

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC. AND AMAZON WEB SERVICES, INC.,¹

Petitioner,

v.

ZIKLAG IP LLC.,
Patent Owner

IPR2025-00700
Patent 6,182,128 B1

Record of Oral Hearing
Held: June 17, 2026

BEFORE: HUNG H. BUI, SCOTT A. DANIELS, and
KARA L. SZPONDOWSKI, Administrative Patent Judges.

IPR2025-00700
Patent 6,182,128 B1

APPEARANCES:

ON BEHALF OF PETITIONER (*Apple Inc.*):

SCOTT JARRATT, ESQ.
ADAM FOWLES, ESQ.
KALYANI JOSHI, ESQ.
Haynes Boone, LLP
6000 Headquarters Drive, Suite 200
Plano, TX 75024
(972) 739-8663; scott.jarratt.ipr@haynesboone.com
(972) 739-8674; adam.fowles.ipr@haynesboone.com
(202) 654-4583; kalyani.joshi.ipr@haynesboone.com

ON BEHALF OF PETITIONER (*Amazon Web Services, Inc.*):

FRANK MORTON-PARK, ESQ.
Klarquist Sparkman, LLP
121 SW Salmon Street, Suite 1600
Portland, OR 97204
(503) 473-0951; frank.morton-park@klarquist.com

ON BEHALF OF PATENT OWNER:

ANTHONY E. DOWELL, ESQ.
Dowell Commercial Litigation
1010 Foundry Drive, Suite 1200
West Lafayette, IN 47906
(765) 490-3201; aedowell@dowellcomlit.com

ALSO PRESENT:

MONICA DE LAZZARI
LAUREN JOHNSON
TOM DEMORY

IPR2025-00700
Patent 6,182,128 B1

The above-entitled matter came on for hearing on June 17, 2026, commencing at 10:00 a.m. at the U.S. Patent & Trademark Office, 600 Dulany St., Alexandria, Virginia.

¹ Amazon Web Services, Inc. filed a petition and a motion for joinder in IPR2026-00047 and has been joined as a petitioner in this proceeding.

P R O C E E D I N G S

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JUDGE BUI: We reconvene this morning for oral arguments in IPR2025-00700. My name is Hung Bui. On the panel, we have two additional judges who are participating remotely. The first is Judge Scott Daniels from New Hampshire. And the second is Judge Kara Szpondowski from Detroit.

And for purpose of this hearing, we have already reviewed the files carefully, and we may interject, and ask you questions just for purpose of what we need to do on any given issue.

But -- let's start with making an appearance. Petitioner's side, can you introduce yourself for the court reporter?

MR. JARRATT: Yes. Good morning, Your Honor. My name is Scott Jarratt, lead counsel for Petitioner, Apple. And also for Apple, we have Adam Fowles, who will be presenting today, Kalyani Joshi, Monica De Lazzari. And for Petitioner Amazon, we have Frank Morton-Park.

JUDGE BUI: Thank you.

Patent Owner?

MR. DOWELL: Morning, Your Honors. Anthony Dowell on behalf of the Patent Owner. I have with me the inventor on the patent, Lauren Johnson. And with him, also an interested party, Tom Demory, with us today.

JUDGE BUI: Thank you. I have a few housekeeping items that I need to cover for the checklist purposes and make sure that you are given all the accurate information before we can proceed with the arguments.

So for the record, please --note this hearing is going to be

1 broadcasted or live-streamed for the public. So make sure you speak into
2 the microphone and for the court reporter who is trying to record everything
3 you say accurately.

4 And with respect to the burden of proof, particularly for the
5 petitioner, you understand your burden of proof in this case, correct?

6 MR. JARRATT: Yes, Your Honor.

7 JUDGE BUI: Okay. Also for the timer, each party is given 60
8 minutes to present your case. But given the slide deck that you provided in
9 advance, you might not need all of that time, but you will be asked to save
10 your rebuttal time.

11 So how much time you would you like to save for rebuttal?

12 MR. FOWLES: For Petitioner, 15 minutes.

13 JUDGE BUI: Okay. Patent Owner?

14 MR. DOWELL: Five minutes.

15 JUDGE BUI: Thank you.

16 Do we have any counsel -- who is a LEAP practitioner? Okay.
17 Then I can cut that short. Let's proceed with the Petitioner case.

18 MR. JARRATT: Can we -- okay.

19 MR. FOWLES: All right. Yeah, it's the same screen. One
20 moment. No, it's not. Okay. All right. I am ready.

21 JUDGE BUI: Please proceed.

22 MR. FOWLES: All right. Good morning. Again, Adam Fowles
23 for Petitioner. The case before you today is a simple one, really. It hinges
24 on two terms that have come in dispute between the parties, and we'll likely
25 focus most of our time on those terms today.

