

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TIKTOK INC.,
Petitioner
v.
NTECH PROPERTIES, INC.,
Patent Owner.

IPR2024-01340 (Patent 8,145,704 B2)
IPR2024-01342 (Patent 8,886,753 B2)

Record of Oral Hearing
Held: December 18, 2025

Before KEN B. BARRETT, TERRENCE W. McMILLIN, and
SCOTT B. HOWARD, Administrative Patent Judges.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

JAMES GLASS, ESQ.
of: Quinn Emanuel Urquhart & Sullivan, LLP
295 5th Avenue
9th Floor
New York, New York 10016
(212) 849-7142
jimglass@quinnemanuel.com

OGNJEN ZIVOJNOVIC, ESQ.
of: Quinn Emanuel Urquhart & Sullivan, LLP
50 California Street
22nd Floor
San Francisco, California 94111
(415) 875-6469
ogizivojnovic@quinnemanuel.com

ON BEHALF OF THE PATENT OWNER:

JAMES HANNAH, ESQ.
Herbert Smith Freehills Kramer, (US) LLP
333 Twin Dolphin Drive
Suite 700
Redwood Shores, California 94065
(650) 752-1712
james.hannah@hsfkramer.com

JEFFREY H. PRICE, ESQ.
Herbert Smith Freehills Kramer, (US) LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-7502
Jeffrey.price@hsfkramer.com

The above-entitled matter came on for hearing Thursday, December 18, 2025, commencing at 1:14 p.m. EST, at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia and via Video-conference.

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

1:14 p.m.

JUDGE BARRETT: You may be seated. All right. Hello, everyone. We are on the record in IPR 2024-01340 and IPR 2024-01342. TikTok Incorporated versus NTECH Properties Incorporated.

I am Judge Barrett. And with me today, are Judges McMillin and Howard. And I don't know if the name tags are set up right, but, Judge McMillin is to my right and has the darker blue background. And Judge Howard is to my left.

I apologize for the delay, and thank you for your patience. We had some technical difficulties specifically a considerable amount of static. I think we're okay now; if it presents a problem, we have the option of switching to another hearing room, but that's going to cause some more delay.

If you have trouble hearing a Judge, don't hesitate to ask them to repeat the question so we make sure that you understand them and they understand you. Let's start with the parties' appearances. Who do we have for Petitioner today?

MR. GLASS: Good afternoon, Your Honors. Jim Glass, lead Counsel for Petitioner. With me today is my partner and Counsel of record, Mr. Ognjen Zivojnovic. Mr. Zivojnovic will be presenting on behalf of the Petitioner today. I'll also note we have in the courtroom today, representatives from Petitioner, Ms. Nancy Cheng, and Hieu Phan.

JUDGE BARRETT: Welcome. And who do we have for Patent Owner today?

1 MR. HANNAH: Thank you. Good afternoon, Your Honor. James
2 Hannah, on behalf of NTECH and with me is Jeff Price. And the way that
3 we'll be doing the argument, I'll be handling the '753 Patent and he'll be
4 handling '704, and we'll divide our time appropriately.

5 JUDGE BARRETT: Okay.

6 MR. HANNAH: Thank you.

7 JUDGE BARRETT: Hold on one second.

8 JUDGE McMILLIN: If they don't speak into the microphone. Judge
9 Howard and I have a very difficult time with it.

10 JUDGE BARRETT: Understood. They weren't speaking into the
11 microphones. They were just standing at Counsel table. So hold
12 that thought, and when they, approach the podium, we'll make sure
13 you can hear okay.

14 MR. HANNAH: You want to test it, Your Honor?

15 JUDGE BARRETT: Yes, please.

16 MR. HANNAH: Test. Your Honors, can you hear us? This is James
17 Hannah on behalf of NTECH. And with me is Jeff Price, who will be
18 presenting as well.

19 JUDGE BARRETT: All right. Judge Howard, can you hear?

20 MR. HANNAH: Can you hear us?

21 JUDGE McMILLIN: That was much better, thank you.

22 JUDGE BARRETT: Okay.

23 Judge McMillin, you are frozen. And I assume it's not your fault.
24 Hold on.

25 JUDGE BARRETT: Well, while they're trying to bring Judge
26 McMillin back up we can go ahead and keep going here with the

1 preliminaries. We set forth the procedure for this hearing in our oral
2 argument order.

3 Just to remind everybody, both sides are going to have 60 minutes
4 total. That's for both cases. Sixty minutes total.

5 Petitioner will go first. May reserve time for rebuttal. Then Patent
6 Owner will have an opportunity to present its response and also may reserve
7 time for rebuttal. Then Petitioner, then Patent Owner, and that should close
8 this out for the day.

9 We have your demonstrative exhibits pulled up on a computers.
10 Patent Owner has objected to certain slides and Petitioner's demonstrative
11 exhibits. We have reviewed and considered those objections, but
12 demonstrative exhibits are just presentation aids and are not evidence, so we
13 are not going to exclude anything today. However, as we are drafting the
14 final written decision, we will take those objections into consideration. And
15 the final written decisions will be based on arguments properly made in the
16 briefs and the evidence of record.

17 For clarity of the transcript and to assist us later and in following
18 along today, when you refer to a demonstrative exhibit, please state for the
19 record the slide number. And if you go outside the demonstratives into the
20 record for some reason, just clearly identify what you're talking about.
21 Exhibit, page, column, line number, whatever it takes. That will help us
22 immensely when we're preparing the decision and reviewing the transcript
23 later.

24 These hearings are open to the public, and I believe there's an open
25 line that will allow the public to view these proceedings. I don't expect any
26 confidential information to come out. I don't think we have anything sealed

1 in this case. But if you have any concerns, just pause, let me know, and we
2 can always shut down that line if we have to.

3 That's my preliminaries. We're still waiting for Judge McMillin. Any
4 questions or concerns, Petitioner?

5 MR. GLASS: No, Your Honor.

6 JUDGE BARRETT: All right.

7 Patent Owner?

8 MR. HANNAH: No, Your Honor.

9 JUDGE BARRETT: Then, let's -- looks like Judge McMillin is about
10 ready to join us again.

11 If the VTC people can hear me, Ahmed, if you could please, make
12 Judge McMillin's --

13 JUDGE McMILLIN: Can you hear me?

14 JUDGE BARRETT: There we go.

15 JUDGE. McMILLIN: Judge Barrett, can you hear me?

16 JUDGE BARRETT: Yes, we can. We're getting a little bit of static,
17 but I think it's okay, and I told Counsel that if it becomes a problem, we'll
18 figure something out.

19 We are ready to begin then. So, Petitioner, whenever you are ready.
20 And, how much time would you like to reserve?

21 MR. ZIVOJNOVIC: I would like to reserve 20 minutes for rebuttal,
22 Your Honor.

23 JUDGE BARRETT: Two zero, so that's 40 minutes.

24 MR. ZIVOJNOVIC: Yes.

25 JUDGE BARRETT: All right. Wonderful. Whenever you're ready.

1 MR. ZIVOJNOVIC: Just waiting for the video to go through. Okay.
2 Good afternoon, Your Honors. These two IPRs involve two patents directed
3 to generating customized media programming based on the user selection
4 and user data.

5 The primary reference in Grounds 1 and 2 discloses these concepts
6 multiple times over. So I want to focus on the disputes today. And there are
7 a few.

8 The main dispute between the parties, and the only dispute that
9 applies to both patents, is whether or not there is an existing media stream,
10 as it's called in the '704 Patent, or as it's called in the '753 Patent feed at the
11 time of selection. And Patent Owner's position, I'm now on Slide 68, is that
12 there is no existing media stream when user selects custom media channel in
13 Whitehead.

14 So, I first want to address what Whitehead does disclose. Whitehead
15 discloses that a user can create a profile, and once their profile is created, it -
16 - the user has access to what Whitehead calls a custom media channel. The
17 user can log into a content processing device and access a menu for those
18 custom media channels.

19 As disclosed in Whitehead in column 15, the playback application
20 may provide a menu of custom channel options to be displayed to the user.
21 And so I want to be clear that there is no dispute that at the time that this
22 menu is visible, there's actual concrete custom media channel options shown
23 in the menu.

24 And as Patent Owner's own expert admitted in his declaration, and
25 this is Exhibit 2024 and Paragraph 87. "Some form of custom media channel
26 must exist prior to the content information device 110 receiving domain."

1 So the dispute here centers not over whether or not, the custom media
2 channels in Whitehead exist at the time they are displayed and selected. The
3 question is, do they qualify as a media stream under Patent Owner's
4 interpretation, or feed in the case of '753.

5 And Patent Owner's argument is primarily based on a subsequent
6 limitation to claims. So I have up now on Slide 5, Claim 19 of the '704
7 Patent. And one of the first steps in Claim 19 is that the aggregator presents
8 a plurality of media streams to a user, receiving a signal having data
9 indicative of a selection of one of the media streams.

10 In other words, these media streams are shown, and the user can then
11 select one of them. What happens next in the claim is that this selection is
12 forwarded from the aggregator to the publisher. The publisher processes the
13 selection, selects media elements. Then ultimately what happens is that the
14 publisher assembles the selected media stream and the other media elements
15 in a composed sequence.

16 And so Patent Owner's argument is based on the fact that in this
17 subsequent assembly step, the media stream needs to contain media elements
18 for them to be able to be assembled with these other media elements.

19 But, Your Honor, that does not inform what the content is of the
20 media stream. Multiple steps ahead -- of multiple steps before then, back
21 when the menu is displayed. Nothing in this claim precludes a media stream
22 from being shown in a menu from a user selecting the media stream, the
23 media stream then being populated with media elements, and then that same
24 media stream being assembled with other media elements into the media
25 program.

1 And if we look at claim 1 of the '753 Patent, I'm now in Slide 8, we're
2 seeing the same process. There is a delivery of the list of feeds, a selection
3 of one of those feeds, multiple intermediary steps that happen in between,
4 and only then is that a concatenation of the feed that Patent Owner relies on
5 to argue that the feed must have had media elements all along.

6 And again, that is just not any claims. Patent Owner has other claims
7 that explicitly spell out that the media feed or stream comprises the plurality
8 of media elements. Those include Claim 17 of the '704 Patent, as well as,
9 even more explicitly, two other patents in the same family.

10 So Patent Owner new how to claim, both generally and at the time of
11 selection, a media stream or feed that contains media elements. And that is
12 just not what we're seeing in the two -- in the claims that issue here.

13 What the claims do require is the selection followed by the subsequent
14 assembly of media programing. And that is exactly what Whitehead
15 discloses. I'm now on Slide 70, and this has a quote from Whitehead's
16 column 12 where Whitehead describes, so you create a profile, the user
17 selects a custom media stream.

18 And what happens next is that, process 400 in Whitehead is executed,
19 and the custom media channel is at that time populated with media elements.
20 And after, so again, just reading from Whitehead, it's only after process 400
21 is complete, after the custom media channel 170 does in fact include media
22 elements that advertising content is inserted.

23 And that means exactly what -- meets exactly what the claims require.
24 You have a custom media channel, and it's assembled with other media
25 elements, in this case advertising content, to generate media programming.
26 There is nothing in the claims, in Claims 19, 22 of the '704 Patent or Claim 1

1 of the '753 that we -- that excludes the possibility of an intermediary step of
2 populating a video stream.

