and
14 under Patent Owner's expert testimony should be construed as any device
15 that can capture an image and not limited to camera-based scanners alone.

16 Unless there's any further questions on this portion of the claim
17 construction. I'd like to move on to the next claim term at issue, which is the
18 image having information embedded therein. Mr. Crumbley, could we
19 please go to slide 17?

20 The independent claims recite the image having information
21 embedded therein. Again, no definition for this term is offered in the
22 challenged patent, so it is entitled to its plain and ordinary meaning under
23 the Philips standard.

24 Slide 18, please. Again, the Patent Owner tries to narrow the plain
25 and ordinary meaning of the term, which is evident from the intrinsic

1 evidence that we'll discuss next, to mean only information contained in a
2 barcode and to exclude human readable output numeric characters. There's
3 two critical defects from Patent Owner's construction. First, Patent Owner
4 cannot and does not show there is a clear and unmistakable disclaimer in the
5 challenged patent to support its narrow construction that embedded
6 information excludes human readable characters. And second, as I'll show
7 next, the Patent Owner's construction plainly contradicts the intrinsic
8 evidence.

9 Slide 19, please. As I stated, the Patent Owner's construction of the
10 image having information embedded therein can be broken into two parts.
11 First, the Patent Owner construes the term to refer only to information and
12 barcodes. As shown here in the bottom quote and as discussed, an image is
13 not limited to barcodes. Instead, a barcode is simply one type of image in
14 the challenged patent. And, second, Patent Owner construes the term to
15 exclude human-readable alphanumeric characters. This construction cannot
16 be more contradictory to the challenged patent. As shown in the top quote,
17 the image may include a unique number, nonce, a transaction number, or a
18 random number. These are all types of human-readable alphanumeric
19 characters. Patent Owner is trying to change the meaning of the claim terms
20 to stray from the specification. This is improper.

21 JUDGE AHMED: So that portion, isn't that saying that the image
22 may have these numbers embedded in the image? Is there any support in the
23 specification to show that, to support that embedded information includes
24 human-readable text? According to the specification, human-readable text
25 can be part of it.

1 MS. SAIA: Your Honor, this portion of the challenged patent does not
2 say anything about embedded. Instead, it says that the image may include
3 one of these features. And you'll see from our construction of embedded
4 that I'll touch on next that the term embedded does not mean hidden. It
5 means derived from. The images in the challenged patent can include one of
6 these numbers or you can derive the number from a barcode, which is in the
7 image. But the image is not limited to a barcode and can include these
8 numbers.

9 JUDGE AHMED: So your position is, if the image includes a human-
10 readable number, that's still part of that image?

11 MS. SAIA: That's right, Your Honor. The term image in the
12 challenged patent is not limited to a barcode. In fact, we could pull up the
13 challenged patent and go to Figure 7? Thank you.

14 As you can show here, this is Figure 7 from the challenged patent, this
15 is a printed fax form. And the item 710 is one type of image. However, the
16 challenged patent, in other portions, states that the image may be a linear
17 barcode, a UPC code which includes a human-readable alphanumeric
18 portion under the bars and spaces. The term image is not limited to only a
19 barcode, but it's one example, as shown here.

20 Unless there's any other questions, I'll now touch on the motion to
21 exclude.

22 JUDGE TURNER: I guess, really briefly, I mean, the question of
23 embedded, it seems like the Petitioner is drawing a very broad definition. It
24 seems like if I look at an image or you look at an image and all kinds of
25 things are going on in our brains, we're determining, I mean, the image is

1 actually upside-down or right to left and our brains actually interpret it,
2 couldn't embedded, therefore, then, you know, mean anything, if you have
3 any type of visualization, then, you know, therefore, you're determining
4 information that's embedded there. It feels like a really broad definition.

5 MS. SAIA: Patent Owner's position is that embedded means derived
6 from. And so unless you're looking at an image, it's capturing some
7 additional information that is derived from the image, such as a human-
8 readable alphanumeric character, for example. Then Patent Owner's
9 position would be that that image does not contain embedded information.
10 The term embedded means derived from.

11 JUDGE TURNER: And is that Patent Owner's claim construction, or
12 is that Petitioner's claim construction?. . .

13 MS. SAIA: That's Petitioner's claim –

14 JUDGE TURNER: That it's derived from. So if it's there and I can
15 just simply see it and the computer sees it, is it derivation?

16 MS. SAIA: Could we go back to slide 18? I'll use that to answer
17 your question.

18 JUDGE TURNER: Okay.

19 MS. SAIA: Patent Owner's construction, as stated here, their
20 construction is that embedded information includes information contained in
21 any barcode. So under your question, Your Honor, Patent Owner would
22 have the same answer. Derived from and contained in have a similar
23 meaning here.

24 However, Patent Owner is limited this information only to a barcode,
25 which contradicts the challenged patent which states that the barcode is only

1 one type of image. And Patent Owner is arguing that this information
2 cannot be human-readable alphanumeric characters. Based on the intrinsic
3 evidence, there's no support for that, and it's directly conflicted.

4 So derived from or contained in is not the portion of their construction
5 that we're addressing. Instead, it's the later portions.

6 JUDGE TURNER: Okay.

7 JUDGE AHMED: But, counsel, if it's derived from, would that
8 include, for example, if there's a product ID in a barcode, you get that
9 product ID, and then you go to a database and get, for example, price
10 information, is that information still derived from?

11 MS. SAIA: That's right, Your Honor. And Patent Owner's expert
12 testified to this point that a UPC code, the portion of a UPC barcode that
13 contains the letters and numbers or usually just numbers, can contain
14 embedded information exactly based on what you just said because, when
15 you're scanning a UPC code, the device derives information from that image
16 and then the numbers or the bars, whichever is scanned, is used to go to a
17 lookup table and access that product and pricing information.

18 JUDGE AHMED: How is that embedded information if that
19 information is coming from somewhere else, right? Isn't that Patent
20 Owner's argument that we're basically reading out embedded from the claim
21 term?

22 MS. SAIA: Let me provide that citation really quick, Your Honor,
23 just so it's in the record. It's Exhibit 1048, page 72, lines 21 through 23 and
24 line 25. And to answer your question, we understand Patent Owner to argue
25 that there is no meaning in the claim construction derived from and we're

1 rendering the term embedded superfluous. However, this is not true
2 because, as you stated, you cannot look at a UPC code, the numbers
3 underneath the bars and spaces, and tell what the product is, unless you have
4 an incredible memory about, you know, grocery store products or something
5 of the like.

6 So that code does contain embedded information about the product
7 because you cannot look at the code and tell exactly what it is. And simply
8 because the embedded information is derived from another source, a further
9 source, does not mean that it wasn't originally derived from the image
10 because the information about the product in UPC code, for example, would
11 be derived from the image but you cannot understand what the product was
12 without referring to that lookup table.

13 JUDGE AHMED: Okay. Thank you.

14 JUDGE TURNER: Let me just add that you have about 25 more
15 minutes before you get into rebuttal.

16 MS. SAIA: Thank you. I'll move on to the motion to exclude next,
17 unless there's any other questions.

18 Could we go to slide 21, please? Petitioner understands that motions
19 to exclude are not routinely granted. However, this case is unique. Patent
20 Owner relies on extrinsic evidence to completely change the meaning of the
21 claim terms. In so doing, Patent Owner plainly contradicts the Federal
22 Circuit precedent.

23 The precedent on this issue is clear. First, as stated in Paytronix, it's
24 improper to use extrinsic evidence when the intrinsic evidence alone
25 supplies the meaning of the claim term. And, second, as the Federal Circuit

1 made clear in *Tempo Lighting*, when extrinsic evidence may properly be
2 used to construe claims, it must be consistent with the intrinsic evidence.
3 Extrinsic evidence may not be used to contradict the intrinsic evidence or
4 change the meaning of the claim in violation of the specification.

5 Here, Patent Owner's use of extrinsic evidence is legally improper
6 under the precedent and should be excluded under Federal Rule of Evidence
7 403 because it lacks probative value, confuses the issues, and is misleading
8 to this Court. I'll address each of these reasons for exclusion in turn.

9 Slides 1 and 2, please. First, for this claim term, image capture
10 device, as we discussed, the term means any device that can capture an
11 image, and it's not Patent Owner's narrow construction that the term only
12 means a camera-based barcode scanner. The challenged patent makes clear
13 that the image capture device can include a digital camera or other types of
14 image capturing devices, and a digital camera is not the only type of image
15 capture device.

16 Additionally, as we discussed, an image is not limited to a barcode
17 and can contain other elements, such as numbers. So Patent Owner's
18 construction that an image capture device is limited to a camera-based
19 barcode scanner is incorrect, and the extrinsic evidence on this point should
20 be excluded.

21 Could we go to slide 23, please? I'll briefly touch on the second
22 claim term, the image having information embedded therein. As we
23 discussed, Patent Owner's construction conflicts with the challenged patent
24 because they are trying to exclude human-readable alphanumeric characters

1 from the image when the challenged patent specifically states these
2 components may be contained within the image.

3 JUDGE HAMANN: Counsel?

4 MS. SAIA: Yes, Your Honor?

5 JUDGE HAMANN: This is Judge Hamann, and, as I understand,
6 we're dealing with the framework of Rule 403.

7 MS. SAIA: Yes, Your Honor.

8 JUDGE HAMANN: It's under part of this argument. And to me, and
9 I think we have suggested in a number of decisions, 403 certainly is more
10 relevant. It suggests that a jury, for example, you know, they may be more
11 easily confused or misled; and in bench-trial type situations, which this is
12 more akin to, it may have less application, for better or lack of a better
13 phrase. I mean, I think we certainly are familiar with Federal Circuit
14 precedent and can weigh what weight we should give the evidence.

15 So the question, you know, whether how much of this evidence that's
16 sought to be excluded can really mislead or how much 403 should really
17 apply in this context.

18 MS. SAIA: Your Honor, Petitioner's stance is that it would be legal
19 error to limit the meaning of the claim terms based on Patent Owner's
20 intrinsic evidence and that this should be excluded.

21 But, alternatively, you are right. It should at least be entitled to little
22 weight. But, again, Petitioner's position is that it should be excluded
23 because considering it would be legal error.

24 And I'll conclude on that note, unless there is any other questions, and
25 I'll let my colleague address the invalidity grounds.

1 MR. KRIEGER: Thank you, Ms. Saia. Just to clarify, may I clarify
2 some of the issues that were just raised, or would you prefer that I do that at
3 the end of the proceeding?

4 JUDGE TURNER: It's your time. You can do it now, or you can do it
5 on rebuttal.

6 MR. KRIEGER: Okay. Just a couple of quick points. There were
7 questions raised regarding slide 19 -- if you could please go there, Mr.
8 Crumbley -- regarding the quote that's at the top here regarding image
9 including unique numbers, and the question was asked isn't this saying
10 embedded information, and the answer is no. This very clearly is referring
11 to what the image contains itself, and so that is why it very clearly is
12 referring to numbers and alphanumeric characters as being one option for
13 what is actually included in the image itself.