26 Let's go to Slide 2 of the presentation and briefly -- there we go.

1 Slide 2. Touch on the '128 Patent. Do some level setting. The '128 Patent is
2 a patent directed to music distribution system that relies upon multiple
3 regional networks. Each network has a distribution center that stores music
4 tracks, and users connect to these system distribution centers to search for
5 desired music. Yeah. When they find --

6 JUDGE BUI: Let me interject for a minute. One item that I forgot
7 to convey to you and that is the use of timer. I'm going to be controlling the
8 timer for 60 minutes, and I -- and when it's the time to close, you will see a
9 yellow light.

10 MR. FOWLES: Okay.

11 JUDGE BUI: Meaning you have probably ten minutes left, and
12 then the red light will come out. But I'm going to control your time, okay?

13 MR. FOWLES: Okay.

14 JUDGE BUI: Please proceed.

15 MR. FOWLES: Okay. So, again, with respect to the '128 Patent,
16 after a user has connected to the system and if that is found at the regional
17 distribution center, that center pulls it and sends it to the requesting user.
18 When that distribution center can't find it, it then escalates that to a central
19 controller, which tries to find it at another distribution center. And if it does,
20 it retrieves that and routes it to the user. The problem is that these concepts
21 were already known and described in the art well before the '128 Patent was
22 filed.

23 So let's skip ahead to Slide 4 for a moment. Slide 4 illustrates just
24 a few notable disclosures that describe these concepts in the 1990s. So if
25 you look all the way to the right, here on this timeline, you see, in 1998, the
26 '128 Patent was filed. If you go all the way to the left here to -- back to

1 1991, people were already designing and describing these kinds of systems.
2 Yurt was filed as a patent application in 1991 and describes systems for
3 distributing audio and video information over high bandwidth broadcast
4 channels like cable in real time where the user can consume that media as it's
5 still being delivered.

6 In 1995, the Real Audio Player was introduced. Real Audio Player
7 lets users stream audio in real time over the Internet. Also in 1995, Time
8 Warner Cable implemented what it called a full-service network. That was a
9 network that they provided for real time delivery of all sorts of content
10 where the users could stream things like digital video, audio, shopping on
11 demand over cable.

12 And then further up to your right on the timeline here, in 1997,
13 DOCSIS was released. This was an industry standard for digital audio or
14 really, any kind of data distribution over cable TV systems.

15 These are just a few examples that illustrate that the building
16 blocks of the '128 Patent like regional libraries, like a central controller, high
17 bandwidth cable transport and real time delivery and consumption were
18 already known and in use before 1998. But it's not just that.

19 JUDGE DANIELS: Mr. Fowles?

20 MR. FOWLES: Yes.

21 JUDGE DANIELS: I have just sort of a general question. I was
22 looking at the timeline. Was the Real Audio Player -- and I know it's -- I
23 remember the Real Audio Player, and I guess you still see it maybe from
24 time to time, but were we able to download and store music in that service?

25 MR. FOWLES: That, I don't know. Yeah. What we looked at it
26 for was for streaming music in real time over the Internet. Whether you

1 could download and store, certainly, that was what got Napster on the map
2 later, but we're talking here about just examples of before 1998 when audio
3 was streamed in real time.

4 JUDGE DANIELS: Oh, no, no, thank you. I was just curious.
5 Appreciate it.

6 MR. FOWLES: Yeah. So, again, it's -- and it's not just that these
7 were individual components known in the art. In fact, as we've shown in the
8 petition and discussed throughout the briefing, the combined teachings of
9 Yurt and Logan demonstrate that the complete system was known before the
10 '128 Patent.

11 So let's actually look at your -- in a little bit more detail. To do
12 that, let us jump to Slide 21. Here on this slide, I wanted to focus on the
13 illustration of the overall system in Yurt. It's from Figure 1C and just
14 wanted to illustrate that -- sorry. The overall structure of Yurt is very similar
15 to that of the '128 Patent.

16 So what you see is that there are multiple transmission systems in
17 Yurt illustrated in green, those green circles on the right. Those are
18 distribution systems according to the claims of the '128 Patent. They
19 distribute requested audio content and video content in real time to
20 requesting users at high speed, such as cable or satellite.

21 And that is all managed by a central controller illustrated and
22 highlighted here in blue. So just like the '128 Patent, which has a central
23 controller there on the left in blue, multiple exemplary distribution systems
24 in green, this structure was illustrated in Yurt, you know, several years prior
25 to the '128 Patent.

26 JUDGE BUI: So the label may be different. Item -- if you look at

1 Figure 1C of Yurt, is it 300? The remote order processing and item database
2 300, it actually functions as a central controller; is that correct?

3 MR. FOWLES: So it's illustrated as that database 300 in Yurt's
4 Figure 1C. Yurt describes that as operating along with a distribution
5 software, and it is the distribution software and that database that together
6 complete this central controller functionality.

7 JUDGE BUI: So on the same slide, you have that central
8 controller is being used to route the digital audio files between the
9 distribution centers. That limitation, can you account for that in the Yurt
10 reference?