3 There's no negative limitation of that sort in there, and there's no
4 explicit -- there's no requirement either of a media feed or stream needing to
5 contain these media elements at time of selection. In fact, if we look --

6 JUDGE McMILLIN: This is Judge McMillin. I'm sorry for
7 interrupting you. But I wish you to confirm that with regard to both patents,
8 and all the challenge claims you are asking us to apply the plain and
9 ordinary -- construction is necessary?

10 JUDGE BARRETT: Judge McMillin, you're breaking up a little bit,
11 but I think Counsel got the gist of your question.

12 MR. ZIVOJNOVIC: Yes. So, Your Honor, I believe your question
13 was, are we applying the plain and ordinary meaning. And our position is,
14 yes, we are. All right.

15 So, and the fact that this is the plain and ordinary meaning, you know,
16 it needs to be looked at --

17 JUDGE. McMILLIN: Both patents, all claims?

18 MR. ZIVOJNOVIC: So that is correct, Your Honor. Our position is,
19 that all disputes presented as issues of claim construction, I do not believe
20 that either party is relying on lexicography or disclaimer, or any of the sort
21 to narrow the plain and ordinary meaning.

22 I do want to discuss the intrinsic record and how it supports our claim
23 meaning, but again, our position is that that is in fact the plain meaning. All
24 right.

25 So I next want to address the intrinsic record, and how it confirms our
26 plain and ordinary meaning of feed and stream. And I'm now on Slide 71,

1 which shows a quote from the '704 Patent in column 5. That same quote is
2 also found in the '753 Patent.

3 And here we have covered embodiment of these patents. Patent
4 Owner has never disputed that this falls within -- that this relates to the
5 claims. It's not some distinct unclaimed embodiment.

6 And here the patent talks about that, electronic program guide 410
7 first causes a list of feeds to be displayed on television 415 as a user selects
8 one of those feeds. That selection is forwarded to a cable or satellite
9 provider. And only then does the cable provider 410 and satellite provider
10 440 then generate those feeds. So this is an example where in the patents
11 themselves we have a selection of the feed before it's populated with media
12 content.

13 JUDGE BARRETT: Counsel, you've been, correct me if I'm wrong,
14 but you've been speaking today as if all the claims -- one argument for all
15 the claims, but they seem to be different. And I believe the two you showed
16 us earlier, one of them was, the first limitation pertained, I think, to a list of
17 feeds and or streams, whatever it was. And the other claim it was actually, I
18 think the user was selecting the stream or the feed or whatever it was.

19 So it seems like very nuanced, but not necessarily the same subject
20 matter.

21 MR. ZIVOJNOVIC: So, I'm happy to walk -- just for efficiency, I
22 was focusing on what I believe is the representative claim. The parties have
23 been setting forth the same arguments across claims, but let me walk through
24 how this applies to each claim individually.

1 So this relates to Claim 19 of the '704 Patent, Claim 23 of the '704
2 Patent, and Claim 1 of the '753 Patent. A completely separate dispute exists
3 as to Claim 1 of the '704 Patent.

4 So '704 Claim 19 is what I've been focusing on. It talks about
5 presenting a plurality of streams to a user. That's met by Whitehead's menu,
6 and the user then selects one of those streams.

7 If we go to Claim 23, which is shown on the right here, we again have
8 presenting to a user a list of media streams, which again is met by
9 Whitehead's menu, and then receiving an input signal having data indicative
10 of a selection of one of the media stream feeds from the list.

11 So again, it's Whitehead's menu shown with custom media channels.
12 User picks one. That same disclosure, or there's some difference in the
13 claim language meets those limitations.

14 And then if we go to Claim 1 of this '753 Patent, and I apologize for
15 the mislabeling here, and I'm on Slide 6, it talks about receiving by an
16 aggregated data relating to -- apologies, I'm on Slide 8, actually.

17 It talks about delivering by an aggregator to a client a list of feeds
18 that, again, is met by Whitehead's content processing device, providing
19 displaying a menu on the client 105, running media player 115, and then
20 receiving from the client a selection of one of the feeds.

21 And so again we're talking about client device 105, user picks a
22 custom media channel from the menu and that is the selection. So while
23 there are differences the claim language, list versus plurality, that's true. But
24 ultimately the issue here is when Whitehead, when you select that custom
25 media channel in the menu, and this is a dispute, does that qualify as a
26 stream or feed.

1 And just be clear, you know, we've been talking -- I've been using
2 feed and stream in my discussion. And I want to note that in -- for purposes
3 of our discussion, we do not believe there's a substantive difference between
4 those terms as it relates to the specific dispute here.

5 So the dispute is for both terms. Does it have to have media content at
6 the time of selection? And this is further confirmed by the '704 Patent
7 Figure 4, where the figure refers to a stream and then the accompanying
8 disclosure describing that figure calls the exact same step a feed. So yes,
9 I've been focusing on the language of the '704 Patent and specifically Claim
10 19, but the same disputes and issues apply to the other claims where these
11 arguments were raised by the parties.

12 So going back to Slide 71 and disclosure in the '704 Patent, what I
13 want to address there specifically is, Patent Owner points to the use of the
14 words existing channels to argue, well, this is somehow different because
15 even though it says generating feeds after they're selected, there's an existing
16 channel there. And, Your Honor, first, the language speaks for itself.

17 You select a feed, you then generate the feed. But second, Patent
18 Owner is internally inconsistent because when it comes to distinguishing the
19 prior art, when it comes to construing stream and feed, their position is that a
20 channel may or may not be a feed, now moving on to Slide 72, depending on
21 time of day.

22 So we asked their expert during deposition, okay, is a TV channel a
23 media feed, a media stream? And the actual position was, well, sometimes.
24 If there is scheduled broadcast content, then a TV channel is a feed or
25 stream. That same TV channel, if there's nothing scheduled, is not a media
26 stream or feed.

1 And so if you look at the claim language, the selection of the exact
2 same TV channel at different times of day. So we are selecting a media
3 stream, that same selection of a TV channel would meet the limitation, under
4 Patent Owner construction, would meet that limitation sometimes, but the
5 same selection would not meet the limitation at other times.

6 And so again, looking at the known channel disclosure, Patent
7 Owner's own position is that that should not alone be enough to disclose the
8 media feed or stream. Now, I do want to talk about, what does the '704
9 Patent teach us, what the nature of the feed and stream. And on Slide 72, I
10 believe that column 6, lines 9 through 16, are highly instructive.

11 So here the patent talks that, says that by way of example, some or all
12 of media sources thus presented are drawn from remote sources by a suitable
13 method or device. So it's talking about a method for drawing content from a
14 source. It then goes on to say -- it lists some examples and then goes on to
15 say. these methods may be referred to herein as feeds -- and feeds is in
16 quotation marks.

17 So what this is describing here is that when it uses the word feed, it's
18 talking about the method by which content is drawn from a source. And that
19 is again, the plain meaning. That is what becomes the plain meaning. But
20 even if it weren't, the plain meaning, as I would say, is this would be an
21 example of lexicography. But again, it's plain meaning.

22 And then it gives an example. It says an XML feed is an example of a
23 feed. And hereto an XML feed is an XML feed, and it has XML tags and
24 it's the same XML feed whether or not there's media content at a particular
25 moment in time present in that feed.

1 And so again our position is that, the user media stream to a custom
2 media channel at the time of selection in Whitehead's menu does not need
3 yet to be populated with media outlets. Nothing in the claim prevents it
4 from being populated in a subsequent step. And then the same custom
5 media channel after it's populated is assembled with advertising into the
6 final media programming.

7 Now, even if Your Honors accept Patent Owner's construction of
8 media stream and feed, Whitehead still anticipates and renders obvious these
9 claims. And that is because Whitehead also discloses that its custom media
10 channels may correspond to specific, what Whitehead calls content sources.
11 And this is undisputed. Their expert in deposition, I'm now on Slide 73,
12 reading from Page 22 of the deposition.

13 I confirmed that there is a one to one mapping of custom media
14 channel to profile to content source. So when you're selecting a custom
15 media channel on the menu, you're selecting the content source it
16 corresponds to. And to drive the point further home Whitehead explicitly,
17 and this is in column 18, lines 50 to 54, when it talks about the menu, it
18 describes that one of the options in how that menu is organized, is that the
19 custom media channels 170 that are available for playing may be displayed
20 according to "particular sources". And so again we're looking at that menu.
21 It has custom media channels. And those custom media channels each
22 correspond to a specific content source.

23 And this matters because, and I'm now in Slide 74, the content sources
24 in Whitehead can be just TV channels: ABC, NBC, CNN. And we know
25 this from Whitehead because it talks about how the content you get from that
26 is popular television programming.

1 But even more importantly, and I especially want to focus here on
2 column 10, lines 51 through 54 of Whitehead. It specifically says that this
3 can be content broadcast from a particular content source 135 on a particular
4 day at a particular time. That Your Honors, is a TV channel. It's and it's
5 not some TV channel or static or anything like that. It's a TV channel with
6 scheduled programming.

7 And that, Your Honor, we submit, is a media stream or feed even
8 under Patent Owner's interpretation. And we raised this point multiple times
9 over. We've explained how this is expressed in Whitehead explicitly. Just
10 because Whitehead does not use the words TV channel, to drive the point
11 further back, we include an obviousness point that, given this disclosure of
12 what's effectively a TV channel, a POSITA would find it obvious to indeed
13 make it a TV channel.

14 And until the sur-reply, this was not disputed. Now, in the sur-reply
15 Patent Owner argued that there is some distinction between a content source
16 and a stream it provides, and I just want Your Honors to keep in mind what
17 it is we're talking about here. We're talking about a TV channel, NBC.

18 When I select NBC in a menu, I'm selecting the broadcaster, I'm
19 selecting the frequencies of which that programming is transmitted, and I'm
20 selecting the programming itself. Those are, all three of those, especially
21 from the perspective that is relevant to the claims, from the perspective of a
22 selecting step, all of those, that's the difference without a distinction for
23 purposes of the claims.

24 But even if Your Honors find some difference there, and again, we
25 don't think there is one or the claims require this, we do in addition have our
26 Ground 2 which combines Whitehead with Marcus '904, including

1 specifically using Marcus '904's media streams and Marcus '904 is from -- is
2 assigned to the same company as Patent Owner. It uses similar language. It
3 does qualify as prior art.

4 And it's -- Patent Owner did not dispute this disclosure, but that it
5 would be obvious to combine for Ground 2. And so I'm right now I've
6 jumped to Slide 96 where I have, on the right, deposition transcript of their
7 expert, Dr. Goodrich at Page 44, Line 6 to 22. And we asked him, you did
8 not challenge the obviousness to combine Whitehead and Marcus '904,
9 right? I don't have an opinion about that.

10 We also asked him to confirm that for limitations that are attributed to
11 Marcus '904 and that combination, he does not dispute Marcus '904's
12 disclosure. He did not. And so we talked about multiple layers of invalidity
13 here. The claim should not be construed to require, at the time of selection,
14 media elements that are already in the media stream of feed.

15 Even if that is required, there's the one-to-one mapping of content
16 sources to, custom media channels in Whitehead that discloses this. And
17 then further, we have obviousness arguments. And even if you know,
18 beyond all of those, we have Ground 2 which stands undisputed.