14 Thank you, Mr. Crumbley. Could you please go to slide 26? We do
15 have slides addressing all of the claim features. We're not going to,
16 obviously, go over all of those today, but we're going to focus on those claim
17 terms again that are primarily at issue here. First, I'll discuss the image
18 capture device that's disclosed in Wang, and this is, again, relevant for
19 Grounds 1 through 5.

20 Wang relates to a portable electronic authorization device, or PEAD,
21 and there are several embodiments in Wang, and the one that Petitioner is
22 primarily relying upon is the one that is found in paragraph 115. Mr.
23 Crumbley, could you please pull up Wang? Is it 1004? And go to page 33,
24 please. As you can see, I'm on the first nine lines of paragraph 115. Thank
25 you.

1 As you can see here, Wang discloses a point-of-sale transaction device
2 and explains that a barcode is scanned with the device. Wang specifically
3 states the device can use a barcode scanner or an OCR reader. Now,
4 regarding barcode scanners, as discussed by my colleague, the plain
5 meaning of the term image capture device is any device that can capture an
6 image, such as a barcode scanner. And in response to Your Honor's question
7 earlier about that's not really construction, we agree. Plain and ordinary
8 meaning should control, and the words speak for themselves, and that's why
9 the words were chosen that way. No specialized construction is needed, no
10 definition was provided, and there certainly was no disclaimer; and that is
11 why that is, in fact, the language that is the appropriate plain and ordinary
12 meaning of that term.

13 For this reason, Wang's disclosure of barcode scanners satisfies the
14 image capture device limitation of the challenged claims. Although Wang
15 doesn't specify whether it's a laser barcode scanner or a camera-based
16 barcode scanner, that doesn't matter because both types of scanners are
17 image capture devices.

18 Mr. Crumbley, could you please pull up Exhibit 1048 and turn to page
19 163? Thank you. And then let's call out the last line of this page and the
20 first four lines of the next page, please. This is the deposition transcripts of
21 Patent Owner's expert. As you can see here, Patent Owner's expert agreed
22 when he testified that laser scanners can scan an image, such as a barcode, as
23 the term image is used in the challenged patent.

24 Thank you. Let's go to the next slide 28, please.

1 But Dr. Berisso didn't stop there. He went on to volunteer in his
2 testimony under deposition, but completely unprompted -- this wasn't in
3 response to a question on this issue -- he testified that a laser barcode
4 scanner, in fact, captures an image. That's the language that's used in the
5 patent itself, and that's at Exhibit 1048, page 163, lines 1 through 6.

6 Now, the completely voluntary nature of this testimony in the context
7 of laser barcode scanners, not image-based but laser barcode scanners,
8 makes this exceptionally credible. A laser barcode scanner captures an
9 image and, thus, is an image capture device.

10 Slide 29, please. Yes, Your Honor.

11 JUDGE TURNER: Just a quick question. Can you give me an
12 example of an OCR that wouldn't be able to reproduce the text that's been
13 captured? I understand that's a hypothetical. So let's say I have an OCR
14 system, and I'm capturing an image. Wouldn't that system be able to,
15 therefore, reproduce the image?

16 MR. KRIEGER: Well, actually, no. The testimony of record in this
17 case indicates that the vast majority of times these scanners do not
18 reproduce. It's not like, you know, we're used to thinking of phones, but the
19 testimony from a Patent Owner's expert is that usually there is no image that
20 is seen or displayed or anything of that sort. The data is preserved, just like
21 with a laser barcode scanner. The data, of course, is preserved, and
22 information is derived from it, of course. But it's all electrons. It's all bits.
23 In the vast majority of situations, according to Patent Owner's expert's
24 testimony, there is no display. There is nothing that is shown.

1 I agree with you, though. The data is certainly retained in both
2 situations, laser and image-based barcode scanners.

3 JUDGE TURNER: Because with a laser-based barcode scanner, I
4 don't know any laser-based barcode scanner that could reproduce a barcode.
5 I mean, it typically just reads it, and it doesn't care. It's not like, okay, I'd
6 like to reproduce this barcode and put it on something else. It doesn't have
7 that capability, whereas perhaps an optional character recognition system
8 where you'd be able to pull it up and say, okay, here's where the mistake
9 occurred, here's why it thought this word was this word, and I'd be able to
10 make that sort of distinction.

11 MR. KRIEGER: Yes. I think the testimony is contrary to that. There
12 is no reproduction involved with any of these devices, imaging-based or
13 laser-based. They both obtain bits. They both obtain data and manipulate
14 the data. The data is there in both instances, but there is no reproduction of
15 any image in either embodiment, for the most part, and that is supported by
16 Patent Owner's expert's testimony.

17 But touching more on the OCR embodiment, Wang's disclosure of an
18 OCR reader also satisfies the claim's image capture device. Okay. And the
19 cite for that is a prior discussion of how even image-based barcode scanners
20 don't display or reproduce, that's at Exhibit 1048, page 111, line 22 through
21 page 112, line 16, and then also page 114, lines 1 through 4.

22 Regarding the OCR, this issue doesn't even appear to be in dispute
23 that OCR readers do require imaging- or camera-based barcode scanners.
24 And as you can see here, Dr. Berisso agreed that OCR readers do require
25 imaging-based -- excuse me -- do require image capture devices. So in

1 summary, Wang discloses two types of image capture devices, the barcode
2 scanner and the OCR reader, both of which satisfy this limitation.

3 Let's go to embedded, please, at slide 30. We'll talk about how Wang
4 discloses the embedded information feature. As discussed by Ms. Saia,
5 nothing in the challenged patent limits embedded information to somehow
6 exclude alphanumeric characters. Mr. Crumbley, could you please go back
7 to Wang, Exhibit 1004, page 33?

8 JUDGE HAMANN: Counsel, this is Judge Hamann, and I'm trying to
9 understand the import we should put to some of these arguments. It seems
10 like there's a particular amount of focus on what Patent Owner's expert said
11 in general, I think. You know, in my view, at least to some of this, you have
12 a construction, the term, and you probably construed it under the cannons for
13 construction and you look at a reference and, you know, make factual
14 findings of what the reference teaches. And to a certain extent, what an
15 expert says, even if I were trying to turn this into some type of admission,
16 even what an expert says about what a reference really says, is sort of, you
17 know, I think not as important as looking directly at the reference and seeing
18 what it says and comparing it to the claim construction.

19 I'm trying to understand the focus so much on what the Patent
20 Owner's expert said in the context of numbers, as opposed to the, you know,
21 looking at what the reference is teaching and how things should be extruded,
22 which I know we probably --

23 MR. KRIEGER: No. I certainly understand your comments there.
24 First, our briefs and our position regarding embedded are based on the
25 intrinsic evidence itself. The term embedded is not defined in the patent.

1 There is no disclaimer regarding the meaning of embedded. And the
2 evidence, again, the intrinsic evidence fully supports the derived from
3 interpretation of embedded. There's no magical other construction that's
4 provided in the intrinsic evidence, and so that is why the intrinsic evidence
5 points to that as being correct. And, furthermore, the depositions, obviously,
6 when an expert testifies by way of declaration, the only thing that the parties
7 can do is cross-examine them and challenge the veracity of their statements.
8 And when they voluntarily contradict their statements without any
9 prompting under very mild examination, that, to me, speaks volumes that, in
10 fact, the actual position here is flawed and that certainly, for example, an
11 image capture device includes laser barcode scanners, as he volunteered in
12 that testimony.

13 I appreciate intrinsic evidence is the primary source you go to. But
14 when you have an expert who is making statements that, in our view, is
15 inconsistent with that intrinsic evidence, all we can do is cross-examine and
16 provide testimony that supports that position, and that's what we've done
17 here, Your Honor.

18 JUDGE HAMANN: Thank you. And I'll certainly agree it would
19 certainly go to what weight provided that particular expert testimony or any
20 expert testimony, but I think looking at the original sources in some places
21 also –

22 MR. KRIEGER: Agreed. Agreed, Your Honor. Mr. Crumbley, let's
23 go to Exhibit 1004, page 33. And let's call out the first seven lines up in the
24 right column, please.

1 And what this portion of Wang shows is that the Wang device displays
2 price of the item the user entered or scanned in, and the information is
3 derived from or embedded in the barcode. The user can then approve the
4 transaction, and an electronic receipt is created. Thus, in response to this
5 scanning action of the product barcode, the Wang device clearly obtains,
6 derives, or obtains information from that barcode. For example, indexing
7 information or product item and pricing information. That's all explained
8 here in Wang, which also clearly discusses obtaining information embedded
9 in an image, explicitly product and pricing information, and satisfies the
10 embedded claim feature, as well.

11 Thus, under the correct meaning of embedded, Your Honors, Wang
12 satisfies this claim limitation and its optional use of both OCR to scan the
13 alphanumeric text. So, next, unless there are any more questions on Wang,
14 I'd like to move to the Take An Order! reference.

15 JUDGE AHMED: Counsel, setting aside the barcode scanner in
16 Wang, is there any evidence in the record that shows that an OCR reader
17 could also recognize a barcode or read a barcode?

18 MR. KRIEGER: So I think that the testimony, I think, on both sides -
19 - I don't believe this is in dispute, but I'm sure counsel will correct me if I'm
20 wrong -- is that OCR focuses on alphanumeric text. However, there is
21 extensive testimony that was provided by Patent Owner's expert about how
22 these OCR readers work. And they take an image, and the image, for
23 example, with a barcode, which had numbers underneath it, would see the
24 bars in the barcode and would create blobs around them from the image and
25 then would identify the text and interpret the text. So it captures both the

1 bars in the barcode, and the letters, and then the software identifies the
2 blobs, and then identifies the letters, and then interprets the data. But OCR,
3 I don't believe is in dispute, does require an image capture device.

4 Does that help me answer the question? Okay. So, let's go to slide 38,
5 please.

6 Take An Order!, Exhibit 1005, is a website from a company called
7 Stevens Creek Software. It's a product advertisement for Take An Order!
8 Software, which is similar in many respects to the system that Wang just
9 discussed. The web page describes points-of-sale software that can be
10 implemented in the Palm Treo software platform. And like Wang, Take An
11 Order! refers to scanning barcodes with a, quote, barcode scanner, unquote,
12 and obtaining product information from the barcodes. For example, you can
13 scan the barcode of a product and have it added to your order.

14 Now, the claim chart for claims for Ground 6, rather, the petition and
15 Petitioner's expert indicate that the Take An Order! barcode scanner satisfies
16 the image capture device claim feature. In its response brief, Patent Owner
17 argued that a barcode scanner in Take An Order! is limited to a laser barcode
18 scanner, and that assertion is demonstrably false. It's incorrect, Your Honors.