11 MR. FOWLES: Yes, Your Honor.

12 JUDGE BUI: Okay.

13 MR. FOWLES: So what Yurt describes is that when a file is not
14 found at a local transmission center or for any other location, you know,
15 types of reasons that we'll potentially touch on, that central controller, so the
16 database in cooperation with the distribution software sends an order for the
17 transmission center or distribution center where that file is located to transfer
18 it to the necessary distribution center.

19 JUDGE BUI: Can you point that out in a specific teaching in the
20 Yurt reference?

21 MR. FOWLES: Yes. So one example, let's go to Slide 22 now, is
22 here on the bottom, you see that Yurt -- in Yurt, the remote order processing
23 and item database 300 communicates with the library system of the
24 transmission system of interest to communicate where a file needs to go.

25 Now beyond that, there's also teaching in Yurt with respect to what
26 it describes as interlibrary transfers. And the exact site for that, let me

1 provide that for you. That would be at Column 7 of Yurt, Lines 44 to 48.

2 So as we're talking about, for example, Claim 1 of the '128 Patent,

3 you see here, if you go back to Slide 20 -- actually, no, stay on Slide 22,

4 what does the Claim 1 of the '128 Patent require of a central controller?

5 Well, two things. Structurally, it just has to be connected to the distribution

6 centers. Functionally, it has to be for routing digital audio data files between

7 those distribution centers.

8 So as an example, again, Column 7, 44 to 48, those inter-library

9 transporters in Yurt, each library is at a different distribution center. So the

10 -- this central controller in Yurt is directing one distribution center to route a

11 file to another distribution center, and so it achieves the same function in

12 much the same way.

13 JUDGE BUI: Okay.

14 MR. FOWLES: Thank you. And I think that is sufficient for Yurt

15 in terms of a broad overview. Let's dive into the details. Let's go back to

16 Slide 5 now.

17 As I noted, there really are just two issues in dispute between the

18 parties that are worth discussing today, and that involves "substantially real

19 time". What does that mean? And what does Yurt teach, as well as central

20 controller as we've already started talking about?

21 And there are other issues with respect to motivation to combine,

22 you know, whether Patent Owner's declaration testimony should be given

23 little or no weight and the Motion to Strike, but really, it boils down to

24 "substantially real time" and the central controller concept.

25 JUDGE BUI: So, based on your submission, I gather you want a

26 plain, ordinary meaning of those two terms, correct?

1 MR. FOWLES: Yes. The plain and ordinary meaning is sufficient
2 to resolve all controversies here.

3 JUDGE BUI: So if we were to adopt that plain, ordinary meaning
4 in those two terms, we don't really have to address the Motion to Strike. We
5 can just dismiss it as moot, correct?

6 MR. FOWLES: It's not our belief that it would be moot because
7 there are new arguments that were raised in the sur-reply and so we would
8 like a ruling on that. But, certainly, if the Board decides to not get that far
9 with respect to construing "substantially real time" beyond plain and
10 ordinary meaning, or central control, or really "substantially real time", then
11 the briefing before the sur-reply is really where the rubber hits the road.

12 JUDGE BUI: So let's dive into that. Of course, the plain, ordinary
13 meaning term is the default rule of claim construction, right? You know,
14 unless there's ambiguity, of course, in the case of dispute like this, then we
15 would have to look at the record, look at the claim, look at the specification,
16 all that to make a ruling on the claim construction issue. But otherwise, it
17 would be the default rule. So please go ahead and tell us exactly what it is
18 that you're advocating for.

19 MR. FOWLES: Certainly. So let's go to Slide 6 and step through
20 "substantially real time", and as part of that, we'll look at the specification of
21 the '128 Patent, certainly the context of the claims, and then we'll look at
22 what Yurt teaches and how it's such a clean mapping between the two that
23 there really is no confusion to clarify with a construction.

24 So going to Slide 6, you know, there are two independent claims of
25 the '128 Patent, Claims 1 and 2. Claim 1 is the only independent claim in
26 which the term "substantially real time" is recited. And you see here, it's

1 recited first in the preamble for distributing digital audio files in
2 substantially real time to users. And then again, it's recited in the body of
3 the claim with respect to what the distribution center, a given distribution
4 center is doing.

5 So as it recites here, the distribution center is sequentially
6 transmitting the requested digital audio files in substantially real time to said
7 user through a high bandwidth network like satellite or cable.

8 So distinct from that, at the very end of Claim 1, there is a central
9 controller recitation, but that is distinct and separate from anything being
10 recited with respect to what the distribution center is doing in transmitting
11 something to a user.

12 JUDGE BUI: So when you are saying that term -- what do you
13 mean by "substantially real time"? Is it instantaneously, you know,
14 downloaded without -- there's obviously -- in any kind of communication
15 system, you're going to have some sort of latency, some sort of delay
16 between, you know, from the signal transmitted from point A to the receiver,
17 at point B, right?

18 MR. FOWLES: Uh-huh.

19 JUDGE BUI: So it depends on the network, the delay in the
20 network. But in theory, they are almost "substantially real time."