19 If I may ask a quick question, does the timer start at 60 or 40?

20 JUDGE BARRETT: It's counting down from 40.

21 MR. ZIVOJNOVIC: All right. Thank you. I just wanted to make
22 sure.

23 JUDGE BARRETT: You have about 19 minutes left of your original
24 40.

25 MR. ZIVOJNOVIC: Perfect. Was going to be either in trouble or
26 exactly on track. But thank you.

1 So, you know, in addition to all of this, we do have this second. So
2 everything I talked about up until this point was in, what Patent Owner
3 called in relation to the real-time embodiment in Whitehead. Where you
4 create a profile, and then you select a custom media channel for menu, you
5 pick the custom media channel, and at that time the mixing sort of populates
6 it with media elements. There is a second embodiment in Whitehead.
7 Patent Owner calls that the pre-generated embodiment. We called it output
8 signal mapping two. Where instead of relying on selecting a custom media
9 channel for playback from a menu, we're relying on selecting of a profile to
10 update from the menu.

11 And so we select a custom media channel profile to update and that
12 then, in this other embodiment, the custom media channels are created as --
13 populated with media content as soon as they are created, as soon as their
14 profile is created. And so in this predefined embodiment, what we are
15 pointing to is again, a menu. You select the profile for custom media
16 channel, and at that point it gets modified. And that modification or revision
17 is the step of assembly that we point to in the claims. And Your Honors can
18 find discussion of this on pages 21 to 23 of the petition and 7 to 8 of the
19 reply.

20 But instead I do want to jump now to the second dispute. That
21 implicates independent claims. This is specific only to independent Claim
22 19 of the '704 Patent that requires that after the user has made a selection,
23 the aggregator then sends to the publisher an output signal including data
24 indicative of the selection and of user data.

25 Now here we've cited, and we contend that that can be more than one
26 signal that contains those two pieces. But what I really want to focus on,

1 and I'm moving on to Slide 79, is how Whitehead meets this limitation, even
2 under Patent Owner's interpretation, and specifically Whitehead discloses
3 and makes it --

4 JUDGE BARRETT: Maybe before you go down that road, you were
5 saying an output signal that could be two separate signals that include the
6 two pieces of data?

7 MR. ZIVOJNOVIC: That is our position, yes, Your Honor. So --

8 JUDGE BARRETT: And what's the basis for that? If you could
9 remind me.

10 MR. ZIVOJNOVIC: So the basis for that, and we're primarily relying
11 on the Convoke, Inc. v. Compaq Computer Corp. case. It goes back to the
12 concept of "a" can mean one or more. And while some cases have found
13 differently, the one that's most applicable is Convoke where the federal
14 circuit found that a processor which executes a series of steps, that those
15 steps can actually be performed by more than one processor.

16 And the reason why we why Convoke is more applicable than other
17 cases cited by Patent Owner is that in Convoke, just like in these claims, we
18 have a singular object followed by what it needs to do. Whereas, the Patent
19 Owner I believe cited the Salazar case where the claim language at issue
20 talked about an object performing "a" then "the" object performing
21 something else. And the Federal Circuit found it's significant and
22 distinguished Convoke on the presence of antecedent basis to assign each
23 step to the same object.

24 JUDGE BARRETT: Okay.

25 JUDGE McMILLIN: This is Judge McMillin. Can you hear me?

26 JUDGE BARRETT: We can hear you. You're a little soft.

1 JUDGE McMILLIN: Okay. Not ideal, but I'll try to talk loudly.
2 Show us on Slide 78 a single signal that does include data indicative
3 of the selection and of user data.

4 MR. ZIVOJNOVIC: So, I believe Your Honor's question was, do we
5 show in Slide 78, a single signal that includes both the selection and the user
6 data? Was that the question?

7 JUDGE McMILLIN: Yes.

8 MR. ZIVOJNOVIC: All right. Thank you, Your Honor. So, not
9 Slide 78, but I can point you instead to Slide 79, where we do have
10 disclosure to that effect.

11 And specifically what 79 describes then, first it's in column 9. So just
12 to again set the stage. User is in a menu that's provided by content
13 processing device 110. User selects one of the custom media channels. And
14 then in column 9, it talks about how the content processing device 110 sends
15 a request for custom media channel 170 to mixing server 130.

16 And we then, I'm now going to column 11, describing figure 4 which
17 describes what the mixing server then does. And it talks about how in step
18 405, mixing server 130 receives an instruction, e.g. a message, triggering it
19 to create one or more custom media channels 170 based on one or more
20 custom channel profiles 160.

21 And so the request and I will, I can address -- I was planning
22 addressing this a little bit later, but I also have to talk about now is, a request
23 for a specific custom media channel, it has to include an identifier for that
24 channel. It has to include the selection because otherwise how would the
25 system know what to create.

1 And we've also additionally included an obviousness position as well,
2 just to drive the point home that when you make a request for a specific
3 custom media channel, that request both itself, as well as its contents, it does
4 contain and indicate that specific selection.

5 The dispute, so the dispute was primarily focused on whether or not
6 that same request contains the user data. And I believe Your Honor, sir, just
7 to answer your question was directly is yes. And we see that in column 12,
8 lines 18 to 20 where it talks about how in the next, in step 410, the mixing
9 server 130 analyzes the custom channel profile 160 received in step 405.

10 So the same initial instruction, the same request for custom media
11 channel, that's from the content processing device, the mixing server 130.
12 Whitehead explicitly features in column 12 that that request includes the
13 profile, which in turn contains the user data.

14 Again, to drive the point home, we included, we both explain how it
15 includes the selection necessarily. We explain how, also to the extent there's
16 any, to drive the point home, we also further made the point in our petition,
17 and this is, now, or expert -- apologies -- I'm quoting actually from our
18 expert declaration, Exhibit 1023, Paragraph 37.

19 Our expert fully explained why it would be obvious that when
20 Whitehead tells you the mixing source going to get a request, and that
21 request is going to contain a profile, and Whitehead tells you that that
22 request comes from a content processing device, it would at a minimum be
23 obvious for the content processing device to have a copy of the profile, so
24 you can send it to the mixing server. And Patent Owner raised arguments
25 about security. But those arguments were directed to, incorporating the
26 entire profiles.

1 JUDGE McMILLIN: Can you hear me?

2 MR. ZIVOJNOVIC: And now I did.

3 JUDGE BARRETT: We can -- we heard you there, Judge McMillin.

4 JUDGE McMILLIN: -- back to your Slide 79.

5 MR. ZIVOJNOVIC: Yes, Your Honor.

6 JUDGE. McMILLIN: Counsel, can you hear me?

7 MR. ZIVOJNOVIC: I heard the request to go to Slide 79. I don't
8 know if there was more.

9 JUDGE. McMILLIN: Can you go --

10 JUDGE BARRETT: We cannot hear you now. You are breaking up.
11 Will you --

12 VTC: Judge, if you can hear me, this is the VTC. I sent you the
13 phone number to call in. If you want, you can call in. Check the chat on
14 Teams.

15 JUDGE McMILLIN: Thank you very much. I shall do so.

16 VTC: Thank you.

17 JUDGE McMILLIN: Okay.

18 JUDGE BARRETT: All right, hold on. I've paused your time. Have
19 no fear.

20 MR. ZIVOJNOVIC: Thanks.

21 JUDGE BARRETT: Okay. We're still having problems connecting
22 Judge McMillin, but let's go ahead and keep going.

23 MR. ZIVOJNOVIC: Okay. So again, we've never contended that it
24 would be obvious to include all of profile server 165 inside of the specific
25 use content processing device. So the security concerns raised by Patent
26 Owner are not actually applicable. We're talking about just the profile for a

1 specific user's custom media channels, storing it locally on that particular
2 user's content processing device to then allow, a POSITA to more easily
3 implement the express disclosure in Whitehead of a request for custom
4 media channel, including that profile.

5 And if anything, moving a single user's profile to a local storage will
6 improve security. Because now hackers don't have a central repository of
7 profiles that would be a valuable target. Instead, a target's much less
8 valuable if we're talking about each content processing device having a
9 user's specific profile.

10 But even beyond the express disclosure of Whitehead, and how it
11 would be naturally implemented, we do have additional obviousness
12 positions to drive that point home. So first, on the profile server itself, the
13 records, and this -- I'm now at Slide 81 and I'm reading from column 11,
14 lines 23 to 28. That the records on the profile server are, "generally
15 identified by an identifier associated with the user."

16 And Whitehead column 7 talks about how information generally
17 includes a username. So second, in our obviousness position is that at a
18 minimum to facilitate and in fact make it possible to look up records that are
19 organized by user, you would include a username, which is the user data, in
20 your request for specific custom media channel for that user.

21 So you would have both the selection of a specific channel of a user in
22 addition to the user's identity using. And so those two elements again, meet
23 the requirement of their claims. And then finally we have the position that --

24 JUDGE BARRETT: Judge McMillin, were you trying to ask a
25 question?

1 JUDGE McMILLIN: This is Judge McMillin. I did lower the
2 speaker level.

3 JUDGE BARRETT: We can hear you, Judge McMillin.

4 JUDGE McMILLIN: Okay. Thank you.

5 JUDGE BARRETT: Do you have any questions, Judge McMillin or
6 shall we proceed?

7 JUDGE McMILLIN: No. Thank you.

8 JUDGE BARRETT: Okay.

9 JUDGE McMILLIN: Thank you. Please proceed. I'm very sorry.

10 MR. ZIVOJNOVIC: No worries. So on Slide 82 again, this is now a
11 tertiary, obviousness position. Whitehead explicitly discloses targeting
12 advertisement based on the user's location.

13 In fact, it has advertisements that are geographically associated. And
14 so this is in columns 12 and 4 of Whitehead. And so, but Whitehead also
15 discloses that the client device 105 is mobile. And I'm on Slide 83 now.
16 And it talks, and in column 7 Whitehead talks about how the client device
17 can be notebook, laptop, or handheld computer.

18 And then in Figure 1, and the accompanying disclosure is found in
19 column 2 lines 18 to 25, it talks about how the client device can yes, connect
20 to a content processing device over your local router 117 at home within
21 home 101. But the same, the client device can also access the menu, access
22 custom media channels with the internet. Here shown as packet switched
23 network 125.

24 So it's a mobile device. It's location can change. And so to effectuate
25 Whitehead's disclosure of targeting based on the user's current location, it
26 would be obvious to include that user's location in the request for a specific

1 custom media channel. So again, you request a specific channel that gives
2 you an indication of selection. And in that request, you include information
3 about the user's location.

4 And the specific technology that the parties discussed was using IP
5 geolocation techniques. And Patent Owner's own exhibit, Exhibit 205
6 describes such IP geolocation techniques as a key enabler for many of these
7 services.

8 Examples of such services comprise targeted advertising. Whitehead
9 discloses targeted advertising. This is a technique to implement that, given
10 the mobile hardware at issue in Whitehead.

11 And finally Patent Owner's expert confirmed in his deposition that for
12 such geolocation techniques, "many of these come before the priority date."

13 Now in the sur-reply Patent Owner shifts position. Now in his sur-
14 reply they contend, and I'm now on Slide 85 and reading from their sur-reply
15 pages 14 to 15, they now contend, Petitioner does not identify any disclosure
16 in Whitehead that corresponds to data indicative of the selection.

17 Your Honors, we disagree. As we explain in the petition, this request,
18 Whitehead's explicit request necessarily identifies the selected custom media
19 channel. And this is from pages 16 to 17 of the petition. And as I
20 mentioned again, just drive the point home, we also included an
21 obviousness argument on that same page.

22 But even if you accept Patent Owner's position that the mixing, as
23 they put it again in the sur-reply pages 14 to 15, Whitehead's system
24 provides only profile 160 to mixing server 130. Again, we address that in
25 prior briefing as well, and Patent Owner is just ignoring this.