19 Slide 41, please. So as you can see here, at the end of Take An
20 Order!, it indicates that its software runs on Palm operating system and it
21 indicates that there are, quote, there are a variety of options for barcode
22 scanning using Palm OS handhelds. You can read all about them here,
23 unquote. This hyperlink leads to a description of imaging-based barcode
24 scanners for Palm OS handhelds.

1 Slide 42. Specifically, as you can see here, on pages 5 and 6 of
2 Exhibit 1010, the Stevens Creek website indicates that one option for
3 barcode scanning is the Socket SDIO scanner, which is a camera scanner,
4 not a laser scanner. In fact, as you can see here, even Patent Owner's expert
5 agreed that a Socket SDIO scanner is an imaging-based barcode scanner. So
6 that issue doesn't appear to be in dispute. The SDIO scanner in Exhibit 1010
7 was discussed by Petitioner's expert at length in paragraph 59 of his original
8 declaration, Exhibit 1002. And what's important is that that specific
9 paragraph of his declaration was repeatedly cited in Petitioner's claim charts
10 for image capture device, for example, on pages 65, 68, and 70 of the
11 petition. Thus, the testimony in Exhibit 1010 unequivocally support that the
12 term barcode scanners that is in Take An Order!, that term is, in fact,
13 referring to both laser-based scanners and imaging-based barcode scanners.
14 It also clearly shows that the term barcode scanners in Take An Order! isn't
15 limited to barcode scanners, as Patent Owner has suggested.

16 So just to reiterate, under the correct construction, both laser-based
17 and imaging-based barcode scanners satisfy the image capture device. So
18 even under Patent Owner's narrow construction of image capture device,
19 Take An Order! satisfies that claim feature.

20 Lastly, I just wanted to briefly address the embedded information
21 limitation as it pertains to Take An Order! Just like in Wang --

22 JUDGE AHMED: Counsel.

23 MR. KRIEGER: Yes, sir.

24 JUDGE AHMED: Could you address Patent Owner's argument that
25 there are evidentiary problems with combining these two exhibits? They

1 relate to web pages from different times, they were captured at different
2 times and supported by different declarations. So how are we supposed to
3 combine these two to read the Socket scanner as part of the Take An Order!
4 reference?

5 MR. KRIEGER: That's a good question, Your Honor. I think the
6 reason for this is multiple. First of all, the issue was raised in Petitioner's
7 reply solely to show that this assertion by Patent Owner that Take An Order!
8 was somehow limited to laser barcode scanners was incorrect. That is a
9 false statement. It specifically refers to these imaging-based barcodes.

10 But to be clear, Petitioner is relying on Take An Order!, Exhibit 1005,
11 and, specifically, their disclosure of, quote, barcode scanners, unquote, to
12 satisfy the image capture device. So Exhibit 1010 is being provided and was
13 provided originally and discussed originally in paragraph 59 of Exhibit 1002
14 to just demonstrate and support that Take An Order! is referring to both
15 types of barcode scanners and that Patent Owner's suggestion otherwise is
16 false.

17 As to your question regarding the different times, as I'm sure Your
18 Honors are aware, the Internet Archive scours the internet and it grabs
19 webpages on different days, and they point to two different versions of the
20 Take An Order! web page. Of course, one would expect that sales web
21 pages from companies would change over time, and what's interesting is that
22 the -- let's actually pull this Patent Owner's demonstrative, page 18, and let's
23 go ahead and zoom in on the two web sites in the bottom right of this slide
24 18 of Patent Owner's demonstratives.

1 So here you can see the two versions of Take An Order! that were
2 presented by Patent Owner in its, I believe, surreply brief. Yes, the website
3 changes, but what you can see here is the word here on the left, which is a
4 spec Take An Order! that's relied upon here does point to the image-based
5 barcode scanners we discussed, the SCIO scanner, and so does the one on
6 the right. They highlight it in green here, the text that says wants to learn
7 more about Palm OS and handhelds, that's the wrong section to highlight.
8 The section below it that says, quote, want to learn more about barcode
9 scanning options for the Palm, unquote, and the hyperlink that says read all
10 about it on the bottom right -- you can highlight that please, Mr. Crumbley --
11 that takes you to a similar discussion of the SCIO imaging-based barcode
12 scanner.

13 So this is not a relevant issue to this case. And, moreover, the fact that
14 a website changes over time doesn't somehow disqualify references being
15 prior art. We are relying specifically on Exhibit 1005, not Exhibit 1010,
16 page 35, in our grounds. And so Exhibit 1005, page 3, is, in fact, what refers
17 to imaging-based barcode scanners, as does the earlier version of Take An
18 Order! that Patent Owner has submitted. Does that make sense? I'm happy
19 to clarify that.

20 JUDGE AHMED: Thank you.

21 MR. KRIEGER: Okay. Let's go back to slide 47. And just basically,
22 you know, getting back to the embedded information, Wang and Take An
23 Order!, they both discuss scanning barcodes and obtaining product and
24 pricing information from them. That is embedded information derived from
25 those; it is embedded in them. If you give a barcode to somebody, chances

1 are they're not going to know what that relates to. We have to scan it. We
2 have to derive information, embedded information from that barcode to
3 determine, for example, the --

4 JUDGE TURNER: Counsel, you're into your rebuttal time. Do you
5 want to use any of your rebuttal time?

6 MR. KRIEGER: Yes. Let's go ahead and use it, but I'm just about
7 done here. Thank you, Your Honor. I appreciate it.

8 JUDGE TURNER: Do you want me to set a clock for you, or do you
9 want me to just time you?

10 MR. KRIEGER: It's okay. I'm just going to say a couple of
11 sentences, and then I'm done.

12 JUDGE TURNER: Okay.

13 MR. KRIEGER: Thank you. So just to conclude here, both parties'
14 expert testimony support that all of the challenged claims are unpatentable
15 over the prior art. Wang and Take An Order! both disclose laser-based
16 barcode scanners and imaging-based barcode scanners. Both of them do.
17 And both of those are different types of image capture devices, and both
18 Wang and Take An Order! also describe use of images having embedded
19 information therein, as we just discussed. And for this reason, the
20 challenged claims are invalid and should be canceled.

21 Any other questions? Very good. Thank you, Your Honors.

22 JUDGE TURNER: Okay. You will have 24 minutes.

23 MR. KRIEGER: Thank you.

24 JUDGE TURNER: And just to confirm, for Patent Owner, that's 40
25 minutes of principal time; is that correct?

1 MR. THEISS: Yes, Your Honor. Oh, we're good. Sorry about that,
2 Your Honors. I'm ready to proceed when you are, Your Honor.

3 JUDGE TURNER: Fine. Whenever you're ready.

4 MR. THEISS: I'm Brandon Theiss, and I represent the Patent Owner
5 here, Intellectual Ventures. Assisting is Heather King.

6 First, Your Honors, I would like to address the motion to exclude. As
7 was discussed by the panel, the Federal Rules of Evidence 403 generally
8 applies more in the context of gatekeeping function that a judge does
9 occluding jury. The question is is the information more prejudicial than
10 probative?

11 Counsel just stood up here and said that there is not an express
12 definition in our intrinsic evidence for the terms image capture device or
13 embedded information. Then there was a discussion about how there was an
14 apparent contradiction between the extrinsic evidence and the intrinsic
15 evidence. But, Your Honors, as questions asked, what evidence has
16 Petitioner offered for why this information -- what these terms mean because
17 both parties agree the document itself that is our touchstone is going to tell
18 us what the term means. But, specifically, under Philips, it recognizes
19 expressly that because -- I'm pointing to Philips directly -- because the
20 meaning of a claim term as understood by a person of ordinary skill in the
21 art is not immediately apparent and because patentees frequently use terms
22 idiosyncratically, the court looks to those sources available to the public that
23 would show what a person of ordinary skill would understand the disputed
24 claim language to mean, Your Honors. And that is what we have presented
25 with these references.

1 Specifically, if we look at Exhibit 2024 that Petitioner seems to take
2 issue to. That specifically is a contemporaneous patent that walks through
3 the background of the differences between different conventional barcode
4 scanners. If we look at Exhibit 2025, this is an exhibit that presents an
5 example of a conventional barcode scanner. And then look at 2026, we
6 similarly see a discussion that corroborates all the other discussions here
7 about the differences between linear scanning barcode scanners and image-
8 based barcode scanners, Your Honor. This is the type of evidence that
9 Philips expressly tells us we need to look to.

10 Now, Petitioner could have put forth an expert, could have provided
11 extrinsic evidence to refute our definition of an image capture device. They
12 didn't, Your Honor. Instead, they rely upon a miscommunication about the
13 meaning of the word image versus captured image. And I think, Judge
14 Turner, you had a very great characterization of Petitioner's position on this,
15 that a person of ordinary skill in the art or just a layperson would understand
16 a captured image to mean I have it, I can do something with it. That is
17 exactly what Patent Owner believes the term means with an image capture
18 device. Like a phone. You take a picture, a picture is an image. Then you
19 can run algorithms on that to extract information from that image. That
20 information can be a barcode, it can be a human readable, it can be a micro-
21 dot, it can be anything, any of those tools and techniques that there's an
22 entire field of study in security related to putting things in images.

23 We are 100 percent in the position, as Your Honor has said, is that the
24 extrinsic evidence here shows that an image capture device is a class of
25 image barcode scanners or imagers that capture a picture and then do

1 additional processing on that captured image. The extrinsic evidence
2 supports that. Our expert testimony supports that.
3 The deposition supports that. Counsel was just walking you through the
4 deposition of Dr. Berisso when he was talking about could a linear barcode
5 scanner capture an image of that thing that was printed in front of him. Yes,
6 Your Honor, absolutely. There's words printed on the page. I can take out
7 my camera and take a picture of those words on the page. The image is
8 here. The captured image is in here.

9 Counsel also discussed in Dr. Berisso's discussion that a lot of
10 barcode scanners and potentially even barcode scanners in your phone don't
11 necessarily need to have a viewfinder. That's sort of immaterial about what
12 we're talking about here. What we are talking about here with regard to an
13 image capture device is what is going on inside the camera itself. What
14 happens after you've taken that picture, what are the algorithms and
15 processing that is going on inside that captured picture, what is going on
16 inside; and that is very, very different than what happens inside of a barcode
17 scanner, a laser-based barcode scanner.

18 Let's just talk about what goes into a barcode scanner. I'm on the slide
19 —

20 JUDGE TURNER: Let me just ask a quick question. So if I had an
21 optical character recognition system, does it have to involve an image
22 capture device or is that not true?

23 MR. THEISS: Well, Your Honor, I think an image capture device, an
24 OCR, would be camera-based. Yes, we agree with that position. Where I
25 think the important thing is not, one, is not in the petition and, again, this

1 proceeding is governed by the information contained in the petition, the
2 Petitioner chose to identify the embedded information as the barcode
3 information.