21 MR. FOWLES: Right. So let's go to answer your question, let's
22 go to Slide 8. Sorry, Slide 9. And I think this will be useful to start
23 answering that question.

24 So the '128 Patent really describes two ways to get audio files to
25 users. One option is to transmit the audio file in real time, and this first
26 quote here juxtaposes real time versus the second option, some

1 predetermined time in the future. And if you look further down here, what
2 does it mean to do it sometime in the future? This kind of touches on Judge
3 Daniels' question in a way that, apparently, the '128 Patent envisioned
4 downloading the complete file for some playback sometime in the future.
5 So that's option 2.

6 Option 1 is what the claim requires. So it is “substantially real
7 time.” And looking here at the middle quote, what are we looking at for
8 substantially real time? Well, at least, the '128 Patent seems to understand
9 that this requires that there can be immediate audio playback at the receiving
10 end. So that certainly got developed further during the proceeding. And for
11 example -- again, it just comes down to, you know, the immediate audio
12 playback seems to suggest you can just start playing back right when you
13 start receiving the content, and the user doesn't have to wait.

14 JUDGE BUI: Does that always -- include receiving playback
15 simultaneously? So the dispute term in the claim requires sequentially
16 transmitting. What did you mean by sequentially transmitting that digital
17 file?

18 MR. FOWLES: So I didn't write the claim, so I'm not sure what
19 Patent Owner meant by writing, sequentially transmitting, but looking at the
20 term in the context of the claim and in the context of the specification, it
21 -- sequentially transmitting suggests transmitting, bit by bit is probably the
22 wrong word, but block by block, but, you know, chunk by chunk to the user.

23 JUDGE BUI: Right.

24 MR. FOWLES: And that's certainly what Yurt describes as well.
25 So one of the embodiments of Yurt literally describes transmitting block by
26 block a file, whether it's video, audio or whatnot, to the user.

1 And in fact, if we go to Slide 11, we can see that what Yurt teaches
2 is -- in one of its embodiments is transmitting in real time to the user from
3 the distribution center. In fact, it's faster than real time is what it describes.

4 JUDGE BUI: So in your Slide 11, a part of the Yurt disclosure is
5 in -- particularly in Column 2, Line 1 and 3, Yurt is talking about that once
6 the video and audio material is selected, that select audio, video material is
7 sent over to any one of those channels, and they're talking about in a fraction
8 of real time. So the fraction of real time seems to suggest that substantially
9 real time; isn't that correct?

10 MR. FOWLES: That's correct. And in fact, we don't have to rely
11 just on that.

12 If you look at the second quote here at Column 5, Lines, really, 1
13 through 9, Yurt describes that in an embodiment at -- when the transmission
14 starts, the user can begin immediately viewing the content as the
15 transmission is ongoing.

16 JUDGE BUI: That's because usually, data is transmitted in terms
17 of chunks of -- you know, typically over the Internet, or packets, right?

18 MR. FOWLES: Right.

19 JUDGE BUI: So a bunch of sequence of packets, and they could
20 be buffered and then present live. That's why you have live-streaming these
21 days, right? So you have to sequentially transmitting the audio broken up
22 into different pieces, and it gets sent over different channel.

23 The channel could be cable, could be internet, could be any other
24 communication network available, right? And then you have to factor in
25 some sort of delay, some sort of latency for -- in order to realize a real time
26 component of the distribution.

1 MR. FOWLES: That sounds fair. It -- really, it could be viewed
2 this way. So acknowledging any introductory latency, you know, this is a
3 situation where the patent seems to -- the '128 Patent seems to be claiming
4 once it starts arriving at the user, the transmission speed is fast enough from
5 the distribution center that the user is able to consume that content without,
6 you know, that little spinning icon saying it's waiting.

7 And in fact, Yurt describes buffering, it's not buffering to wait. It's
8 actually describing because it's getting there faster than the playback is
9 requiring. It's storing the excess for when the user catches up. It's kind of
10 like when you're watching a YouTube video and you're at 00:00:10, but you
11 can see that this gray bar is moving all the way past, maybe it's up to minute,
12 three or four, meaning that it's already reached your computer, and so the
13 user doesn't have to wait as it's continuing that playback. That's just a
14 simple example.

15 But definitely, as we further probed what Patent Owner seemed to
16 believe this term required, that is consistent with their positions at portions
17 of this proceeding. So let's explore that just a little more by going to Slide, I
18 believe, 12. Well, since we're at Slide 12, just to reiterate with your -- and
19 then we'll go to -- further in this proceeding. But we have in the claim,
20 reciting transmission in substantially real time, and we have Yurt teaching
21 transmission in real time.

22 And the '128 Patent describes what does that mean to be in real
23 time. Well, it at least means for media audio playback at the receiving end,
24 and Yurt teaches the same thing. Immediate viewing as transmission is
25 continuing.

26 So Slide 13 now, which is where I was trying to get. So originally,

1 substantially real time was not a term Patent Owner requested construction
2 of in the preliminary response. But after institution, in their response, they
3 argued that a construction was necessary for substantially real time, but they
4 didn't actually propose a construction.