1 So in our reply on Page 11, we talk about how the profile 160 itself
2 includes a name or identifier that the user selected for that profile. So when
3 it sends a profile, it contains the data indicative of a selection. And
4 Whitehead also discloses that profile includes other interests, keywords,
5 subject matter interests, other information. And so it also has the claimed
6 user data.

7 So even if the only thing that goes from content processing device 110
8 to mixing server is the profile 160, that still meets both requirements of data
9 indicative of a selection, and user data.

10 Now I want to address briefly one point also raised by Petitioner in
11 the sur-reply. And this was subject to the motion to strike -- sorry, Patent
12 Owner's sur-reply and the motion to strike.

13 So the Patent Owner contends that Petitioner has somehow waived or
14 disclaimed all arguments in our petition related to the real-time embodiment.
15 And that is not correct Your Honors. We've always maintained that
16 Whitehead's real-time embodiment, when the user clicks on the menu, and a
17 custom media channel is then populated, meets all limitations.

18 And what Patent Owner does is they selectively quote from a single
19 paragraph in the reply. But if you read the entire paragraph, what it's talking
20 about is that, and now reading from it, Petitioner never meant creating
21 profile 160.

22 That initial step, the step that occurs before any of the menu selection
23 that we talked about with the real-time embodiment, when you first create
24 the profile to populate the menu. We've never contended that creation of
25 that profile in the first instance is the user data. What we are talking about in
26 the -- for the real time embodiment is later on, when you want to hit a

1 custom, select a custom media channel for playback, that profile is sent to
2 the mixing server or addition -- or it would be obvious to include a username
3 or a user's current location in that request.

4 And that applies to the real-time embodiment. And you can see also
5 that at that same paragraph that Patent Owner selectively quotes from, we
6 listed those things. We listed our obviousness positions for the --
7 specifically for the real-time embodiment as supporting opposition.

8 And so -- and then finally, if there's any doubt at all, and I don't
9 believe there is, that we maintain our real-time embodiment position, the
10 final sentence should put that to rest. So here we talk -- and to the extent PO
11 is arguing, a selectable custom media channel does not qualify as a media
12 stream until a profile is used to select media content for that custom media
13 channel. That argument is addressed in Section 3.a.

14 And the Patent Owner's interpretation of our reply, their argument is
15 oh no, you've been talking the entire time about the scenario where custom
16 media channel is not just created by creating profile 160, but it's already
17 populated with media content. And that's again, then why have that final
18 sentence there?

19 We have that final sentence there because throughout this paragraph,
20 throughout our reply, throughout our petition, we've always maintained that
21 Whitehead's real-time embodiment meets all claim limitations, including the
22 output signal limitation that we just discussed.

23 Patent Owner quotes from our expert's deposition. They chose some
24 select soundbites where, yes, our expert was at times confused as to the
25 meaning of individual sentences and the record itself. The deposition itself
26 shows he didn't know the answer to some of the questions.

1 But at the end of the day, what Patent Owner omits is that our expert
2 was clear. So, I am now reading from Page 45 at Line 8 to 46, Line 2 from
3 Exhibit 2032.

4 So now Patent Owner said, so there are multiple theories. Some of
5 the theories include the assumption that Dr. Goodrich's claim construction is
6 correct. But he goes on to say, there are other scenarios described in the
7 context of the opening declaration and also described in other paragraphs
8 here. We've always maintained both positions.

9 I realize I'll be eating a little bit into my rebuttal time, but I will do so
10 at my own risk.

11 I would now like to jump to briefly address Claim 1 of the '704 Patent.
12 There, the only dispute relates to the accessing step. We have arguments as
13 alternative interpretation of that term, accessing. But Your Honor, this can
14 this can also just be addressed as purely as claim construction.

15 Accessing is a simple verb. It has a plain meaning. And as Patent
16 Owner themselves admit, and I'm reading from their sur-reply at Page 8,
17 there are other definitions of access, e.g. but treating obtaining. Access just
18 means you get the stream, and that's what Whitehead does.

19 And now Patent Owner contends that independent Claim 1, and this
20 from sur-reply at 7. Independent Claim 1 covers an embodiment where the
21 aggregated uses media streams to modify the content of the streams.

22 And Patent Owner was trying to read this, what they themselves admit
23 is an embodiment, to say that the claim somehow requires that access is not
24 just obtaining the stream, but simultaneously then also using it not just for
25 any purpose, but specifically to modify content.

1 And again, that is not the plain meaning. There's no lexicography
2 here that more and such a construction, no disclaimer, nothing.

3 And again Patent Owner themselves still in sur-reply 7 betrays their
4 position when they say a stream must be accessed before other actions, such
5 as caching, can be completed. No other actions are required to access the
6 stream. You just get it and that's it. That's what Whitehead discloses.

7 So when -- because the content from content sources 135 goes
8 through mixing server -- the mixing server to then be stored in a database.
9 The act of accessing the content from those content sources to then put them
10 in a database that meets the claim limitation. And we have additional
11 arguments in the briefs, under even their interpretation of how the limitation
12 is met, including under Ground 2. But I need not delve into those.

13 Just for dependent claims at issue, claims 18 and 24 of the '704 Patent.
14 Again, we believe Whitehead alone discloses or renders as obvious, but we
15 also have, the second alternative position that it -- that they're rendered
16 obvious by Marcus '904.

17 And Patent Owner, and I'm now on Slide 95, did not dispute that
18 patent -- that Marcus discloses those limitations. Patent Owner did not
19 dispute that it would be obvious to combine Whitehead with Marcus.

20 The final two limitations are frankly, dependent claims are in dispute
21 is Claim 13 of the '704 Patent. Again, I can dispose of that one relatively
22 quickly. Patent Owner, so what we have here is Figure 2 annotated from
23 Whitehead. It has what -- it has advertising. No one disputes that given
24 Whitehead's disclosure, that is the predetermined media programming.

25 It has content that is programming responsive to the user information.
26 And the second time period, no one proposed a construction of media

1 programming. There's no specific requirements of plain and ordinary
2 meaning governance of any one of those elements is media programming.
3 And yes, it is.

4 And then finally, I do want to just briefly touch on Claim 5 of the '753
5 Patent. I'm now on Slide 98. So here again, based on what Patent Owner
6 has said, including in Exhibit 1023 at 53, those are their infringement
7 contentions. Patent Owner has taken the position in litigation, that Claim 5
8 does not add anything beyond what's required in Claim 1 of the '753 Patent.
9 They just cited back to their Claim 1 allegations.

10 Given that position, it doesn't require anything. And now in the sur-
11 reply, they argue for the first time that given Claim 1, there have to be
12 multiple media elements inside of this second feed. Of course construction
13 of feed is just one. The limitation is met if you include parts of the media
14 programming in there. So we believe it's met.

15 But even then our expert clearly, unequivocally testified in his
16 deposition, Exhibit 2032 at Page 75, lines 18 to 88 to 18, that given the state
17 of play he opined that it's one content, one media element would be the
18 second feed. If they're changing positions it just as easily could have applied
19 that same analysis and did apply that same analysis as deposition to say that,
20 look, yes, you can have multiple elements and thereby the entire individual
21 customized media programming as part of the second feed of Claim 5.

22 And finally, I -- this is all under express disclosure. We also have to
23 drive the point home in obviousness argument. What are we talking about
24 here? We're talking about Whitehead's disclosure of an advertisement and
25 Whitehead's disclosure of a custom media channel.

1 And the only thing that that Patent Owner alleges is missing is playing
2 that advertisement before the content. And, Your Honors, we submit that at
3 the time of this priority date, it would have been obvious to do so. A
4 POSITA would have gone to movie theaters. We see a site, Exhibit 1027,
5 about the growth of playing a commercial before the start the movie. That's
6 all we're talking about.

7 Whitehead has at least some delay in generating its custom media
8 channel. You've got to pick the content, you've got to organize it, you've got
9 to concatenate it. There was a dispute about how long transmission would
10 take. But set aside transmission.

11 Just the sheer process of creating it takes time. Whitehead explicitly
12 discloses it's only near real time. A POSITA would be familiar with playing
13 advertisement before content. It will be obvious to play as advertised before
14 content. And thus Claim 5 would also be obvious.

15 Thank you, Your Honors. And apologies, I was going to say this at
16 the beginning, but Judge Barrett we have a copy of our demonstratives if
17 you would like a hard copy.

18 JUDGE BARRETT: We're fine.

19 MR. ZIVOJNOVIC: All right.

20 JUDGE BARRETT: We have the electronic copy. Thank you.

21 As you're setting up, how much time would you like to reserve?

22 MR. HANNAH: We'll reserve 20 minutes as well, Your Honor. And
23 then the way that we're going to break it up is going to roughly split the
24 time. So for our 40 minutes, I'll talk about the '753, and then Mr. Price will
25 come up and talk about the '704, and we'll try to do the same in rebuttal, just

1 to make sure that the record's clean and presentation is understandable. If
2 that's all right with Your Honor?

3 JUDGE BARRETT: That's fine.

4 MR. HANNAH: Thank you. May I proceed, Your Honor?

5 JUDGE BARRETT: Whenever you're ready.

6 MR. HANNAH: Thank you very much. And may it please the Court.
7 First, I'd like to thank Your Honors for your time and your consideration in
8 this oral argument. And also, when you review the record, this transcript,
9 and look at the references themselves, we appreciate that time and digging in
10 and digging into this record because this is very important for our client, and
11 we appreciate the time that you're doing it for us.

12 With that, let's just dive right into the merits here. So, I'm going to
13 start with Slide 4. And in Slide 4, what we have on the screen, is Claim 1 of
14 the '753 Patent.

15 And as we see here, it has numerous elements. Part of those elements
16 that we're going to be discussing here for my 20 minutes is going to be that a
17 client is provided a list of feeds, and then it receives a selection of one of
18 those feeds. After that selection, individual customized media programming
19 is provided based on the feed selection that was just done. And it includes
20 media elements selected, ordered and concatenated with the feed.

21 So just looking at the plain language of Claim 1, we have to have an
22 existing feed that is selected by a client. That's the plain language of the
23 claims.

24 Based on that feed, that selected feed, that existing feed, another feed
25 is provided to the client. Not the one that's selected, but a modified feed.
26 That modified feed includes the selected feed, but also these additional

1 media elements that are concatenated with that. And that's the fundamental
2 difference between Whitehead and the '753 Patent.

3 The '753 Patent, based on the plain language, you have to have an
4 existing feed that becomes selected by the user. The user receives --

5 JUDGE BARRETT: Could you pause there for a second? So, '753,
6 Claim 1.

7 MR. HANNAH: Yeah.

8 JUDGE BARRETT: Which specific limitation are you talking about
9 here? The delivering?

10 MR. HANNAH: So first I'm talking about where it says you receive -
11 - you can do the delivery.

12 JUDGE BARRETT: Okay.

13 MR. HANNAH: So delivering to a client a list of feeds.

14 JUDGE BARRETT: Right.

15 MR. HANNAH: But in particular I'm talking about receiving by the
16 aggregator from the client a selection of one of those feeds.

17 JUDGE BARRETT: And in your position the feed has to exist at that
18 point?

19 MR. HANNAH: Absolutely.

20 JUDGE BARRETT: Well, so the first one, delivering, it's not a feed,
21 it's a list of feeds. So that doesn't really tell me the feeds have to exist yet.
22 Or are you saying it does?

23 MR. HANNAH: I'm saying that it does. The plain language of the
24 claim says that you deliver to the client a list of feeds. And then you receive
25 from the client a selection of one of those feeds, right?

1 But then to make it even clearer or to support it by the claim language
2 itself, the last element says that you have to concatenate media elements
3 with the selected feed. Meaning there has to be something to concatenate
4 with.