4 So, yes, Your Honor, and there's no dispute in the record that an OCR
5 is image-based. It's going to take a picture of that text and then process it.
6 Absolutely, Your Honor.

7 JUDGE TURNER: So it meets that claim term of an image capture
8 device if I have -- in Wang, it discloses an OCR system, so it at least has an
9 image capture device. Maybe it doesn't do the rest of the claim, but at least,
10 with respect to image capture device, does it disclose that?

11 MR. THEISS: Oh, I believe so, Your Honor, to the extent that Wang
12 discloses that, but we have to be careful here is that what does the petition
13 allege that embedded information is, and the petition never makes the
14 connection, so yes.

15 JUDGE TURNER: And just because I have you -- I'm sorry, I know
16 you want to move on --

17 MR. THEISS: No, that's okay.

18 JUDGE TURNER: No, no. I understand you want to argue the way
19 you want to argue. I want to let you do that. So if I have an image capture
20 device and it captures a barcode, I think we've had Petitioner's counsel talk
21 about what happens if I have an image capture device and it happens to
22 capture a barcode, it's looking at a page and it's looking for characters and it
23 happens to capture a barcode, is it able to discern what it is? Is it able to do
24 anything with it?

1 MR. THEISS: Your Honor, I'll direct you to slide 9 of our
2 demonstratives where we're excerpting from Dr. Berisso's deposition
3 transcripts.

4 Counsel asked Dr. Berisso the question: Could you use an OCR
5 scanner to interpret the barcode?

6 Witness: No.

7 Why not?

8 An OCR scanner is a task-specific device that is looking for
9 characters to optically recognize. It would look at the picture, say there are
10 no characters, and there is nothing to happen. Your Honor, it could not read
11 the barcode scanner. It might see it as a squiggle, a random dot, some other
12 information on a product label, the case that you can see. It would
13 completely ignore all the information related to the barcode and only look at
14 the text, the text being human-readable below the barcode. It completely
15 ignores the upper portion of the barcode.

16 JUDGE TURNER: Okay.

17 MR. THEISS: So talking about why this is so different than the way a
18 barcode scanner works, a laser-based barcode scanner works, we have all
19 gone to the checkout counter at the supermarket or Home Depot or wherever
20 and we see this red line. That red line looks like it's a solid line, but the way
21 it actually works is there's a laser that's sweeping across and looking at the
22 reflected light back. And as a result of that sweeping of the light, you can
23 tell the thickness of the bars. There physically is no image that is captured.
24 There is an output that internally looks like presented on the bottom of slide
25 6.

1 As a practical matter, if you hook up that barcode scanner to your USB port,
2 it's just going to be numbers as if you were typing those numbers on the
3 keys.

4 Going to slide 7, as it relates to what is an image capture device, well,
5 Your Honors, as we said before, that specifically takes a picture. It takes a
6 picture and there's information contained in that picture and you need to run
7 algorithms to figure out where the information is, how far is that
8 information, but it starts with a captured image, because, as Your Honor said,
9 you have to have it, then you can do something with it. That is exactly what
10 a captured image is and that is what an image capture device does.

11 Petitioner said that the image capture device is something that
12 captures an image and did not want to tell you what the image is. Your
13 honors, I'm standing in front of you and telling you exactly what an image is.
14 It is a picture. It is a picture that is taken of something and that something
15 has embedded information. That embedded information can be in the form
16 of a barcode, it could be a micro dot, it could be anything that you can
17 imagine. It has that information.

18 Counsel also has been slightly mischaracterizing Patent Owner's
19 position as to what an image capture device is, saying that it is a camera-
20 based barcode scanner. Your Honor, our position, to make it perfectly clear,
21 is that anything that takes that picture is an image capture device. As it
22 relates to the technology in the patent, the implementation would be
23 something that takes a picture, like your phone, and then parses that image
24 that's acquired to find the barcode and then extract the information there.

1 JUDGE TURNER: Counsel, does that information have to be
2 numeric?

3 MR. THEISS: I would suggest, based on embedded information
4 specifically, it doesn't have -- I'm sorry. It's embedded information, Your
5 Honor. It can't be alphanumeric in a human-readable format. Otherwise, it
6 would just be information.

7 JUDGE TURNER: Let me give you a thought experiment. So let's
8 say I'm on the internet and it's asking me if I'm a robot, and it's showing me
9 pictures of bicycles. I'm assuming maybe there's nothing maybe embedded
10 in there, you wouldn't say, okay, is there information embedded there. But to
11 me, in order to prove that I'm not a robot, I have to click on the picture of the
12 bicycles; and so, therefore, is that embedded information?

13 MR. THEISS: I don't believe so, Your Honor. I believe embedded
14 information needs to be information contained in the documents. There was
15 a discussion –

16 JUDGE TURNER: Why wouldn't that be information? The fact that
17 there's a bicycle or not a bicycle, why wouldn't that be information
18 contained within the picture that I'm being shown?

19 MR. THEISS: Contained versus embedded, Your Honor, I think is the
20 distinction there. We're not going to get into a philosophical discussion on
21 number theory between the differences in numbers and numerals or in the
22 abstract concept that written language represents. At the end of the day,
23 fundamentally, a numeral written on this page, if I scroll to number five, the
24 numeral five is relating to an abstract concept and the number five.

1 Similarly, language. If I say Brandon is talking, well, that has no
2 inherent meaning. Your brain has to decode that. But that is not what we are
3 talking about here, Your Honors. What we are talking about here is
4 embedded in a very specific context, and I believe there was a question of
5 opposing counsel relating to what does embedded mean in this context? If
6 it's just human readable, is that embedded? No, Your Honor, that isn't.
7 That's just information.

8 Our patent law has the printed matter doctrine. I would be struggling
9 to stand in front of you here and saying that information should have
10 patentable weight under the printed matter doctrine if the word embedded
11 wasn't there. Embedded has to have some meaning. And, specifically, it has
12 to be that a human can't discern it and the information needs to be there.

13 JUDGE TURNER: But what about the math of the -- that opposing
14 counsel brought up, that if I have a barcode up there and I happen to
15 recognize it, is that still embedded? If I work at Walmart and I've just
16 learned the barcodes and I become such that I can go, like, oh, I know that
17 barcode, on sight, is it no longer then embedded because I can recognize it?

18 MR. THEISS: You said if you, personally, if you code the barcode
19 and there was information --

20 JUDGE TURNER: I don't think I personally could, no. But if one
21 could.

22 MR. THEISS: So, Your Honor, there's a barcode in front of your
23 monitor right now that's identifying the USPTO.

24 JUDGE TURNER: I can't identify it. Sorry.

1 MR. THEISS: I think I absolutely agree, there's barcodes on
2 monitors. And I guess if you were sitting there every day or you were
3 standing at my lectern every day, you would start to recognize that. And if
4 you were really sharp, you could make that connection. I completely
5 understand where you're going with that.

6 So I think in that case --

7 JUDGE TURNER: Would that no longer be embedded?

8 MR. THEISS: Well, I think you would have superhuman abilities. A
9 lot of times --

10 JUDGE TURNER: I don't have superhuman abilities.

11 MR. THEISS: Well, you would have that ability, Your Honor.
12 Generally, what we're looking at here is the way a person of ordinary skill in
13 the art would understand that. I think, in this case, you would have an
14 extraordinary ability. We sometimes see this in the § 101 context, which
15 everyone is probably familiar around here, is that, yes, a human practically
16 could do all the complicated mathematics for an encryption algorithm. But,
17 in practical terms, that isn't what we're talking about in the § 101 context.

18 And I think the same is sort of helpful to your question, Your Honor,
19 is that, yes. To say it a little bit more tactfully, is that, Your Honor, you
20 could physically measure each one of the bars. You could go to a lookup
21 table, code 3 of 9, look up how those thicknesses relate to it and do the
22 decoding yourself. Yes, yes, Your Honor, if you could do that cool math in
23 your head, absolutely. It wouldn't change the fact that that's embedded
24 information in the barcode.

1 It absolutely excludes, though, Your Honor, the human readable that
2 you, my assistant, opposing counsel, the court reporter can all walk up to
3 and understand that the number says 123456.

4 JUDGE TURNER: Okay. So it appears that Patent Owner is sort of
5 creating, between the claim term embedded, it's saying that that's either
6 encoded or encrypted; is that fair?

7 MR. THEISS: No, Your Honor. We did advance that in an earlier
8 stage in the proceeding, but we are not taking that position here. What we
9 are saying, Your Honor, as this relates to embedded, is it has to have some
10 meaning. It has to mean something more than just the information, and we
11 submit that the human readable printed on a page is just the information.
12 The word embedded needs to mean something. So it needs to be in a form
13 that you or I looking at it can't discern, can't understand. A barcode is a great
14 example of that, and that is actually what Petitioner lays out as embedded
15 information in the petition, is that the barcode contains embedded
16 information, which we agree with that. A barcode is an example of
17 embedded information; we completely agree with that position.

18 But where we disagree is about the new theory that the OCR scanner
19 that can read the human readable can decode that information.
20 Well, the only testimony here in our universe is from Dr. Berisso that makes
21 very clear that the OCR scanner cannot read the barcode. Therefore, it
22 cannot decode the information.

23 JUDGE TURNER: I'll just let you know, you have about 24 more
24 minutes. Go ahead.

1 JUDGE AHMED: The concept of the barcode, isn't the information in
2 text at the bottom of the barcode the same information that's included in the
3 barcode? So why isn't that information embedded?

4 MR. THEISS: Oh, Your Honor, it may or may not be. There are
5 some symbologies. So symbology refers to the standard by which the
6 information is included. Some of the symbologies will include a check sum.
7 That actually does not appear in the human readable. But in UBC, which is
8 an example up there, yes, all those numbers are included in that information.

9 But, Your Honor, we have to understand that the context that we're
10 talking about this term is related to the image capture device. The image
11 capture device has to access the information that is embedded in the image.
12 And if it's just the human-readable text, it's our position that that is not
13 embedded, it's just information on the page.

14 JUDGE AHMED: And going back to the example in the
15 specification, the specification says that the image can be a one-dimensional
16 barcode, a media barcode. So why would a person of ordinary skill read that
17 and think that you need a picture device, something that captures images, to
18 be able to read those barcodes?

19 MR. THEISS: Well, Your Honor, I think a slight, you know,
20 difference of opinion of what you just said is that the reference, in terms of
21 reference says that the image can contain these things, and we're not
22 disputing that the image can contain these things. The picture, I take a
23 picture of the barcode on this water bottle. That picture I took with my
24 camera phone has the barcode. Absolutely. It also has some text in it. It has
25 probably a background, probably has my hand, because somehow, whenever

1 I take a picture, somehow my finger is always over the camera. But it has
2 all this additional information. We're not disputing that.

3 Again, Patent Owner's position is an image is a picture. And, of
4 course, we've all taken pictures with, to us that are after years, with film
5 cameras. We've taken them with digital cameras. An image capture device
6 is something that takes a picture, and that picture can have whatever it wants
7 in it.