5 However, outside the claim construction section, and what we
6 emphasize here is that they did argue that "substantially real time" requires
7 playback while transmission is ongoing. And so that's what we addressed.
8 We said, okay. Well, if that's what they think it requires, let us demonstrate
9 to you why Yurt teaches that. And I think we've already really touched on
10 that a bit. And to just avoid, you know, whether there's any confusion --

11 JUDGE BUI: Before you go forward, the requirement of playback
12 is only one of the options available in both the '128 patent and the Yurt
13 reference, correct? Because you have the option of seeing in real time,
14 listening to the music or the movie in real time, or you can save it for
15 playback at some other time later, a day later maybe, okay, or a week later.
16 So the requirement of having a playback while transmission is ongoing sort
17 of undermines the second option, doesn't it?

18 MR. FOWLES: You're asking whether the real time --

19 JUDGE BUI: Yes. In real time, if we were to import that
20 limitation into the claim, wouldn't that undercut the second option available
21 by both the '128 patent and the Yurt reference?

22 MR. FOWLES: Oh, you mean it would undercut saving and
23 playing back later?

24 JUDGE BUI: Yes. That's right.

25 MR. FOWLES: It would -- Claim 1 chose the first option. It says
26 it requires that real time playback. Now, whether that is also saved and can

1 be played back again later is maybe possible, but it's not at issue in this
2 proceeding. What really is at issue is whether transmitting substantially in
3 real time is met by Yurt's teachings of also transmitting in real time for
4 immediate viewing as the transmission is ongoing. This statement, in Patent
5 Owner's response, we probed in deposition from their declarants.

6 So let's go to Slide 16 now. We wanted to make sure we were
7 understanding what Patent Owner was asserting in their response. And so
8 first, we spoke with Mr. Johnson, one of the named inventors of the patent.
9 And when we were asking about this concept of substantially real time, he
10 said a couple of interesting things.

11 So first, and I'll just read from this transcript on the left, "The
12 whole purpose of the invention," of the '128 Patent, at least Claim 1, that's
13 my interjection, "was to find a way to deliver media while that allowed
14 playback while the file was still arriving."

15 And then he put it more succinctly right after that. He said, "So
16 that's how I would describe the substantially real time, playback while the
17 file is still arriving." We also asked similar questions to Dr. McCulloh, and
18 his answers were quite similar. You know, from his perspective on the
19 upper right there, "Real time," to him is, "if I had no delay or disruption in
20 playing the content." And he described it as being measured from the user's
21 perspective.

22 JUDGE SZPONDOWSKI: Counsel, I have a question about Mr.
23 Johnson's deposition. Was he noticed for deposition as -- for expert
24 testimony or for his testimony as an inventor?

25 MR. FOWLES: I believe Patent Owner submitted him as expert
26 testimony, and so we noticed him in that capacity.

1 JUDGE SZPONDOWSKI: Okay. Thank you.

2 MR. FOWLES: Yes. So both of their declarants described this
3 concept in similar terms to how Patent Owner argued in their response, that
4 substantially real time requires this playback while transmission is ongoing.
5 And not to beat a dead horse, but just to reiterate, that's what Yurt teaches.

6 So you know, really there are two birds that could kill -- get taken
7 care of with one stone, and that is, first, Yurt teaches this limitation, and it
8 does show -- does so regardless of a construction put forward by Patent
9 Owner. And that takes care of the second issue of whether "substantially
10 real time" has to be construed.

11 It doesn't have to be. The teaching of Yurt is so plain relative to
12 the recitation of the claim and relative to Patent Owner's characterization of
13 it in their response and in deposition, that --

14 JUDGE BUI: So is your contention that, regardless of the Patent
15 Owner's construction of the -- of those terms, the Yurt reference would meet
16 both the plain and ordinary meaning of the term and the Patent Owner's
17 proposed construction of those terms?

18 MR. FOWLES: Yes, Your Honor. Inasmuch as the argument in
19 the response can be seen as a construction, yes, Yurt meets that. Otherwise
20 -- and if you look at Slide 14, what did they argue for the construction?
21 Their -- really the full import of their claim construction page was what was
22 underlined here. And I quote, "Substantially real time requires clarification
23 to ensure that Petitioner does not erroneously equate bulk fraction of real
24 time delivery with streaming-like sequential playback."

25 Well, first off, you know, that's not a construction. But beyond
26 that, it's just not right. While Yurt may teach an option of later playback,

1 just like the '128 Patent has an option for full download and play later, it's
2 irrelevant to the actual teachings of Yurt that have been at issue or been
3 presented in the Petition from the beginning, namely that Yurt teaches real
4 time transmission.

5 And we know it's real time just like the patent envisioned because
6 Yurt expressly says there is immediate viewing possible while the file is still
7 downloading, while the transmission is ongoing.

8 JUDGE BUI: Thank you.

9 MR. FOWLES: With that, unless there are any other questions
10 about substantially real time, we can move on to central controller.