5 These media elements that are part of this new feed that is provided to
6 the to the client, right? This is a, it's a different feed that's provided to the
7 client. This publisher initiated feed. Because it comprises the original feed
8 that was selected, plus these concatenated media elements.

9 And there's not an or in the claims. It doesn't say selected, or
10 concatenated. It has to be and. So you have to concatenate these media
11 elements with something. And with that something is the selected, and it
12 says this is the plain language, the feed selection.

13 That you have to concatenate it with the feed. And so that tells you
14 just based on the plain language that the feed has to exist, the selected feed
15 has to exist. It can't be something that doesn't exist because you can't
16 concatenate something with something that doesn't exist.

17 So that's what the plain language of the claim requires. And I think
18 that this is further -- does that answer your question?

19 JUDGE BARRETT: I think so.

20 MR. HANNAH: All right.

21 JUDGE BARRETT: And maybe I'm just not understanding it. But I
22 don't doubt at some point there exists a feed. I was thinking maybe more of
23 the chronological aspect, and maybe it doesn't matter. But you know,
24 delivering, the delivering line.

25 MR. HANNAH: Okay.

1 JUDGE BARRETT: A list of feeds. If I go in a restaurant, I get a
2 menu. That's a list of food. The food hasn't been prepared yet. And the
3 next line receiving from the client a selection of one of the feeds. I give my
4 order to the -- the waiter, and then later, the food is created, and maybe they
5 add something to it. You see where I'm going there?

6 MR. HANNAH: I see where you're going. But I think it's a
7 difference when you're talking about feeds here. Because feeds in the
8 specification is constantly referred to as this continuous stream of media or
9 continuous media content as throughout the specification.

10 There's not once in the specification in the '753 Patent that is contrary
11 to the example of what feeds would normally be. For instance, it gives an
12 example of a podcast feed. That's a feed that someone would typically
13 understand is a feed of content that is coming through. And so if I'm
14 selecting that feed, I'm not selecting it to be generated later. I'm selecting
15 the feed that exists.

16 And then throughout the patent it talks about that. You modify that
17 existing feed, right? I mean you can -- if you just -- if you just do a search
18 for the word modify, you'll see it throughout the patent. And it always talks
19 about modifying the existing feed. So we've got to look at it in context with
20 the specification which talks about that.

21 And so that's why when you select that feed, it must exist because
22 then you concatenate it with something. In your example of food you're not
23 concatenating the food with something else.

24 Like if you're selecting -- I'm selecting an item of food you know,
25 from the menu, and that later it says, okay, you need to concatenate it with
26 something. Well, it has to be something that you concatenating it with,

1 right? It can't be nothing, right? And so that's why based on the plain
2 language, this is what this entails.

3 And that's why I like to turn to -- I'm on Slide 5 now, Your Honors,
4 Slide 5 is a demonstration of Figure 1. And it shows this flow.

5 In one you have a feed selection by user one to the aggregator. User
6 information is used, and then the publisher is going to be sending it a
7 different feed. It's going to be a feed that's based on the feed that the
8 aggregator has, but it's going to insert these media elements in there.

9 And that's the point of the '753. In '753, it specifically has examples
10 in which it says that the user one and user two in Figure 1 here will initially
11 receive the same content. Actually, this specifically says that, telling you it's
12 an existing feed. And then at a later time the content may be modified, or
13 the stream, or the feed may be modified in order to provide a customized
14 feed.

15 But these embodiments throughout the specification of the '753 Patent
16 just crystallize that this initial -- there is an initial feed that everybody's
17 going to get, and then it may be customized based on the user information
18 that's provided.

19 So with that I'll jump to claim construction. And this is on Slide 7.
20 Now our position is based on the plain language of the claim themselves.
21 There's an understanding of what is required, in particular with the selection
22 and the feed and concatenating media elements with that feed.

23 But with the claim construction that we provided, this is entirely
24 consistent with everything in the specification, which is this is a feed that
25 consists of one or more associated media elements. Nowhere in the

1 specification does it say that it can be a container that does not include
2 media at all times. It just doesn't exist. It's not the specification at all.

3 Every single time in the specification it talks about a feed that always
4 has media elements within it. So on Slide 8, I'm on Slide 8 now, Your
5 Honors. On Slide 8 we talked about, what's the support for this construction.

6 First is the antecedent basis, the antecedent basis where it says that is
7 the feed that's concatenated with the immediate elements. And so that
8 indicates, to one reading this patent and these claims that the proper
9 construction is, if the original feed needs to have media elements in order to
10 concatenated with additional elements, because it uses the word additional
11 media elements.

12 Also the specification. This is throughout our briefing. And so I'll let
13 the brief rest on that. But then we have some citations here on Slide 8. But
14 it defines them as a collection of media elements.

15 And then finally the dictionary definitions. We even offered those.
16 It's a common understanding of feed. If you went and talked to somebody
17 else and you said, hey, what's a feed in terms of what do you understand that
18 to be in the context of streaming media, people are going to understand that
19 there's content within those. It's not merely an empty container.

20 Now this is, I've turned to Slide 9, Your Honors. Slide 9 is showing
21 some examples from the specification. And this kind of hits home again,
22 this whole notion that this initial feed that you select is something that exists,
23 and does not necessarily has to be customized for the user at that point.

24 As it says here, this is a quote from the '753 Patent, column 11, lines
25 25 through 38. It talks about that there's a -- each music feed listed on home
26 page contains predetermined content, not customized for viewer or user.

1 That indicates that this initial feed is a feed that has this content. It is later
2 modified with the additional media elements in order to provide this
3 customized information and this customized programming.

4 So based on the specification, the extrinsic evidence, the intrinsic
5 evidence, a feed is one or more media elements and makes sense in the
6 context of the claims. Now this is important because of Whitehead. Let's go
7 through what Whitehead discloses. And now I'm on Slide 11.

8 Whitehead discloses two different flows. I'm just, up here, I'm going
9 to call them the real-time flow, and I'll call it the pre-generated flow.

10 Now when Counsel argued up here in the opening remarks, Counsel
11 forgot an important step in the flow that happens with the real-time flow and
12 the feed generated flow. So as we know from Whitehead, a user can select
13 an attribute in the real time scenario. Well, what happens after the user
14 selects an attribute is that a playlist is generated. That playlist does not exist
15 at all before the user selects the attribute. And we can see this on column 9
16 of the Whitehead reference in lines 30 to 40.

17 And you can see it discussed throughout when you go back and look
18 through the specification. You'll see that every single time when a user
19 selects this attribute, that a playlist is then generated or created at that time
20 that did not exist before.

21 That's important because that is not a feed that the user can select.
22 Even the playlist hasn't even been generated in order to create whatever
23 channel that it's trying to make. And then after the user selects the attribute,
24 the system generates this playlist in real time, and then media will be shown
25 to the user based on the playlist. Now that's important because as we've

1 been discussing, the user doesn't select a feed, and based on the existing feed
2 that's there, there's no concatenation with it.

3 The second is the pre-generated flow. And the pre-generated flow,
4 and this can be found in Whitehead as well where it talks about how a
5 playlist may be scheduled to be created at some time before the user selects
6 the channel.

7 And that in that example, in that flow, the user selects this pre-
8 generated channel. That pre-generated the channel is simply shown to the
9 user. There's no concatenation of anything done after the user selects the
10 channel. The user is just selecting a pre-generated channel, a pre-generated
11 playlist. And so again this is important because there's no notion of
12 concatenating with any additional media elements with an existing feed, or
13 with the feed that is selectable by the user.

14 Now let's compare that to the '753 flow that we just saw. The '753
15 flow as shown in the specification, in numerous instances, is that a user
16 selects a feed. This feed is not customized to the user. It can be user one.
17 User two can see the same exact content at that point.

18 When the user selects the feed, user information is used to modify that
19 existing feed, and then the existing feed is shown to the user based on a
20 variety of criteria. So for those reasons, Whitehead does not read on the '753
21 Patent. And this is on, now on Slide 12.

22 On Slide 12 we laid out the two --there are two embodiments, the real-
23 time embodiment and the pre generator embodiment. And highlighted that
24 there's no selection of an existing feed for the real-time embodiment, and
25 there's no additional media elements that are concatenated with an existing
26 channel or feed at all with regard to the pre-generated embodiment.

1 So if Your Honor's, I'd like to open up for any questions Your Honors
2 might have with regard to arguments with regard to the real --with regard to
3 Claim one of the '753. And if not, I can move into Claim 5.

4 JUDGE BARRETT: I think we're fine. Go ahead and move on.

5 MR. HANNAH: Okay. With regard to Claim 5, this is a dependent
6 claim and dependent claim requires you -- I'm jumping here to Slide 15,
7 Your Honors.

8 This claim requires specifically that there's a first feed that's
9 responsive to the selection of the one or more feeds that's furnished during a
10 first time period, and a second feed comprising individual customized media
11 programming is furnished during a second time period.

12 Petitioner has not pointed to any disclosure within Whitehead or
13 anything in the record that specifies a disclosure of two different feeds at
14 two different times. At most, they show a pre-generated channel. That's one
15 feed that's provided at the same time.

16 There is no notion of a second feed provided at a second time. And
17 this is based on Claim 5, is based on the disclosure in the '753 Patent, it's
18 column 7, lines 54 through 60. And there it talks about how in response to
19 the received selection of a feed, the publisher provides a predetermined feed
20 during a first time period and provides a feed responsive to the recipient
21 information and a second time period. Thus, the same initial feed may be
22 provided to all users who make a particular selection.

23 So this just further emphasizes one, that there's two different feeds
24 that can be provided at two different times, which are not provided in
25 Whitehead. Because based on what they mapped to Whitehead, it's one
26 feed. Number two, this reemphasizes the point with regard to both the real-

1 time and the pre-generated content, in that the same initial feed is provided
2 to both users. Meaning that when you have that selection and Claim 1, the
3 selection of a feed, that feed is going to be the same until additional
4 customized media is provided with it within the feed.

5 Now, Counsel made some arguments about how the green boxes and
6 the blue boxes and, you know, how these different media elements can be
7 considered feeds and whatnot. The problem is it's a confusing mapping for
8 number one. And confusion goes in our favor, not theirs. They have the
9 burden. And so they need to convince us, with sufficient evidence, that the
10 mapping makes sense.

11 When you start unraveling it, you start to question what is the feed,
12 what are the media elements? How can it be possible that they're mapping
13 one feed and then saying that it's a feed of feeds? What are the media
14 elements?

15 And actually there are arguments, when you look in the papers we
16 start to try to unravel them, cuts against their entire argument with even with
17 regard to Claim 1. Because they start conflicting the mapping in terms of
18 what they're mapping to, to what aspects.

19 And so, based on that, there is insufficient evidence in order to find
20 that Claim 5 is met in the '753 Patent.

21 Now, Counsel didn't talk about ground three at all. So I understand
22 that, I'm not going to be talking about that today. So with that, I'm going to
23 pass the rest of my time to my colleague to talk about the '704.

24 JUDGE BARRETT: Thank you.

25 MR. PRICE: Thank you, Your Honors.

1 JUDGE BARRETT: Before you begin, just for the record, to make it
2 clear, Judge McMillin is able to hear clearly and is able to follow along. So,
3 just because you don't see his face up there and he's not speaking, he is
4 participating.