8 For the claim's invention to work, the claim's invention needs to have
9 something more. It needs to have that picture and, within that picture,
10 included in that picture -- and that's what the section you were talking about
11 was dealing with -- is what needs to be included in that picture, in that
12 image, for it to work. And a barcode would be a perfect example of that, or
13 you can have multiple barcodes in that image for it to work. Yes, Your
14 Honor, absolutely.

15 JUDGE AHMED: Okay. Thank you.

16 MR. THEISS: So just to make clear, going to Slide 10, when we look
17 at the petition at 46 and 40, the petition, again, what we are in an IPR, this is
18 not ex-parte re-exam. Petitioner is defined and required to lay out
19 everything in the petition. And here's what they say in the petition: that the
20 embedded information is the barcode information. So Petitioner is confined
21 that the embedded information is the information contained in the barcode,
22 and we agree that information contained in a barcode is embedded
23 information.

1 Now, Petitioner is now trying to say that the human readable that may
2 appear, may or may not appear below a barcode, is the embedded
3 information, but nowhere does this appear in their petition.

4 Nowhere. The first time it appears is, impermissibly, in the reply brief, Your
5 Honors, and that is just not allowed under the Fed Circuit precedent.

6 And, again, as we talked through a bit to the questioning, is that if you
7 were to extract the word embedded from the claim, the claim would make
8 sense. You can see on the right, we just removed the word embedded, but it
9 doesn't say that. The claim, as proposed on the right with the part removed,
10 is exactly what Petitioner is saying: it would satisfy the claim. Information,
11 it's just written on the page. It's just there.

12 But the claim doesn't say that. It says embedded information. And we
13 have our testimony here, from the deposition that we've heard quite a lot
14 about, is embedded information is not human-readable text.

15 So there was just a question asked of opposing counsel related to if
16 someone were to read the human-readable text, see that there's a UPC
17 number underneath it, then take that number, go look it up in the database, is
18 that information under the construction of derived? Well, the word does not
19 say derived. It says embedded. So the information that is being extracted
20 has to be included in the image. And, Your Honor, again, if you were to use
21 their definition, it would work absolutely fine if you removed the word
22 information. So, you can say the information on the barcode label being
23 human readable, you go look that up in the lookup table, and you look up
24 that -- I think the example that was given in the deposition was a container
25 of pickles. I think that was the example that Petitioner used, and that just

1 isn't the intent of the claim. The word embedded has to have some meaning
2 here for the word to make sense.

3 And if you're just going to have words written on a page, well, then
4 we start to get into the printed matter doctrine and whether or not we should
5 even be having this discussion. But the word embedded there changes this
6 from just being pure information in information form to being a technical
7 feature, and that technical feature is that we're going to take that information,
8 put it in something like a barcode, then we're going to use our image-capture
9 device to capture an image that includes that barcode, and then we're going
10 to decode that information that's embedded inside the barcode.

11 JUDGE TURNER: As a follow-up on that example that's being
12 discussed here, so if I have optical character recognition and I'm reading the
13 letters, and let's say that there's a substitution cipher, so is that embedded in
14 the text?

15 MR. THEISS: Well, Your Honor, I think that encryption has a
16 separate meaning than embedded. Cryptography is a completely separate
17 branch than steganography. They're two separate branches of security and,
18 again, when they're talking about a non-seer, the question that came up
19 before is, I believe, the intent's the patent, and there's no evidence in the
20 record to dispute this, nor is there an expert testimony to dispute this, was
21 they intended that information to be included in the image in the barcode.
22 There's nothing in terms of record that says it wouldn't work that way, and
23 our expert says it should work that way.

24 JUDGE TURNER: So if it's encoded, that would fall under the scope
25 of embedded?

1 MR. THEISS: No, Your Honor. I think of it as human-readable, and
2 it is just encrypted and would just require a mathematical operation to take
3 the human readable, do some math, some cool math to it. I don't believe
4 that would be embedded information. That would be encrypted information,
5 Your Honor, but I don't think that would be embedded.

6 JUDGE TURNER: Okay.

7 JUDGE AHMED: So, Counsel, what is the support to exclude
8 human-readable text from this claim term? Petitioner pointed us to Figure 7
9 and showed us two of the examples that include text in that figure, so what is
10 there in the specification that would support a negative construction--

11 MR. THEISS: Your Honor, I've actually discussed Figure 7, so that's
12 found on Page 8 of our demonstratives, Figure 7 of the reference. This is an
13 example of what could be scanned, so this is going to be the image, which
14 you take a picture of, and then that becomes a captured image, and you
15 would process.

16 So, if you were to take a picture of the thing that was labeled as facts,
17 the image would contain -- the captured image would contain the text, the
18 various lines, some of the words, the typed text, the handwritten scribbles
19 that are in there, that would all be contained in the captured image, because
20 it's taking an image of what is there. It would also contain the barcode. I
21 don't see there really being any difference between what we're saying and
22 what is shown in Figure 7.

23 Figure 7 is saying, yes, this is the type of thing that you could capture an
24 image from. You could take that picture of that facts. You could

1 theoretically put it in a flatbed scanner, that would also work. You could use
2 a cheap barcode scanner to only read the QR-type code with regard to that.

3 Did that answer your question, Your Honor?

4 JUDGE AHMED: Yes. I was asking more about the specification of
5 the '167 Patent itself. What is there for us to exclude human readable text?
6 I don't think it was Figure 7.

7 MR. THEISS: Oh, I apologize, Your Honor. I believe that the most
8 specific evidence we have in the document itself is the utilization of the
9 word embedded. Otherwise, if you didn't use the word embedded, it would
10 just be information. I don't know how you would represent information on a
11 page or a definition that information would exclude printed information on a
12 page. All I know is that, in claim construction, we don't exclude words.
13 Embedded has to mean something, so that has to exclude the generic. That's
14 just information written on a page. We have a modifier there, it has to mean
15 something.

16 And if you look to the examples that are in the specification, you see
17 the examples of a barcode, both a 1D and a 2D. And it's actually not
18 disputed, based on the petition, that embedded information is the
19 information contained in the barcode. That is what the Petitioner lays out on
20 Page 40 and 46 and throughout the petition. It's just not in dispute that
21 embedded information is the information contained in the barcode.

22 The human readable just came out in the reply brief. It's not in the
23 petition, which is not permitted under our rules. The rules say it has to be
24 laid out in the petition. What's laid out in the petition is the barcode

1 information, not the human readable. And even if you were to get there, it
2 still doesn't meet the claim limitation.

3 JUDGE AHMED: Why is it not responsive to your claim construction
4 argument, which was raised for the first time in the patent owner response
5 where you proposed that the claim excludes the human-readable text?

6 MR. THEISS: Well, Your Honor, because I think it wasn't responsive.
7 We were pointing out that their mapping is incident. It's not a claim
8 interpretation issue. They said the embedded information is the barcode
9 information. Now, they're pivoting to the embedded information is not the
10 barcode information, it's the human readable that is only readable by an
11 OCR scanner that can't even work with their original proposed claim
12 construction. It's incompatible, as the only evidence we have in the record is
13 that OCR scanners cannot read barcodes. And the information that they said
14 is embedded information is the information contained in the barcode. Those
15 are fundamentally incompatible.

16 Therefore, it's complete pivot, and that's why it's impermissible, Your
17 Honor.

18 JUDGE AHMED: Okay. Thank you.

19 JUDGE HAMANN: Counsel?

20 MR. THEISS: Yes.

21 JUDGE HAMANN: Obviously, we've been doing a lot of discussion
22 of embedded. We've talked about what's not embedded or may be
23 embedded. What does embedded mean? What did Patent Owner put
24 forward as an affirmative, you know, statement as to what embedded means?

1 I know we've talked a lot about what is and what isn't with specific
2 examples, but what does it mean for this context?

3 MR. THEISS: It is information that is not readily discernible by a
4 human.

5 JUDGE HAMANN: And Patent Owner put that forward in its
6 construction.

7 MR. THEISS: We put forth the inverse of that. Specifically, we put
8 forth, as identified on Slide 4 accordingly, in the POR specifically,
9 accordingly, a person of ordinary skill in the art at the time of the '167
10 Patent reading the claims in light of the specification would have understood
11 that human-readable text in the form of unencrypted human-readable
12 alphanumeric characters is not embedded information.

13 So, Your Honor, I just inverted that. Instead of defining it negatively,
14 I recited it possibly.

15 JUDGE HAMANN: Okay. But that sort of gives me an example of
16 what's not embedded. It doesn't say what embedded is. And maybe I'm
17 missing something here. To me, it's saying, you know, here's an example of
18 what's not embedded, right? Human-readable text is not embedded, is what
19 I think Patent Owner is suggesting.

20 MR. THEISS: Yes, Your Honor.

21 JUDGE HAMANN: Okay. So what is embedded? You give me an
22 example.

23 MR. THEISS: A barcode would be a perfect example. A micro-dot
24 would be a perfect example. A watermark would be another example.

1 JUDGE HAMANN: I don't want examples. I want to know what
2 embedded means in this context.

3 MR. THEISS: Yes, Your Honor.

4 JUDGE HAMANN: You give me an example, and I'm trying to
5 understand. I'm not sure some of the papers necessarily given by any party,
6 you know, what is embedded from the meaning. When we construe
7 something, we have to say what it means, you know. Sometimes, saying
8 here's an example, in or out, it is insufficient to get into the proper scope. So
9 I'm trying to understand where in the papers there's a clear statement as to
10 how we should construe the term embedded without going just purely by
11 examples.

12 MR. THEISS: Your Honor, can I reserve an answer to that question
13 for rebuttal? I want to review the record to make sure I have the logic and
14 correct citations on that. Would that be acceptable?

15 JUDGE HAMANN: Yes.

16 MR. THEISS: Great. Seeing I only have approximately 10 minutes
17 left, I'd like to move to the other grounds, the TAO reference, the T-A-O,
18 Take An Order! reference. Is that comfortable with the Board? Great.

19 So, moving to Slide 14 of our demonstratives, what we have here is
20 what is identified in Exhibit 5. I'm sorry. In Exhibit 1005. Specifically,
21 what we have here is an identification of a Symbol SPT Palm OS handheld.
22 As you can see on the slide here and in the exhibits, this is Exhibit 2009, is
23 the manual of a contemporaneous symbol SPT scanner that was available at
24 the time. We've also, for completeness, have provided another one that's the
25 earlier model, the 1700. This is the manual from the 1800.

1 And according to the manual, the SPT-1800 has an interval laser
2 barcode scanner, which, if your unit is configured to use scanning input,
3 allows you to collect data by scanning barcodes. The SPT-1800 decodes the
4 following barcode symbologies, and then there's delineation, Your Honor.
5 Each and every one of those barcodes is a 1D barcode.