11 JUDGE BUI: Let's move on to central controller.

12 MR. FOWLES: Okay. Why don't we go to Slide 21? Or actually,
13 let's go to Slide 19.

14 JUDGE BUI: Well, before you go, Judge Daniels and Judge
15 Szpondowski, do you have any questions regarding the term "substantially
16 real time"?

17 JUDGE SZPONDOWSKI: No, not right now. Thanks.

18 JUDGE BUI: Okay.

19 JUDGE DANIELS: I just wanted to confirm that the description
20 you're relying on in Yurt, Mr. Fowles, is the buffering that happens at the
21 user end, and I think in Yurt, they just call it the reception or the receiving
22 station or something 200; am I correct?

23 MR. FOWLES: The section -- certainly Column 5, Lines 1
24 through 9 in Yurt is what we're relying on. And Yurt describes really a
25 couple of ways it can happen even to accomplish real time. It can either be
26 just transmitting and playing back without any buffering, or if it's so fast that

1 the playback can't keep pace, there could be some buffering.

2 And in fact, we also spoke with Mr. Johnson about that, and he
3 acknowledged in his deposition that the substantially real time could allow
4 for some buffering.

5 JUDGE DANIELS: Is there a cite to Mr. Johnson's testimony for
6 that? You don't have to give it to me right away if you don't have it off the
7 top of your head, just interested.

8 MR. FOWLES: All right. We'll have it in a moment. It's --

9 JUDGE BUI: It's on Slide 16.

10 MR. FOWLES: Thank you, Your Honor. Actually, there is
11 another place. So if you go to Slide 46, it is in the deposition transcript,
12 Exhibit 1018 at Page 39, Lines 1 through 9. In there he explained that
13 substantially real time term "makes a little bit of room for buffering and
14 other things."

15 JUDGE DANIELS: Got it. Thank you.

16 MR. FOWLES: Yes, Your Honor. All right. Let's go to Slide 19.
17 So central controller, moving on to that term, is a term that appears in both
18 Claims 1 and Claim 2 of the '128 Patent. And here, we've just further
19 highlighted and emphasized where the central controller arise in Claim 1 and
20 what does it recite. Note again what's required of a central controller, that it
21 be connected to the distribution centers and that it functionally be for routing
22 digital audio data files between said distribution centers. That's it.

23 And that's because, you know -- sorry, going back, you know
24 -- staying on Slide 19 for a moment, notice that in Claim 1, this again is a
25 scenario where when the distribution center receives a request for a digital
26 audio file, Limitation (a)(4)(c) recites that the distribution center actually

1 found the requested files in its own library. So it already had the files
2 responsive to the request, so we could send it.

3 Now, if we go to Slide 2 -- I'm sorry, Slide 20 and Claim 2, Claim
4 2 covers an additional scenario where the distribution center that received
5 the request couldn't find all the files in its local library. And that's why here
6 you see at Limitation (b), the central controller has three functions that it
7 further has to do.

8 It has to receive a file import request from the, you know,
9 originating distribution center that couldn't find the file in its local library.
10 The central controller has to search for that file in other libraries and then
11 has to tell the other distribution center where it finds it to retrieve and
12 transmit that file to the requesting distribution center.

13 So let's go to Slide 21, and we've, in essence, already covered this
14 with respect to Judge Bui's questions about what Yurt teaches in this regard.
15 Yurt, again, has the same structural configuration with respect to distribution
16 centers connected to a central controller. Again, that's the database and
17 distribution software operating together. And Yurt teaches, in several
18 different ways, the concept of routing files between distribution centers. In
19 fact, beyond that, Yurt, you know, in general, teaches the concept of -- sorry.
20 I got to get my cursor to the right place.

21 So when a request comes in, in Yurt -- so let's go to Slide 21 again.
22 So when a request comes in from a reception system in Yurt, the
23 transmission system seeks to fulfill that request with its local library. But if
24 it can't, it too has the function where the central controller maintains a list of
25 files available at all the different libraries across the system because you're
26 also recognized, maybe not all the distribution system centers have the same

1 files.

2 And so in Yurt, that central controller finds which distribution
3 center has the file that's necessary, and it then facilitates this inter-library
4 transfer, is what Yurt describes it as. And not only is that a generic teaching,
5 but Yurt specifically teaches that when the file is found, the central
6 controller sends a distribution request to the distribution center that has the
7 file. So again, we have this same functionality achieved by this same central
8 controller.

9 JUDGE BUI: So that disclosure would account for the
10 functionality of the central controller as recited in Claim 1 as well as the
11 functionality recited in Claim 2; is that correct?

12 MR. FOWLES: Yes, Your Honor.

13 JUDGE BUI: Okay.

14 MR. FOWLES: To say it a different way, especially disclosure,
15 where the central controller has to find the file at a different library in Yurt
16 and then send that distribution request so that the other distribution center
17 can send it --

18 JUDGE BUI: Well, that act alone would be understood by one
19 skill in the art as requiring some sort of routing between different
20 distribution centers, right?