5 MR. PRICE: Understood.

6 JUDGE BARRETT: Thank you.

7 MR. PRICE: I am having trouble having this show up on the screen
8 though. Because I --

9 MR. HANNAH: Give it a second, it will --

10 JUDGE BARRETT: And again, we do have your demonstratives
11 pulled up. If all else fails.

12 MR. PRICE: Okay. I won't take any more time trying to get them on
13 the screen.

14 Okay. Thank you, Your Honors. And may it please the Court. My
15 name is Jeff Price. I'm here talking about NTECH's '704 Patent.

16 Some of the issues in the same, in the '704 Patent are very similar to
17 the issues raised, in the '753 Patent that my colleague just spoke about. I
18 think my friend on the other side fairly accurately described, one of the key
19 questions in the case about whether or not a media stream or medium feed
20 must include content at the time it is selected.

21 That issue is the same. You know, we have, for the construction of
22 media stream. I'm on Page 8. It's not simply a container, that can be filled
23 with media later. It's a continuous sequence of media data.

24 Now, my friend on the other side, you know, during his opening
25 remarks, said that he was giving the plain and ordinary meaning for both
26 media feed and media stream is what they're relying on. I haven't seen from

1 Petitioner what the plain and ordinary meaning of either of these terms
2 actually is.

3 I've heard that they disagree with ours. So, you know, to the extent
4 that they're, you know, proposing an ordinary meaning, I don't know what
5 that meaning is. However, a media stream, there is a well-known term.
6 People stream media all the time. There needs to be media data for it to be a
7 media stream.

8 Similar to the issues raised with respect to the feed construction, I'm
9 on Page 9 now, we have the similar antecedent basis, requirement even if
10 we, you know, don't want to give a plain, ordinary meaning to the term
11 media stream itself, we know, based on antecedent basis that the selected
12 media stream, which is assembled with other media elements, must have
13 content, otherwise it can't be assembled with those other media elements.

14 Now the construction where we're talking about a continuous
15 sequence of media data does have some relevance to the accessing
16 argument. And some of their, the arguments about how Whitehead, actually
17 constructs the custom media channel. So we'll get there, later. But I did
18 want to flag that our construction does have a purpose besides just showing
19 that the media stream must have content at the time it selected.

20 Moving on to the construction for the term. Are there any questions
21 on our media stream construction perhaps?

22 Moving on to the construction of the term output signal. I think for,
23 this is for Claim 9. The output signal must include data indicative of the
24 selection end user data. But look, you know, whether or not the term "a" in
25 general patent law, you know, can refer to one or more whenever you have,

1 you know, if you have a thing that requires two things, then that one thing
2 has to include the two things.

3 And I think the Verna case, subject cited in our sur-reply, drives home
4 that point really nicely. If I have you know, if I have a dog that barks and
5 rolls over, it's not sufficient to have one dog barks and another one that rolls
6 over. You have to have one dog that does both.

7 Similarly we need one output signal that includes both the selection
8 and the user data. And I think, we think that it's just a straightforward
9 application of federal circuit precedent.

10 So similarly, when we are now talking about the obviousness issues,
11 with respect to Whitehead, very similar to the points that my colleague made
12 with respect to the '753 Patent, when you are selecting Whitehead's custom
13 media channel, you are not selecting a stream unless it was pre-generated,
14 right?

15 In a pre-generated embodiment in Whitehead, those menu items
16 actually do refer to a stream. However, that stream is then never modified
17 with additional media elements. It's not assembled with Anything else.

18 In the real-time embodiment, there is no, that menu item does not
19 point to a stream. It does not refer to a stream. What it does is refers to a
20 profile, and then the profile is then used to figure out which media elements
21 are eventually going to be put into the custom media channel.

22 So when the user is presented a menu of choices, in the real-time
23 embodiment none of those choices is a media stream, and it's certainly not
24 the media stream that is then concatenated or assembled with other media
25 elements, because that's what you get at the end of the process, which is, you
26 know, it's all put together at once.

1 So if there are aren't any other further questions on that aspect of
2 Claim 19, which was, I think, fairly well covered in 23 of the '704, which
3 was fairly well covered in my colleague's remarks, I'll move on to the output
4 signal argument.

5 And Whitehead just doesn't have this, right? You know, when a user
6 selects, you know, a custom media channel from the list, it sends the
7 selection. And then in order to make that channel, the mixing server will
8 call on profile 160, which is not sent at the same time and not sending the
9 same signal as the selection. And, you know, at that point Whitehead's
10 stream is created, but there is no disclosure of an output signal having both
11 of these aspects that are required.

12 I do want to just touch briefly on this issue of whether or not
13 Petitioner has combined this theory, I'm on Page 21, to Whitehead's pre-
14 generated embodiment, when it's said that Petitioner's theory is based on
15 selecting a previously created custom media channel, including elements at
16 the time of selection.

17 So during -- this argument came up in one paragraph in the reply, and
18 it was completely word for word verbatim from their expert's report. When
19 we asked the expert what he meant by this language, he told us that he was
20 talking about the pre-generated embodiment. That's what, those were the
21 expert's words. That was the expert explaining his own terminology and his
22 own argument, which the Petitioner copied word for word into their brief.
23 So this idea that the expert was wrong about his own testimony, it just, it
24 doesn't hold water.

25 On the merits, it doesn't matter. We can look at all those arguments
26 and they all fail for the same reason that we set up top. Real-time

1 embodiment, there's no selection of the media stream. In the pre-generated
2 embodiment there's no later assembly.

3 On Page 22 there are issues with the timing of Petitioner's arguments
4 under our construction. In Whitehead, custom media channels are either
5 updated or revised based on updates to the user's profile, not based on the
6 selection, right? So these are totally asynchronous events.

7 You can create a profile, you know, in the real-time in the pre-
8 generated embodiment you might create it right away. But what you never
9 have is the idea of selecting the media channel and then sending both the
10 selection and user data within the same output signal. Are there any other
11 questions about the output signal argument?

12 Okay. Moving on to Page 23. Whitehead also does not disclose
13 accessing media streams by an aggregator. So this is where our construction
14 of media stream does become important. So everybody knows what a media
15 stream is. It's a stream of data. I can stream data from Netflix. I can stream
16 data from YouTube. I can stream data, you know, in all sorts of ways. But
17 it's always a data stream, right? It's a continuous sequence of data that that's
18 being, you know, transmitted, received.

19 Whitehead doesn't operate on the basis of media streams. It doesn't
20 work with media streams. It doesn't modify media streams. What
21 Whitehead does is it will take content from a content source, store that
22 content as individual media elements in a database, and then when you're
23 going to construct the custom media channel, the profile generates a query of
24 the database, pulls in individual media elements, puts them into a sequence,
25 and then the user can stream that.

1 But this idea of, you know, of just taking these individual media
2 elements that are stored, you know, statically in a database is not working
3 with a continuous stream of media data. You know, whether or not the
4 media elements was at one time part of a stream, that's not sufficient.
5 Because when we're talking about actually putting these things together, it's
6 working with the individual media elements, not media streams.

7 And so where this touches on our accessing by the aggregator
8 argument, there's no dispute that the aggregator does not do anything with
9 the streams before they go to the database. Now, the whole idea of the
10 aggregator, you know, at least receiving media streams comes from the
11 figure in Whitehead, and I'll see if I can pull it up, where there's an arrow
12 pointing from a content source through the mixing element and to the
13 database.

14 The spec doesn't actually talk about that path existing. It doesn't say
15 that the aggregator does anything with that, you know, with those media
16 streams other than what we might presume happens, is it just passes through
17 that device on the way to the database.

18 But where the, those streams are not being accessed by the aggregator
19 and certainly not accessing in order to cache them or, you know, then
20 assemble them. Instead, as we know, the media streams, if they are provided
21 as streams from the content sources, going to the database, those static
22 media elements are then used to build the custom media channels.

23 So for those reasons, it's our point of view that the access, the
24 aggregator doesn't ever access the media streams, even if they do pass
25 through on the way to being stored in the database.

1 JUDGE BARRETT: So tell me again what -- how are you
2 considering access?

3 MR. PRICE: Sure.

4 JUDGE BARRETT: Because if it passes through, it at least feels like
5 there's a presence there.

6 MR. PRICE: Right. So back on 13, our proposed construction is
7 accessing. It requires using or being able to use the media stream. So, and
8 this is consistent with the plain and ordinary meaning of access.

9 So there are dictionary definitions that we have describing access as,
10 to be able to use. To access something means to open up a computer file,
11 the opportunity for use of a resource. So our point of view is based on just
12 the plain and ordinary meaning of access, including how it's used in the
13 specification itself.

14 It's not just that we're pointing to the extrinsic sources, it's just that
15 those extrinsic sources, consistent with how the term is used in the art, is
16 also consistent with how it's using the claims and the specification.

17 So our point is that just allowing a media stream to pass through a
18 device is not sufficient for it to be accessed. You have to actually be able to
19 use the stream. Does that answer your question?

20 JUDGE BARRETT: I believe so, thank you.

21 MR. PRICE: The point is just that working with media streams and
22 assembling media streams is a different beast than working with statically
23 stored content elements. And so when we're talking about caching a media -
24 - accessing a media stream, caching a media stream, assembling the media
25 stream, that's all talking about things that aren't done with static, with static
26 media elements.

1 Moving on to Slide 24. We're talking about Claim 13, which is
2 similar to Claim 5 of the '753 Patent, where it requires providing
3 predetermined media programming at a first time period and providing
4 media programming responsive to the user information at a second time
5 period. And in Whitehead, there's just no concept of that, right? In the pre-
6 generated embodiment, you have a single media channel, you know
7 Whitehead talks of it.

8 You know, you can put it together as a single multimedia file that's
9 then streamed. That's just one thing. You don't have predetermined media
10 programming at a first time period. And then your custom media program
11 and a second time, all you get is the custom media programming.

12 And so again, Petitioner's argument is that it would have been obvious
13 to provide a predetermined advertisement before presenting the -- before
14 presenting the custom media channel to the user. However, that's first of all
15 not disclosed in Whitehead. And it doesn't make sense. If you can stream --
16 if you can begin streaming a predetermined advertisement, you can begin
17 streaming your custom media channel. They're created and available in real-
18 time. There's no reason for it and there's no disclosure of that.

19 I know, you know, my friend was talking about going to the movies
20 and seeing an advertisement before the film. It's all put together in advance
21 that's just Whitehead's pre-generated media embodiment, right? It's, you
22 know, there's an advertisement and then your then you have some media.
23 That's just a pre-generated channel you know, in Whitehead's parlance. It's
24 not motivation to do what's claimed in either Claim 5 or '753 or Claim
25 through 13 of the '704.

1 Moving on to -- I see about two minutes left. Moving on to Page 27
2 of the demonstratives. This is about Claims 18 and 24. They're patentable
3 over Whitehead.

4 This follows similarly on the argument I was making about how
5 working with media streams is just work different than working with media
6 elements. They're different animals.

7 And so, claim 18 also requires not only accessing but caching by the
8 aggregator, the media streams, which just doesn't happen in Whitehead.
9 And then switching between media streams, which also just doesn't happen
10 in Whitehead. Whitehead does not disclose any, manipulation of media
11 streams at all.

12 Again, the, you know, if there are streams that are provided by a
13 content source, those go straight to the database where they then store as
14 media elements and then used to create the media channel. Okay. I think
15 that went through everything I have to say. Do Your Honors have any
16 questions for me before I turn it back over?

17 JUDGE BARRETT: I think we're fine. Thank you.

18 MR. ZIVOJNOVIC: All right. Thank you, Your Honors. So I want
19 to dive right in, and I want to go to Slide 8 of our slide show. And this shows
20 the claim language, Claim 1 of the '753 were Patent Owner started.