6 Now, if we go to the grounds that are before us today, and, again, as
7 we talked about earlier, the IPR process is different than re-exam. It is
8 governed and bound by the grounds set forth by the Petitioner in the petition.
9 This is our universe. EX-1010 is not in this universe. None of the grounds
10 include EX-1010. Here's taken from the surreply on Slide 16 of our
11 demonstratives. EX-1010 isn't there, Your Honor. Whether or not -- what
12 EX-1010 says or doesn't say is not the grounds before us. The ground before
13 us is the content of what EX-1005.

14 It's important to remember, Your Honors, and the Federal Circuit has
15 made very clear, it is not the role of the PTAB to play archaeologist with the
16 record. The Petitioner bears the burden of showing where the evidence is in
17 the petition. It's not there. Our rules do not allow incorporation by
18 reference. It needs to be in the petition. Your Honors, EX-1010 is not in the
19 petition. It's mentioned briefly on a tangentially unrelated matter.

20 Also, this is very important, Your Honors, is there is absolutely no
21 evidence in the record of what happens when you click the link. It's not
22 there. There's a link. There's nothing in the record that says what happens
23 when you click that link.

24 Now, this was talked about a bit. Actually, they put up this slide, and I
25 think it's important that they put up this slide, is this shows how they didn't

1 meet their evidentiary burden. Your Honors, it is not the PTAB's job to go
2 dig through a website, a commercial website, and say these are the tools and
3 the boards you could have put into your computer that could have possibly
4 been configured to do things. If Petitioner had put EX-1010, we could be
5 having a discussion about that, but we don't even get to that discussion, Your
6 Honors, because EX-1010 is not part of the grounds. It's EX-1005, and all it
7 says is that you can use the SPT barcode scanner from Symbol. And when
8 we go and look at what that barcode scanner was at the time -- and, again,
9 there has been no evidence to refute that either the barcode scanner being
10 referred at the time was the SPT-1800 or the SPT-1700, the manual page
11 looks virtually identical. There's no evidence to say that's not what they
12 meant. That's evidence, Your Honors. We put forth the manual.

13 There's no evidence about what happens when you click that link.
14 And what there is, is there's an unrelated reference, EX-1010, that is a
15 different time, different page, different memory, that has this information
16 buried in there somewhere. And the PTAB rules are very clear, that just
17 because it was tangentially referenced in an expert declaration, does not
18 allow the Petitioner to correct the defect in the petition. Very easily,
19 Petitioner could have put it in there, but he didn't.

20 So, Your Honors, Grounds 1 through 4 fail because Wang's barcode
21 scanner is not inherently or expressly an image capture device configured to
22 capture an image. As Judge Turner said, a captured image is I have it, I can
23 do something with it. For clarity, an image capture device under Patent
24 Owner's construction is a camera that takes a picture. Image is equivalent to
25 picture. Included in that picture is some additional embedded information.

1 Petitioner did not allege that the OCR human readable was the
2 embedded information in the petition. Now, they're putting forth an
3 argument that, well, there could have been an OCR. Well, OCR does not
4 read the embedded information, Your Honor. It just reads information. And
5 the word embedded has to mean something. It can't just be superfluous,
6 because, as we saw, if we just delete the word embedded, information makes
7 absolutely perfect sense. So it has to mean something.

8 And then, finally, as it relates to Ground 6, when it relates to the TAO,
9 what is taught specifically in the EX-1010 is the Symbol scanner, which was
10 a linear barcode scanner that could only read a limited number of linear
11 barcodes. It doesn't mention PDF-417, which was a 2D barcode that was
12 available at the time. It doesn't mention QR codes. It only lists out linear
13 barcodes, because it is a laser-based scanner that cannot read to you
14 barcodes.

15 And the content of Exhibit 1010 is completely irrelevant. It's
16 completely irrelevant here, because that is not the grounds that is before us.
17 The ground before us is would a person of ordinary skill in the art have
18 combined these references and then can they teach the feature? And the only
19 thing that is shown on Exhibit 1005 is the SPT barcode scanner, which the
20 manual makes very clear is a linear barcode scanner. With that, I can answer
21 any more questions

22 JUDGE AHMED: Counsel, how do you respond to Petitioner's
23 argument that the Exhibit 1010 was discussed in detail in paragraph 59 of
24 the Expert's declaration and they cited to that paragraph in the petition?
25 Why is that not enough?

1 MR. THEISS: Because, Your Honor, that is not tied to the specific
2 issue of what is the image capture device. It's specific to that issue. The fact
3 that you have a connection somewhere else in the petition that relates to
4 other things is not what our rules are based on.

5 Our rules say that the Petitioner has to lay out the grounds for invalidity in
6 the petition. Otherwise, Your Honor, you could put forth the entire
7 Encyclopedia Britannica, have a tangential reference to something on
8 giraffes, and then say, well, Your Honor, my expert cited to giraffes. Well,
9 I'm going to go talk about zebras in this Z under the Encyclopedia
10 Britannica. That isn't exactly what the Federal Circuit has explained, where
11 it is not the role of the PTAB to be a truffle hog or an archaeologist, to go
12 into the record and to find these things. That is what the Supreme Court has
13 made it so clear that the petition guides everything. This is not like a district
14 court litigation where you can file amended complaints. That's why we're
15 able to conduct these proceedings so quickly, is the burden is on the
16 Petitioner to show where the evidence is at the time of the petition.

17 Anything else, Your Honor?

18 JUDGE TURNER: Thank you. Sure. One quick question. Is there
19 an embodiment in the '167 Patent that has the embedded information that
20 doesn't come from a barcode?

21 MR. THEISS: I don't believe so, Your Honor.

22 JUDGE TURNER: Okay. And I understand we're not dealing with
23 invalidity here, but then I'm trying to understand, because Claim 7 talks
24 about the imaging through the barcode, which is dependent from Claim 1.

1 So does 7 have any more claim limitation than 1? I mean, how can I
2 interpret Claim 1 if there's not a barcode?

3 MR. THEISS: Oh, Your Honor, because the patent talks about other
4 technologies that are similar to barcodes, and it is sort of a bedrock principle
5 that a person of ordinary skill in the art would understand that barcodes can
6 embed the information one way, but there's other technologies, such as
7 micro-dots, watermarks, or -- Your Honor, a great example here, what would
8 meet the claim limitation, would be every printer that's in the United States
9 prints a micro-dot that has a serial number of that printer.

10 JUDGE TURNER: And let me try again, because maybe you want to
11 change your previous answer, but I asked is there any embodiment where the
12 embedded information wasn't derived from a barcode?

13 MR. THEISS: I apologize, Your Honor. It doesn't give an express
14 example of a micro-dot or a watermark specifically, but it says that other
15 things could be used.

16 JUDGE TURNER: Okay. Okay. Because I --

17 MR. THEISS: Yes, I'm sorry. What I was saying is it doesn't say
18 what those other things could be, a person of ordinary skill in the art would
19 understand that those other things could be the micro-dot or watermark.

20 JUDGE TURNER: Thank you.

21 MR. THEISS: Anything else, Your Honors? Thank you.

22 JUDGE TURNER: Patent Owner will have 20 minutes.

23 MR. THEISS: Perfect.

24 JUDGE TURNER: And, Petitioner, you may begin -- hold on. Let me
25 reset. You will have 24 minutes. You may begin when you're ready.

1 MS. SAIA: Thank you, Your Honors. I would like to go through a
2 few of Petitioner's slides that talk about the claim construction issues and
3 then, afterwards, my colleague will touch on some of Patent Owner's
4 invalidity arguments.

5 First, I want to respond to Patent Owner's assertion that the Petitioner
6 has not introduced extrinsic evidence needed to interpret the term image
7 capture device, as it would be understood by a person of ordinary skill in the
8 art. Petitioner does not need to. The Patent Owner supplies the plain
9 meaning of the term, and, under the Federal Circuit precedent, it is improper
10 to consider extrinsic evidence.

11 Mr. Crumbley, could we go to Slide 7 from Patent Owner's
12 demonstratives?

13 This slide has to do with the term image capture device again. And as
14 we discussed, Patent Owner's extrinsic evidence is used to rewrite the
15 claims. As you can see here, as Patent Owner has conveniently underlined,
16 one of these pieces of evidence, Exhibit 2026, uses the term image sensor-
17 based optical readers. This is not what the claim says. The claim says
18 image capture device. If the claim said image sensor-based optical readers,
19 we would not have a claim construction dispute.

20 And it's informative here that Patent Owner's slides do not cite to any
21 of the intrinsic evidence in interpreting the claim at all, which, according to
22 the Federal Circuit, is the first source which we should look to.

23 The image sensor-based optical reader has a completely different
24 meaning than image capture device as used in the challenged claims. And

1 this slide is great evidence of how Patent Owner is improperly using
2 extrinsic evidence to rewrite the claims.

3 Third, Your Honors asked about -- actually, could we go to Slide 12?
4 Thank you.

5 Your Honors asked about how Patent Owner construed the term
6 embedded and if there was a definite construction offered. Patent Owner
7 seemed to avoid this question by suggesting that they argue a negative
8 construction of the term embedded, but Patent Owner argues that embedded
9 has a specific meaning. For example, on Patent Owner's response at Page
10 31, Patent Owner states, quote, Patent Owner accepts Mr. Purvis's opinion
11 that embedded information includes information contained in a barcode, and
12 it goes on to state that information in the form of unencrypted human-
13 readable alphanumeric characters is outside the scope of embedded
14 information, unquote.

15 And, again, this is at Patent Owner's response, which is Paper 16 at
16 Page 31. Patent Owner offers a construction of embedded as meaning
17 contained in, but they take issue with our construction of embedded as
18 meaning derived from, without stating why these two terms are different.

19 And as shown here at Patent Owner's demonstratives at Slide 12,
20 Patent Owner raises an issue about the construction of embedded in its
21 surreply -- or, sorry, in its Patent Owner response, again, at Pages 30 through
22 32. And this was the first time that Patent Owner did so, and rightfully so.
23 However, Petitioner responded to this newly raised construction in its own
24 reply at Pages 8 through 10, but this is not a new argument. Petitioner was

1 well within its right to respond to the reply, since Patent Owner raised the
2 issue for the first time in its Patent Owner response.

3 JUDGE TURNER: Counsel, can you pause just a second? I don't
4 think that my colleagues are able to see. I see what you're displaying, they
5 don't seem to be able to see the demonstratives that you're sharing, if you
6 can pause just a second.

7 MR. KRIEGER: Your Honor, could we pause our time, please?

8 JUDGE TURNER: Certainly.

9 MR. KRIEGER: Thank you.

10 JUDGE TURNER: Let me ask my colleagues if we can -- are you
11 still unable to see the demonstratives?

12 JUDGE AHMED: We can see them now.

13 JUDGE TURNER: You can?

14 JUDGE HAMANN: Now we can.

15 JUDGE TURNER: Okay.

16 JUDGE HAMANN: We were following along, I believe, on the slides
17 that you referenced to beforehand, but this was obviously also helpful.
18 Thank you.