21 MR. FOWLES: Yes, Your Honor. So if you look again here on
22 Slide 21 at Figure 1c, this embodiment of Yurt shows that different reception
23 systems and different users, because reception systems are connected to
24 users, are, you know, connected to different transmission systems, which
25 again is what is mapped to the distribution centers.

26 So let's say that someone on the far left was looking for a file, and

1 it's not at that local library. And the central controller routes that
2 information to the next transmission system on the right, that would have to
3 be then routed from that second distribution center to the first distribution
4 center to even reach the corresponding reception system and user.

5 JUDGE SZPONDOWSKI: But, Counsel, Figure 1c --

6 JUDGE DANIELS: Mr. Fowles --

7 JUDGE SZPONDOWSKI: Oh, I'm sorry.

8 Figure 1c doesn't show any arrows between the different
9 transmission systems.

10 MR. FOWLES: That's correct. This is showing a logical
11 relationship about how the central controller is managing the content, all of
12 the different transmission systems. In the specification of Yurt, it does
13 describe this act of sending distribution requests from this central controller
14 entity to the transmission system where the -- that has the library with the
15 file.

16 JUDGE SZPONDOWSKI: Okay. Thank you.

17 JUDGE DANIELS: Mr. Fowles, you keep talking about a
18 distribution center and -- like the -- is that shown in Figure 1c?

19 MR. FOWLES: Yes, Your Honor. The petition demonstrated that
20 each transmission system, 100, 100' et cetera, is a distinct example of a
21 different distribution center, and that has not been challenged actually in this
22 record.

23 JUDGE BUI: Right.

24 JUDGE DANIELS: Okay. Thank you. Got it.

25 JUDGE BUI: Talking about being challenged by the Patent
26 Owner, if you go back to Slide 19, and our understanding of the dispute

1 presented by the Patent Owner is Limitation (a)(4)(d), (e), and (4)(b), right,
2 disputing the sequentially transmitting the file -- the audio file in
3 “substantially real time.” That's number one.

4 Number two, recording the digital file requested in the database.
5 And then he's also disputing the central controller that's performing the
6 function you just described. Our understanding is that based on your
7 submission and your slide deck, these limitations are accounted for by the
8 Yurt reference; is that correct?

9 MR. FOWLES: Yes. They're all accounted for by the Yurt
10 reference, specifically looking at 1(a)(4)(e). It's not clear to me that that is
11 challenged on the merits. Rather, the only challenge is that Petitioner didn't
12 show a motivation to combine Logan with Yurt. However, it's not clear to
13 me that they then also argued that Yurt or Logan failed to teach that
14 particular limitation.

15 JUDGE BUI: You just mentioned about the application of Logan,
16 and I'm curious as to why Logan is needed at all because Logan is teaching
17 the logging of the user information for metering, for billing purposes, but the
18 claim doesn't require any of that, either Claim 1 or Claim 2. So why is
19 Logan necessary to support the combination we're getting?

20 MR. FOWLES: Sure. Why don't we go briefly to Slide 32 -- I'm
21 sorry, 31 and look at that for a moment? So it's a fair question. The petition
22 put forward that the reason that a POSITA would be -- why are we using
23 Logan? Let's talk about it that way.

24 It would be for Logan's usage log teachings that would be
25 combined with Yurt's related teachings that already describe the desirability
26 of recording certain things.

1 JUDGE BUI: But is that feature recited in Claim 1 or Claim 2 of
2 the '128 patent?

3 MR. FOWLES: So the recording is recited in Claim 1 of -- in
4 particular, the usage and user --

5 JUDGE BUI: But that could very well be just recording for
6 playback purposes, right?

7 MR. FOWLES: If you're asking, you know, what is that recording
8 being used for, it doesn't say.

9 JUDGE BUI: It doesn't say it, and --

10 MR. FOWLES: Claim 1 doesn't say.

11 JUDGE BUI: -- - we don't know.

12 MR. FOWLES: So you know, if we just look again at, say, Slide
13 -- you know, I don't want to keep jumping around too much. Let's find one
14 close by. Slide 19. Let's just go to Slide 19 and look at that limitation
15 specifically.

16 So you know, this recording limitation is "recording the digital
17 audio files requested by said user and said user address in a database." So to
18 your point, Judge Bui, nothing here talks about any need for billing or really
19 anything. It's just recording.

20 JUDGE BUI: Right.

21 MR. FOWLES: Yurt does have general teachings of recording
22 information. What we used Logan for was just that very specific teaching to
23 make more explicit what Yurt was already teaching and to do so because
24 Logan was providing that benefit of making a better selection of materials
25 based on the tracking.

26 So the claim doesn't require that, but a POSITA would have been

1 motivated to turn to Logan, not only because it's a simple combination of
2 known elements according to known approaches, but also because Logan
3 has that benefit of explicitly recording this information for the purpose of
4 fine-tuning how materials are selected for users.