21 And you know, I first want to you know, emphasize what Your Honor
22 picked up on in terms of this being a list of feeds. That also applies to go to
23 Slide 5, that also applies to Claim 19 and also Claim 23 that we're talking
24 about presenting a flurry of fees.

25 We're talking about a menu, the user interface. We're not talking
26 about playing the feed that stage that that's staged in. And as you know, we

1 discussed, you know, Your Honor discussed how, you know. Mr. -- yep. So
2 again, you know, counsel for Patent Owner relies on a later step. Counsel
3 for Patent Owner submitted and did refer to it as a subsequent step. Again,
4 we don't believe it informs and defines the meaning of media streams.

5 No one disputes that in Whitehead. By the time you get to assembling
6 advertisement and content together to generate to file media programming,
7 that custom media channel is in fact populated with media content. At that
8 point, it's there, it's got concatenated, it gets sent out.

9 And what I want to go to next is if we can go to Slide 69. You know,
10 I heard counsel for Patent Owner use the word existing. I believe it was at
11 least ten times that the word existing came up. The word existing isn't in the
12 claim language. But regardless, again, from their own expert, there's no
13 dispute that once there's a profile, once there's a menu, the custom media
14 channels exist. Their own experts at some form of custom media channel
15 must exist.

16 And to address the antecedent basis question, Whitehead itself again
17 is instructive here. I'm now on Slide 70 at column 12. You select the
18 custom media channel, and then Whitehead teaches that in process 400, that
19 custom media channel 170 is populated media content. It's the same custom
20 media channel. It's just now populated content.

21 Counsel for Patent Owner referenced the generating a playlist step.
22 That is one of the steps of process 400 for populating the content, the custom
23 media channel. But it's still the custom media channel that was originally
24 selected.

25 You know, in Your Honor's example, it's a dish order. There's
26 intermediary steps to assemble that dish. There's cooking, there's things that

1 happen before, whatever the chef's secret ingredients, the other media
2 element gets added. There are steps in between. But the claim doesn't
3 preclude that. There's nothing in a claim, again, unlike other claims in this
4 family and dependent claims that says at the selecting step, the media feed or
5 stream must already be populated with media content.

6 Counsel for Patent Owner offensive specification. And I believe they,
7 he acknowledges these are examples. Yes. There's examples in the
8 specification that refer to pre-populated stream or feed, but also Counsel did
9 not at all discuss column 5, lines 1 to 20, but is an example where the feed is
10 generated after the selection.

11 You know, Counsel also, you know, I believe there was a statement
12 about how there's no examples of these patents referring to a feed to a stream
13 as a container. Yes, there is, I'm specifically going to -- make sure the right
14 slide. Sorry, so particularly frankly now to, '704 Patent, column 6, lines 9
15 through 16. There's an example where we're talking about, an XML feed.
16 Something, a method for accessing content for a source. So it's, our position
17 is entirely consistent with what's in the specification.

18 On the question of the output signal, what I want to emphasize, and I
19 ask Your Honors to go back to the transcript. I believe what counsel a
20 patent on a said in discussing what Whitehead does teach is that if, "it sends
21 that selection". So, you know, in their sur-reply they said there's no
22 disclosure in Whitehead that corresponds to data indicative of selection. Of
23 course, there's a selection. You request a specific custom media channel.
24 And that is, and that selection is sent to the mixing server.

25 And finally I want to briefly touch base on -- make sure it's right -- on
26 the predetermined embodiment. I didn't discuss that during my original but,

1 Patent Owner raised it so I do want to address it. They keep saying the
2 custom media channel is not modified in response to the selection. But
3 when Patent Owner makes those assertions, they're looking at the wrong
4 selection.

5 Citing our petition at Page 11 in our reply at 9 to 10, and 16 to 17,
6 development selection for the pre-generated embodiment is not the selection
7 to playback the media content. It's the selection to update a specific profile
8 for that custom media channel. And in response to that selection of a custom
9 media channel for purposes of updating its profile, process 400, that's one of
10 the reasons you go through process 400. That includes the concatenating.

11 So yes, there is concatenating and assembly of content, even in the
12 pre-generated embodiment, it happens in response to a user selecting a
13 specific custom media channel in order to update its profile. So all the
14 discussion about it not being -- no concatenation, it's looking at the wrong
15 selection.

16 So next I want to address the accessing limitation of Claim 1. So I
17 believe I heard, I'm on Slide 90. So I believe I heard that there's you know,
18 we all seemingly agree that Whitehead's mixing server does get this stream.
19 It's undisputed that it gets a stream from the content source. And I believe
20 the phrase that was used is that stream just passes through the mixing server,
21 and is then stored in the media content database.

22 So Your Honors, we submit that's enough for accessing. Counsel for
23 Patent Owner and backed away from their previous construction. So they
24 previously argued that accessing requires not just obtaining but actually
25 using it, and specifically using it to modify content.

1 I have now heard that the definition is using or being able to use.
2 Mixing server 110 was -- this accesses, it receives the media stream from a
3 content source. There's no argument here that it's able to use it. Their only
4 position is it doesn't. But now that they've taken the position that just the
5 opportunity to use is sufficient to meet that, the accessing limitation,
6 Whitehead's mixing so it does that.

7 The content, by their own admission passes through the mixing server.
8 Yes. Whitehead's disclosure at that, in that particular point in time, making
9 sure it chooses not to use it, but there's nothing that prohibits it. It has the
10 content. And frankly, that is all that accessing requires. Obtaining the
11 content.

12 And now we have them on the record also saying that it doesn't
13 require actually using it. So even if the modified construction is adopted, we
14 have the access limitation met.

15 I also want to briefly touch base, we also have Grounds 2 for the
16 access limitation of Claim 1. Since Patent Owner pursued a very narrow
17 interpretation of access that we don't believe is supported, we addressed our
18 existing Ground 2, and this is another argument that renders that obvious.

19 So again in Whitehead the mixing server receives the stream. And
20 even under their interpretation at worst it just caches its content in a
21 database. And again our position is that meets all that accessing requires.

22 To the extent requires more we have Marcus '904, which in Paragraph
23 251 explicitly discloses that the process involves not just obtaining content,
24 but further on then stashing it, but further also switching between streams of
25 uncached programming. So again, Ground 2 at a minimum, renders this
26 obvious.

1 For the dependent claims I will note that for Claims 18 and 24, I don't
2 believe Patent Owner addressed Ground 2 at all. And finally, for Claim 5, I
3 want to, you know, they're reading and saying Claim 5 or '753 Patent
4 requires these things and requires two separate feeds. And, you know, a
5 feed cannot be within a feed. And we disagree that these requirements are
6 there.

7 And I think what probably speaks the loudest is Patent Owner's own
8 submissions. And this is Exhibit 1023. So these are their infringement
9 contentions in litigation.

10 And according to them Claim 5 does not require anything beyond
11 what's been Claim 1. They've been, when they submitted and did the
12 mapping for Claim 5 with the '753 Patent, they said see Claim 1. This claim
13 element is met for the same reasons discussed above regarding Claim 1.

14 There's no discussion of you need more than one feed, whereas Claim
15 1 has just one feed. No, it's already met based on what's just in Claim one.
16 And it's -- and again, to the extent anything more is required, going now to
17 Slide 99, they're not disputing that if you implement our obviousness
18 combination, obvious modification, if you actually play an advertisement
19 before the rest of the custom media channel, it meets the requirements of
20 Claim 5 of the '753 Patent.

21 And so, you know, all we're talking about here is play the
22 advertisement first. Counsel for NTECH reference that there is no delay.
23 And that's just not what the patent, Whitehead itself says.

24 It talks about, now on Slide 100 it talks about the these media
25 channels that created in real-time. So even setting aside any transmission

1 delay, just the act of creating a multimedia, multi-element custom media
2 channel takes time.

3 You've got to query the database, you've got to pull the elements, you
4 got to concatenate it. And so Whitehead acknowledges there's going to be a
5 delay. It's near real-time but doing the best they can.

6 And so combined with the fact that a POSITA will be familiar with
7 the concept of playing advertisement before content, and that's all that the
8 claim for that requires me when you have a break. And so that is motivation
9 to play that advertisement first, and that meets the claim language.

10 JUDGE BARRETT: What, if you know the answer to this, what's a
11 real-time example of the difference between real-time, which I suppose to be
12 instantaneous, and near real-time? Are we talking milliseconds or are we
13 talking 30 seconds?

14 MR. ZIVOJNOVIC: Yeah. So Your Honor, we don't have a precise
15 number, is the answer. We tried to acknowledge, you know, we try to
16 calculate it, in terms of, for just the transmission. So not, setting aside all the
17 time it takes to create, which we acknowledged it, Whitehead acknowledges
18 that there is delay. We tried to calculate transmission. There's too many
19 variables. So we're focusing now on just the delay for creation, and we don't
20 know what that is. It depends on many factors.

21 One thing I will note is that, you know, you can always pay more
22 money to buy faster hardware. So that's you know, a supercomputer will be
23 faster than what is more likely a web server at issue, but it's too many
24 variables to calculate.

25 But I will note that whatever the delay is, why not, you know, play an
26 advertisement to make money and Whitehead recognized the benefits of

1 advertisement. And so if you have any delay, there's no downside. You
2 play the advertisement.

3 And I would further add that, if you accept it, there is just a 15 second
4 delay. And, you know, even if it's normally four or five and you decide to
5 push it to 15, you get money from the advertisement. And moreover, you
6 can bake, you can extend your delay by not investing as much in as many --
7 in as much hardware for your mixing server. So, it's a win-win in that
8 respect. But --

9 JUDGE BARRETT: I hear where you're coming from and you know,
10 we'll take a look at your argument. But to me, the length of delay does feel
11 important for the motivation to combine. If it's on the order of milliseconds,
12 a POSITA, I'm not envisioning a POSITA saying, wow, I could shove a
13 commercial in there and make some money. If it's 30 seconds, maybe 15
14 seconds you mentioned, maybe that might be a motivator. So in my mind, it
15 does make a difference.

16 MR. ZIVOJNOVIC: So yes, Your Honor. I mean, if there is a longer
17 delay, we were unable to calculate a precise number. We do know that there
18 was a delay. And again, Your Honor, we submit that even setting aside a
19 delay, it was -- the movie theater doesn't need to delay playing content. It
20 could play it right away. Yet it chooses to insert the advertisement ahead of
21 time, and create that delay to play an advertisement. And Whitehead also
22 plays advertisements.

23 And so you know that, again, that well known practice would still
24 render Claim 5 obvious. And that's even if we get to obviousness. Because
25 again, according to Patent Owner and their position doesn't require anything
26 more. They're saying, in the claim language they're saying that a media feed

1 can be just a single media element. That's all that's needed. And that's their
2 position. It's one or more media elements.

3 And their only basis for Claim 5 to say requires more than one is just
4 that, Claim 1 talks about multiple mediums for the media programming,
5 though. And we submit Your Honor, that does not mean that Claim 5
6 requires including the entirety of customized media programming as part of
7 that selected feed. Thank you, Your Honors.

8 JUDGE BARRETT: All right. Thank you.

9 MR. HANNAH: Your Honor, may I proceed?

10 JUDGE BARRETT: You may, whenever you're ready.

11 MR. HANNAH: Thank you very much. So, Your Honor I'm going to
12 start with your analogy. I'm going to start with the food. We came up from
13 lunch. And I was trying to think about it during the break there, I shouldn't
14 say break, but during the arguments. And what are the differences in trying
15 to line it up to that.