19 JUDGE TURNER: Okay. You can go ahead.

20 MS. SAIA: Great. Thank you. As you can see here, Petitioner does
21 not raise a new argument. Instead, it was responding to Patent Owner's
22 argument that was raised for the first time in its Patent Owner response.
23 And, again, the term embedded is not rendered superfluous in the claim by
24 Petitioner's construction. Instead, Petitioner construes the term to mean
25 derived from. If an image did not contain information no one could derive

1 from the image, it would not have embedded information. This claim term
2 is not rendered superfluous, and Patent Owner does offer a construction as
3 meaning contained in. And, again, it does not state how this is different
4 from derived from.

5 Without any further questions, I'll turn this over to my colleague.
6 Thank you.

7 MR. KRIEGER: Thank you, Ms. Saia. I just want to address a
8 couple of additional points that were raised by Patent Owner in his
9 presentation. He repeatedly indicated that embedded has to have meaning
10 and, much like Ms. Saia was just discussing, it does have meaning, even
11 under Petitioner's construction. He asserted that alphanumeric text is just
12 information, and, therefore, there's no meaning to embedded there, and that's
13 just incorrect.

14 There is testimony in the case that supports that the numbers under a
15 barcode, when you obtain an OCR of them, if the number is 1678532, no
16 one knows what that is, and it's not readily discernible, as Patent Owner
17 asserted. You have to then go and do a lookup table or some other
18 permutation in order to figure out that it's a banana or a can of soup.

19 So I don't really understand the argument that's being raised here that,
20 somehow, OCR doesn't have embedded information and that it's just
21 information. That's just false. You still have to do that permutation in order
22 to determine the product and pricing and index information that's discussed
23 in the petition, so that's incorrect.

24 JUDGE HAMANN: Counsel?

25 MR. KRIEGER: Yes, Your Honor.

1 JUDGE HAMANN: This is Judge Hamann. So, obviously, human-
2 readable text, you can just read it. You don't need a scanner. And you can
3 take that, whatever you read, and put it into whatever you're talking about,
4 right? So that's the approach, doesn't that seem to render the whole image
5 capture device superfluous?

6 MR. KRIEGER: Well, no, it doesn't, because this is all determined
7 relative to the prior art. And here, Your Honor, we're looking at, for
8 example, the Wang OCR reference. Wang is saying use an OCR to do this
9 action, not have a person go to the store and do this. So based on the
10 language of Wang and the OCR reader that's specifically described there,
11 that is what the prior art describes, and that more than satisfies the image
12 capture device and the embedded information that is in the claims, Your
13 Honor.

14 JUDGE HAMANN: Thank you.

15 JUDGE TURNER: As a follow-up, I guess one question I have, I
16 think when you were discussing, before you were saying when we do OCR
17 and there's a barcode, those just sort of come out as blobs, the bars?

18 MR. KRIEGER: Yes. According to Patent Owner's Expert's
19 testimony, yes, Your Honor.

20 JUDGE TURNER: So if I'm looking at Wang and I'm relying on the
21 embodiment that's talking about OCR, I can't possibly be using the barcode;
22 is that correct?

23 MR. KRIEGER: If the data is not pulled from the barcode, I believe
24 that is correct. But the OCR reader, which parties agree has an image
25 capture device, still has to capture an image having those barcodes in them

1 in order to make those blobs that Patent Owner's Expert testified and
2 separate them from the data that's in the OCR's text.

3 So the image itself, in that situation, would still have a barcode, and
4 the data that's being obtained by the OCR reader would still have those
5 barcodes in it, even though it is used -- it just satisfies the language of Claim
6 7. If you look at the language of Claim 7, for example, it doesn't say
7 anything more than that the image includes barcodes. And according to
8 Patent Owner's Expert, when you do OCR, you have an image that has
9 barcodes and it has text and it isolates the blob of the barcode and separates
10 the text. And so the image still does have, by the words in Claim 7, the
11 barcode bars in the barcode themselves.

12 JUDGE HAMANN: But you're not utilizing them. You're not
13 utilizing the barcode itself.

14 MR. KRIEGER: It's utilizing them to the extent that it's separating
15 them out, but I agree with you. It's not using them to find the pricing and
16 product lookup information, no. It's using the alphanumeric characters.

17 JUDGE HAMANN: I mean, I think that's important, because you're
18 relying on two different embodiments in Wang, and you're saying that the
19 barcode is the embedded information. Then I would think the OCR
20 embodiment wouldn't necessarily have that barcode, it might have other
21 information, as you're detailing. But I want to make sure that I'm
22 understanding that delineation, that I'm not misunderstanding.

23 MR. KRIEGER: Yes. I think the point here is that, even the numbers,
24 if you OCR and just extract the number information, there's still information
25 embedded or derived from those numbers, i.e. what product is that? That

1 information is not readily discernible, and you still have to do a permutation
2 to determine that information from the OCR numbers and letters themselves.

3 JUDGE HAMANN: So is it fair to say I could obtain the same
4 information, but I wouldn't be using the barcode? Is that Petitioner's
5 position?

6 MR. KRIEGER: Well, it still uses it, except that it manipulates data
7 from the image that had it, but I agree with you. The actual pricing and
8 lookup information is pulled from the numbers, but it still is part of the
9 overall process, and it's still part of the image that is used in the OCR
10 process. So the question is what is the image. And again, the '167 Patent, as
11 I'll discuss in more detail in connection with Figure 7, refers to the word
12 image as being what's on the printed paper.

13 JUDGE TURNER: I guess it's just a little bit, maybe strange, that I'm
14 using it by throwing it away. So I'm like, okay, I got the whole thing. I'm
15 just going to look at the numerics, and then those are blobs, but I guess I've
16 used it in the fact that I've thrown it away. That's sort of a different use of
17 the verb use.

18 MR. KRIEGER: I think the important point here, especially with
19 respect to Claim 7, is that the image has to have the barcode and the
20 numbers in them. And then you're 100-percent correct. It then pulls the
21 product and pricing information under the OCR embodiment from the
22 alphanumeric characters themselves, yes.

23 JUDGE TURNER: Okay. Thank you.

24 MR. KRIEGER: And I do want to mention, for the alphanumeric text
25 having information embedded therein, that is discussed at length in in

1 Exhibit 1048, Page 214, lines 8 through 11, and the fact that the UPC code
2 has those numbers in them is discussed in Paper 9 at Page 137, I believe.

3 I also wanted to address another point, here. Patent Owner argued
4 that image means picture. That's a new argument. I'm not aware of that
5 argument being raised anywhere in the briefing. And so, again, that avoids
6 the intrinsic evidence where, in fact, image is not referring to a picture. The
7 word image, in the intrinsic evidence, refers exclusively to the barcode on
8 the printed piece of paper, for example, in Figure 7.

9 Another point, it was asserted repeatedly, that OCRs have embedded
10 information, was never presented in the petition. That is incorrect, and we
11 don't really understand why this is an argument that's being raised, because
12 it was featured front and center in the claim charts in the petition, which
13 refers to both the barcode scanner and the OCR reader and obtaining
14 information embedded therein, i.e. from the barcode or OCR reader.

15 So it was featured it was featured front and center, for example, in the
16 petition on Page 33. It was included fully there. So the assertion that that
17 was a new argument raised for the first time in the reply brief is incorrect.

18 Another argument that was raised was that the term embedded means
19 -- I think I got this quote right -- quote, not readily discernible by a human,
20 unquote. Again, that's another new argument. That does not appear in the
21 briefs and is improper at this stage.

22 However, as we just discussed, barcodes and OCR information,
23 alphanumeric text, both have information that's not readily discernible by a
24 human, i.e. the product information or how much it costs or what the
25 coupons are or other types of information are derived from those

1 alphanumeric characters or barcodes. So it does satisfy that construction,
2 but that's a brand new construction that we had not briefed and that Patent
3 Owner had not briefed.

4 And getting to the argument that we are limited to the grounds of the
5 petition and the references that are cited there, that's correct. That is 100
6 percent correct. And I believe I said this earlier, and I do want to make sure
7 it's clear: Petitioners rely on Take An Order! Exhibit 1005 and its disclosure
8 of, quote, barcode scanners, unquote, to satisfy image capture device. The
9 only reason Exhibit 1010 came back in the reply brief was to correct a
10 mistake of fact that Take An Order! was limited to laser barcode scanners.
11 That's false, and anybody skilled in the art would understand from the
12 Stevens Creek website that barcode scanner refers to both embodiments, and
13 that's why it was raised.

14 Again, it is Take an Order! Exhibit 1005 that is relied upon. But it was
15 necessary to correct the factual error that Take An Order! was somehow
16 limited to laser barcode scanners.

17 All right. Let's go to Slide 8, please, of Patent Owner's
18 demonstratives. Thank you. So, in this Slide 8, Patent Owner appears to be
19 asserting that Wang's barcode scanner is not an image capture device. And
20 the problem here is that the '167 Patent refers to both 1D, or linear, barcodes
21 and 2D barcodes. The '167 Patent clearly states that the captured image
22 may include a barcode including a one-dimensional barcode, such as a linear
23 barcode. That's in Exhibit 1001, column 5, lines 22 through 27. And that
24 opens up the term image capture device to include laser-based barcode
25 scanners, as well as camera-based scanners. And even Patent Owner's

1 Expert agreed with this when he testified that he understood at the relevant
2 time that the term linear barcode, as that term was used in the challenged
3 patent, in the '167 Patent itself, refers to laser scanners. And that can be
4 found in his testimony, Exhibit 1048, Page 99, line 12, through Page 100 at
5 line 11.

6 So the challenged patent's reference, specifically to linear barcodes,
7 clearly opens up the term image capture device to laser barcodes. And, thus,
8 the '167 Patent itself, the intrinsic evidence where you need to be looking at
9 what they didn't cite in their demonstratives here at all, itself supports that
10 Wang's barcode scanner is an image capture device.

11 Now, there is an important semantic distinction I did want to briefly
12 bring up, and this relates somewhat to Ms. Saia's claim construction, which
13 she just discussed. Patent Owner is trying to rewrite the actual claim
14 language, image capture device. So the relevant term in that phrase, again,
15 is image. And the claim does not recite imaging-based device with an ING
16 or an imager-type scanner. That's not what the claim says. And those words,
17 although similar, have different meanings. The '167 Patent, as we've
18 discussed, uses the term image exclusively in referring to the printed image,
19 and you can see that here. The claims don't refer to imaging with an ING-
20 based barcode scanner that uses a camera.

21 And that point is made clear in this figure here from Patent Owner's
22 demonstratives on Slide 8. Specifically, Figure 7. Mr. Crumbley, could you
23 please blow up Figure 7? And then highlight the QR code in the bottom
24 left? Thank you.