16 And I think the best way to describe it is that in Whitehead, if you
17 order a hamburger, you get a hamburger. You order off the menu, you want
18 a hamburger, you're either going to get a pre-generated hamburger or you're
19 going to get a hamburger that they're going to make in the back. And they're
20 going to give it to you. It's made in real-time.

21 The difference is for the '753 and the '704 is, if you order a
22 hamburger, you get a cheeseburger. They go in back, add cheese to your
23 order and that's what they give you. That's the difference. And when you
24 look at Claim 1 of the '753, when you make that selection of the feed, that's
25 what you're expecting. You're expecting that feed. But what happens in the
26 system is they add the cheese. They add the cheese to that feed, and that's

1 what they deliver to the user. And that's what the claims require. So that's
2 how I would address that.

3 Now Counsel made some arguments saying the word "existing"
4 doesn't show up in the claims. The word "existing" does not show up in the
5 claims. It doesn't need to.

6 Think about it. If I'm claiming, I'm a baseball fan, I don't know if
7 anybody else is. So don't hold it against me if you're not. But if you have a
8 claim that says pick up a baseball, throw the baseball. You don't have to
9 claim pick up an existing baseball and throw the existing baseball. It's
10 understood. It's understood when you claim pick up a baseball bat that
11 baseball exists.

12 And it's the same thing as when you claim a selecting a feed. That
13 feed exists. You don't have to add the word existing to every single -- I
14 mean, think about what that would do to claim drafting. It's bad enough as it
15 is, that we have to deal with a's and does and everything else, but if we had
16 to add the word existing to every single time, it would appear in every single
17 patent that was written.

18 That's understood. It's understood when you name it element that that
19 element exists. You do not have to add that adjective to every single noun in
20 a claim.

21 Now, Counsel also has consistently pointed to Claim 12 of
22 Whitehead. I mean, I'm sorry to column 12 of Whitehead. I can't, I'm not
23 showing it on the screen, but if you can follow along with me, I'm in
24 Whitehead. I'm in column 12, and I'm at line 56.

25 And this is the portion of the specification where Counsel is arguing
26 that this advertising content is existed into the custom media stream. But I

1 want to read exactly what this entails. What this says is, for example, a
2 number of items of advertising content to be inserted into custom media
3 channel may be determined according to an overall length of the custom
4 media channel 170.

5 What it's telling you there is, it determines what the length of the
6 channel is, and then inserts them into it. It does not say, I order a hamburger
7 and get a cheeseburger. You are just determining the entire length. And
8 remember, this is based on the playlist. When you go back and look through
9 Whitehead, I encourage you to look at all of the embodiments and how they
10 describe the playlist. You determine what the playlist length is, and then
11 you go back and you say, okay, let's put these advertisements in there.

12 You don't want a 30 minute advertisement in the playlist or in the
13 channel if you've got five minutes' worth of content. You don't want to do
14 that. And so all this disclosure is saying is, I go and as I'm generating this
15 playlist and this channel based on this playlist, I'm going to also take into
16 account the entire length. It does not say that I am going to select a feed and
17 then modify that feed that was selected by the user. It doesn't say that.

18 Now, Counsel has also pointed to column 7 of the '753 Patent. For
19 example, in describing this XML feed. I heard this XML feed, you know, a
20 couple of times. And when you look at the disclosure of the '753 that
21 supports our position.

22 Column 7 specifically says that, and I'm looking at lines 33 through
23 37, it says the single placement may represent a single feed, such as a single
24 XML video feed, a first feed.

25 It's talking about a feed that's commonly understood. It's a video feed.
26 A feed that is going to deliver, and it continues to say what it can be.

1 Include the various programming, can be a mix of music video styles, but it's
2 talking about a video feed.

3 So every time it's talking about XML it's talking about a feed, a video
4 feed. That's the specific example this specification gives. The other
5 examples are the podcast that we talked about earlier. These are common
6 examples of what people would think of as feeds. They're not going to be
7 thinking of something else, or empty containers, or anything of that nature.

8 Now another point that Counsel, during the last argument was trying
9 to make, or he raised was this content source. And I want to be very -- I
10 want to be clear in terms of what these content sources are. Okay. So the
11 content sources are described on column 5 and they're just in Line 13. And
12 this is of the Whitehead reference. Okay.

13 These content sources do not store streaming media as it sounds like
14 Counsel is trying to argue. It stores clips. It stores these individual clips.
15 That's exactly what this is. And each of these clips has metadata associated
16 with it. And that makes sense, because you have to have a playlist that is
17 going to reference these clips.

18 Every single embodiment in Whitehead talks about a playlist that
19 references these video clips. And those clips are going to be associated with
20 metadata in order to present it to the user in the channel.

21 There is no notion of going to a content source and just start
22 streaming. Every single embodiment, and Whitehead talks about having this
23 playlist, and it's shown on Figure 2 where there are discrete chunks of
24 content. And when it talks about different sources for these channels, and
25 for this media content or whatnot, they're always in clips. It has to be

1 because that's how you form the playlist. You can't form the playlist with a
2 continuous streaming content, it always has to be in these clips.

3 So when you look at that disclosure of what the content source is,
4 remember it goes content source, which is referenced by the playlist, and the
5 playlist is the thing that generates media for the channel.

6 Now, the Counsel showed our infringement contentions, right? So
7 infringement contentions and say because we pointed above to our original
8 contentions in terms of how TikTok infringes my client's patent, says that
9 that means that Claim 5 doesn't matter.

10 I think we all know here that when you look at the elements and you
11 look at the proof for Claim 1 and how TikTok infringes, it has the same
12 proof that's going to also meet Claim 5. So the fact that we reference back
13 up to Claim 1, doesn't mean that you just erased the claim language of Claim
14 5. You have to still account for it when you're looking at validity and
15 providing a validity analysis. And it's their burden to map the references
16 that are in this record to those different elements. You can't just say that
17 they don't exist, because we had abundance of proof of infringement by
18 TikTok and how they infringe and how they infringed patents.

19 So with that, I'm going to turn the remaining time over to my
20 colleague. But before I get down, I do want to say thank you again for your
21 time. Thank you, Your Honors. I know we had some difficulty, with the
22 video, audio. I'm glad that we resolved it. And hopefully this was helpful.

23 MR. PRICE: Okay. Thank you, Your Honors. I'm going to turn first
24 to the output signal issue raised in the rebuttal time period where Counsel
25 was accusing us of pointing to the wrong selection.

1 I don't understand that argument. Whatever the user clicks on is the
2 custom media channel. If the user decides from the aggregator to update the
3 profile, that's completely separate from the selection of the channel, which is
4 what eventually causes the media program to be provided to the user, which
5 is a claim limitation.

6 So if it's not the selection of the custom media channel that my friend
7 is talking about in the claims, then I don't understand the theory because it
8 doesn't make sense. You would never then end up providing the media, the
9 custom media programming to the user. All you're doing is either
10 generating or updating media channel, a custom media channel.

11 Talking about the access, I think my friend said that there was some
12 sort of an omission that now sweeps in there, you know, this disclosure
13 again, which only comes in the figure of Whitehead, which shows an arrow
14 between the content sources and the mixing server. Whitehead does not talk
15 about the mixing server ever doing anything with content from the content
16 sources. It just, it doesn't.

17 So even if it's a conduit, it's a conduit in a way that does not allow you
18 to access it. There's no disclosure of accessing it. There's no reason for
19 accessing it in a way that you would actually be able to use it. Certainly not
20 when you get to claim, the later dependent claims where you're talking about
21 caching and you're talking about how well it seems. Or in fact, the claim
22 language of the independent claims, which talk about actually using that
23 media stream in the assembly process, right?

24 So accessing, using, able to use does not encompass just allowing the,
25 you know, data to pass on, which is at best what Whitehead discloses. I

1 think there was an argument about, well, there's this, some disclosures in
2 Marcus '904.

3 Those disclosures don't, wouldn't change the rest of their mappings,
4 right? The rest of their mappings would require, you know, pulling media
5 elements out of the database, which is how Whitehead actually operates.

6 So if all of a sudden now in, you know, you're going to use Marcus's
7 techniques for actually working on streams, then it's completely inconsistent
8 with the rest of the mappings. We don't think that Marcus actually talks
9 about doing that at the mixing at the correct place anyway. But that's the
10 access argument.

11 On the, I did want to return back to Claim 9 and 19 and 23 of the '704
12 Patent. I just want to really make it very, very clear, you know, what we're
13 talking about when, you know, when Whitehead is talking about these this
14 list of menus, right? They, these custom media channels refer to a profile.
15 The profile has some information about the user in it. You know, it might
16 tell you what you know, one of more content sources that the user is
17 interested in. It might have attributes like baseball or soccer or, you know,
18 something else that would, you know.

19 But the key is it's this profile, right, which causes the query for the
20 media elements from the database. So when you click on a menu item
21 you're, even if there's a one-to-one mapping, right? There's, in the profile
22 that's only one content source.

23 First of all, the content source is not a media stream. And I think we
24 went through that and the motion to strike because there was a shift in the
25 arguments from the content source being the media stream and the petition
26 in the reply, or in the motion strike and in the petition, the argument was that

1 the content sources provide the insurance and they could provide many,
2 many streams to a single content source, right?

3 So what happens in Whitehead is you define this profile and the user
4 defines the profile, and then that profile is used as the seed for determining
5 what media elements are going to be brought into it. The key is what you're,
6 what the user wants when they're clicking on that menu item is a customized
7 media channel. It's not the media stream that they're pointing to and the one-
8 to-one mapping, right?

9 You know, even if there was a one-to-one mapping, which to the
10 stream itself, which we deny, you are not then, when you click on that the
11 menu item, you're not asking for that media stream to the extent that that
12 that's even their argument. You're asking for a customized media channel,
13 right? So that's a big difference.

14 If you were, if you wanted to request the media stream, the only way
15 to do that in Whitehead would be to use their old, programming channel,
16 right? So, you know, on my set-top box at home when I used to have one, I
17 could, you know, flip through channels. I could, my friends said NBC. I
18 could click on NBC and that gives me the NBC feed.

19 That is not what happens in Whitehead. In Whitehead, you're
20 selecting a custom media channel that you know, will be based on
21 information in the profile, but there's no sense in which you're, you know,
22 clicking on a single menu item is the selection of any particular feed or
23 stream.

24 That's the end of my presentations Your Honors. So unless there are
25 any other questions, we will give everybody back the four minutes and 25
26 seconds.

1 JUDGE BARRETT: I think we're fine. Thank you.

2 MR. PRICE: Thank you.

3 JUDGE BARRETT: So I believe that's it. These cases are, taken
4 under advisement, and we will issue final written decisions in due course.
5 Thank you.

6 (Whereupon, the above-entitled matter was concluded at 3:26 p.m.)

IPR2024-01340, IPR2024-01342
Patent 8,145,704 B2, 8,886,753 B2

PETITIONER:

James Glass
Ognjen Zivojnovic
QUINN EMANUEL URQUHART & SULLIVAN LLP
jimglass@quinnemanuel.com
ogizivojnovic@quinnemanuel.com

PATENT OWNER:

James Hannah
Kristopher Kastens
Jeffrey H. Price
Jenna Fuller
HERBERT SMITH FREEHILLS KRAMER (US) LLP
james.hannah@hsfkramer.com
kris.kastens@hsfkramer.com
jeffrey.price@hsfkramer.com
jenna.fuller@hsfkramer.com