1 The patent itself, and this is the intrinsic evidence, refers to Element
2 710 as, quote, image, unquote. This is the image, not something else that's
3 reproduced, as we talked about earlier. This is the image in the patent, and
4 thus, this enlightens the meaning of the term image and image capture
5 device. They're just capturing this image.

6 And, in contrast, the Patent Owner argues in his brief, as shown in the
7 slide, that capturing an image refers solely to imaging-based barcode
8 scanners. That's just not what it says. In the actual language from the patent
9 itself, the intrinsic evidence supports that the term image and image capture
10 device just means anything that can capture this 2D printed image that's on a
11 piece of paper.

12 So just to reiterate, I think we discussed this earlier, even Patent
13 Owner's Expert testified in his deposition that laser barcode scanners can
14 scan an image, as that term is used in the challenged patent. Again, that's at
15 Exhibit 1048, Pages 163 to 264. He also testified that laser scanners can
16 capture an image. And again, I appreciate our discussion on this point
17 earlier, but this is how we challenge the veracity of an expert statement, and
18 we think this is entitled to great weight, especially considering the voluntary
19 nature of that testimony.

20 But just briefly here, just reiterating what we discussed earlier, OCR
21 readers, you hear the Patent Owners asserting that the OCR numbers of a
22 barcode can't have information embedded therein. Again, this doesn't really
23 make sense, because that information corresponds to what is in the barcode
24 itself, and so the same permutations are used in both aspects in terms of
25 trying to find the product and pricing index information as specified in the

1 petition and the claim charts. Thus, that product information is embedded in
2 the OCR numbers, much like how that same information is embedded in the
3 barcodes, the bars of the barcode, themselves.

4 Let's go to 11, please. Now, similarly, Patent Owner asserts that the
5 Petitioner did not argue that human-readable text has information embedded
6 therein. But, as we mentioned, this was already featured in the petition and
7 in the claim chart and discussed on Pages 21, 33, and 38 of the petition, as
8 well as in Mr. Purvis's declaration, Exhibit 1002, paragraphs 38, 59, and 63,
9 which were cited in the petition.

10 So, yes, this OCR embodiment was featured front and center, Your
11 Honors, in the petition, contrary to what Patent Owner has asserted.

12 Let's go to Slide 17, please. Now, we discussed this quite a bit, but
13 just to reiterate, here, Patent Owner takes issue with Exhibit 1010, and, as
14 we've discussed, we are relying not on 1010. We are relying on Take An
15 Order!'s statement of barcode scanner, and Patent Owner's attempt to try and
16 narrowly construe barcode scanner, the meaning of barcode scanner in the
17 context of Take An Order! is just incorrect, and it's inconsistent with Take
18 An Order! and how a person skilled in the art would understand the words
19 barcode scanner in Take An Order!, and that is evidenced by Exhibit 1010,
20 but it's not needed. It's just provided to show that the assertion that Take An
21 Order! is somehow limited to laser barcode scanners is incorrect.

22 JUDGE TURNER: Counsel, if we were to construe image capture
23 device to not include a laser barcode scanner, does Ground 6 still stand?
24 Even if it wasn't -- 1010 wasn't originally brought in, I understand you
25 brought it in to say, look, Patent Owner was wrong, but if we, in our claim

1 construction and our final written decision, say, look, we don't think barcode
2 -- there's an OCR, and we'll deal with that, but we don't need a laser barcode
3 scanner; does Ground 6 fall because -- you know, is there enough here to
4 warrant that Patent Owner was put on notice that that's what the Petitioner
5 intended?

6 MR. KRIEGER: Yes, Your Honor, it would not fall. It would not fall,
7 and the reason for that is, if you were to construe it that way, which, again,
8 we submit is incorrect based on the intrinsic evidence that refers to linear
9 barcodes, which, according to their Expert, requires a laser barcode scanner.

10 But setting that aside, if Your Honors were to reach that conclusion,
11 Take An Order!'s barcode scanner, unquote, very clearly delineates and
12 refers to all types of barcode scanners, both laser and imaging-based, as
13 evidenced by Exhibit 1010. And to somehow narrowly construe barcode
14 scanners to be laser barcode scanners, as Patent Owner has done, is improper
15 and inconsistent with the evidence.

16 And what's more, that was presented with our petition. That was in
17 paragraph 59 of the Expert declaration. It wasn't critical, it wasn't
18 necessary, but it was in that paragraph and fully discussed. So Patent Owner
19 did have that position well-documented in the original briefing, which,
20 again, was cited in the claim charts of the petition.

21 JUDGE TURNER: I understand.

22 MR. KRIEGER: I think that the takeaway here is, though, that in any
23 event, it is beyond dispute that the Take An Order! reference specifically
24 refers to imaging-based SCIO scanners. Their Expert agreed to that when he
25 looked at Exhibit 1010. He agreed that that Take An Order! is referring to

1 SCIO scanners. But that doesn't change the fact that Take An Order!'s
2 barcode scanner disclosure itself, that language, that language alone satisfies
3 an image capture device, and Patent Owner's attempt to somehow change
4 the meaning of barcode scanners in the prior art reference is improper and,
5 again, contradicted by Exhibit 1010.

6 Unless Your Honors have any additional questions, that's all we have
7 for our presentation. Thank you.

8 JUDGE TURNER: Thank you. That's fine. I'm assuming, since
9 you've been up there talking, you've already had the chance to clarify any
10 remarks made by the Petitioner, and you've already done that? Just to put it
11 on the record.

12 MR. THEISS: No, thank you. Yes, I think the only main point that I
13 wanted to address was that reference to Slide 19, of Petitioner's
14 demonstratives Slide 19, where it was suggested that the image was referring
15 to the embedded numbers, that that's not what the claim language says in the
16 patent. It just says the image may include numbers, and that language needs
17 to be taken at face value. There's nothing there about embedded at all.

18 But other than that, I think that's all. Thank you, Your Honor.

19 JUDGE TURNER: Okay. Thank you. And I'm going to let you get
20 situated.

21 MR. THEISS: Counsel just said that the first time that we advanced
22 the position that the image capture device requires taking a picture was
23 today. That is completely false. On this screen right now is the POR. At 26
24 through 27, you'll see a person of ordinary skill in the art at the time of a
25 '167 Patent, even in light of specification, would have understood the

1 recitation in Claims 1 and 19 of an image capture device configured to
2 capture an image. As you'll notice, there's a footnote. That footnote says an
3 image is a visual representation of something, such as a likeness, other
4 object produced on photographic material, or a picture produced of an
5 electronic display, such as a television. The dictionary definition of image is
6 consistent with the use of the term in the '167 Patent, which states the image
7 capture circuit 120 captures information uninstilled from moving image or
8 stream of images.

9 So, Your Honor, we have maintained from the POR through the
10 surreply to today that an image is a picture.

11 I also wanted to address the question where I didn't have the citation
12 perfectly in front of me when you asked the question regarding our express
13 construction of the word embedded. As Petitioner pointed out, we do
14 specifically address this on Page 31 of the POR. And the construction says
15 the understanding of a person of ordinary skill in the art at the time of the
16 '167 Patent that human-readable text is not embedded information is
17 consistent with the specification of the '167 Patent which never uses the
18 word embedded to refer to human text.

19 Patent Owner's position is also consistent with the dictionary
20 definition of embedded, which defines something being embedded when it is
21 incorporated into something else as an essential characteristic. A further
22 definition defining embedded as a part of a larger device.

23 In this respect, Mr. Purvis's opinion that embedded includes
24 information contained in any barcode is in keeping with the dictionary
25 definition which defines something, e.g. information, as embedded when it

1 is incorporated into something else, e.g. a barcode. So that is the express
2 position that's articulated in the POR. I used slightly different language
3 when explaining to you. I don't believe there's much of a disappearance
4 between what I just read back to you and what I had originally said, and I
5 apologize if there was any confusion for that.

6 But it is a very, very important distinction between contained versus
7 derived, Your Honors. Contained means the information has to be there.
8 Derived, as we went through our conversation about, is you can go look up,
9 you can go look at a table, you can go look at an Encyclopedia Britannica.
10 You can look anywhere to go get additional information.

11 Your Honor, our position is that information needs to be contained
12 there. So, to make a finer point on that, the embedded information is the
13 barcode version of that information. It becomes information when it's
14 decoded. When it's removed from being embedded, it becomes that human-
15 readable text. That is why the human-readable text is just information.
16 There is no decoding or reading, you don't need a barcode scanner. You can
17 do that just as a person standing there.

18 While that's loading, I'm just going to go on to Slide 8. Petitioner
19 was a little bit confusing in what they just explained to you is linear barcode
20 scanners can only read linear barcodes. Image-based barcode scanners can
21 read both. So if I take the picture, I capture that image, if that image
22 contains a 2D barcode, a 1D barcode, any multiples of those, it could be a
23 streaming video, it could be an image as described by the patent, those can
24 be only captured by an image capture device, i.e. a camera, something that
25 can capture all of that information. A linear barcode scanner cannot.

1 And, Your Honor, it's difficult to understand how an image capture
2 device can capture a piece of paper because that is a position that the
3 Petitioner is saying is that the paper is the image. Well, Your Honor, that
4 kind of device doesn't ever capture a piece of paper. What it does is it
5 captures a picture of that piece of paper. It then applies algorithms to it to
6 discern the information that is in there. That is what a person with ordinary
7 skill in the art would understand the terms to mean, whether or not it's
8 exactly the same term that is provided in the references.

9 What is unmistakable, Your Honor, is that there are different classes of
10 barcode scanners. There's the sweeping laser and the image based. No one
11 disputes that. There's no evidence from the Petitioner saying that
12 characterization of the universe is wrong. It is consistent with everything in
13 the documents. The Petitioner could have offered expert testimony refuting
14 that. They didn't, probably because they couldn't, because it is a well-known
15 fact that, at the time, even today, there are laser based barcode scanners and
16 image based barcode scanners. They are just fundamentally different. And
17 what we have here in Wang is a disclosure of a linear barcode scanner. What
18 we have here in the discussion of Take An Order! is a linear barcode scanner.
19 That is all that is disclosed in Exhibit 1005.

20 1005 specifically calls out a single product. Petitioner has offered no
21 evidence to refute that the single product that is specifically called out in
22 Exhibit 1005 is a linear barcode scanner. Whether or not a commercial
23 website existed where there was something you could plug into a PCMCIA
24 card that on a mobile computer at the time could have also been images is
25 irrelevant because that is not contained in the four corners of Exhibit 1005,

1 Your Honors. And that is the university limit is what is in that document,
2 and what is in that document is the disclosure of a linear barcode scanner.

3 Any questions from the panel? That's all from the Patent Owners.

4 JUDGE TURNER: Okay. Thank you. The case has been submitted.

5 (Whereupon, the above-referred to matter went off the record at 12:10
6 p.m.)

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Patent 7,314,167 B1

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