5 JUDGE BUI: Can you show us where in the Yurt reference that
6 would teach the act of recording?--

7 MR. FOWLES: Sure.

8 JUDGE BUI: If we can account for that, then we don't really need
9 Logan, do we?

10 MR. FOWLES: Logan definitely makes explicit what Yurt teaches
11 more generally. So let me just pull up the petition really fast, and we'll look
12 at that first, and then we'll look at the specific cite in Yurt to go with your
13 request. I'm going to go to Page 45 of the petition.

14 So here, what does Yurt teach is your question? So Yurt -- you
15 know, we stepped through on the petition, the content that Yurt already
16 described was available, which meets what the claim limitation says has to
17 be recorded. So it's got the user address, it's got the address of the item, and
18 it also teaches that it maintains item database records, that's from Column 7,
19 Lines 50 to 55 in Yurt, as well as a system item database at Column 8, Lines
20 45 through 47.

21 So what does Yurt have? It has the types of data that Claim 1 says
22 has to be recorded. And what else does it have? It has a database that
23 already tracks items and, you know, details of those items. Now, we turn to
24 Logan just to make very explicit that not only would that database store
25 information about the specific items but also what the claim requires, which
26 is further the user address. So Logan really just makes explicit what Yurt

1 already generally teaches and provides, and it just brings it all home.

2 JUDGE BUI: Thank you.

3 MR. FOWLES: Yes.

4 JUDGE BUI: So could you move on? Can you address the level
5 of ordinary skill in the art issue?

6 MR. FOWLES: Yes, Your Honor. For that, let us go to, I believe,
7 around Slide 35. 34, I was one off. Well, actually the level of ordinary
8 skill-- let's go to Slide 36. So in the petition, we provided a definition of the
9 level of ordinary skill in the art. And this is from pages --

10 JUDGE BUI: Do you think it's -- is it necessary for us to decide
11 on that particular issue?

12 MR. FOWLES: On the level of ordinary skill?

13 JUDGE BUI: Yes.

14 MR. FOWLES: Not really, Your Honor.

15 JUDGE BUI: But the references -- we have a lot of references in
16 the record that reflect the level of ordinary skill in the art?

17 MR. FOWLES: Can you say that last part again?

18 JUDGE BUI: Are these references that -- we have several
19 references that are part of the record, okay? And usually, these references
20 reflect the level of ordinary skill in the art when anyone would read and
21 research on the material disclosed by the references. So these references
22 really provide a more accurate reflection of one skill in the art -- the level of
23 ordinary skill in the art, rather than the specific years of education or those
24 who work in the industry or, you know, whether you have to have specific
25 knowledges, like, cable delivery architecture or not.

26 So which is a more accurate depiction of the level of ordinary skill

1 in the art?

2 MR. FOWLES: Out of what petitioner proposed, what the --

3 JUDGE BUI: And --

4 MR. FOWLES: -- references describe and what the --

5 JUDGE BUI: Yes.

6 MR. FOWLES: Thank you. Let's go to Slide 48 so we can look at
7 those definitions. So again, so petitioner's definition was a bachelor's degree
8 in electrical engineering, computer science, computer engineering, or
9 equivalent, and about two years of experience working in the field of
10 network systems for distributing data files. And that is certainly reflected by
11 the art of record. The things that are described in Yurt, in Logan, and the
12 other tertiary references would definitely be understood by people with this
13 level of training.

14 Patent Owner's definition, in contrast, is someone with -- and I
15 quote here, "Someone with experience in first cable/satellite delivery
16 architectures, including hybrid fiber coax realities; second, distributed media
17 delivery systems; and third, multi-region orchestration/routing, not just
18 storing files and databases."

19 This is a higher level of skill than what petitioner proposed. And
20 as we know, usually when you have a higher level of skill, things are more
21 obvious, not less. And so that's -- to answer your original question, Judge
22 Bui, we don't have to get to Patent Owner's level of ordinary skill definition
23 because even under petitioner's proposed level, the art would be understood
24 by POSITA to render the claims obvious. If we turn to Patent Owner's
25 definition, the claims would be more obvious, not less.

26 JUDGE BUI: Thank you.

1 MR. FOWLES: Now, I know that we've bounced around a bit, but
2 in terms of the central controller teaching, I'll just note -- you know, to finish
3 that train of thought out, let's just go to Slide 23 thereabouts. Okay, just
4 Slide 24.

5 In the response, Patent Owner had argued that this term also
6 requires, quote, "clarification to avoid petitioners relabeling passive
7 indexing/dispatching as the claimed orchestrator." Again, there is no
8 construction here that we could even address on the merits or that this board
9 could weigh. There are various arguments throughout the response about
10 being active versus passive, about a control claim. But as we've
11 demonstrated, those concepts are in Yurt as well. There really is nothing
12 here that would need construction to resolve any controversy between the
13 parties. Really, what we're seeing is that once Patent Owner is finding that
14 Yurt teaches these concepts, they're adding more requirements, and more
15 requirements to try and get around the art. And because Yurt is on point just
16 with respect to the plain language for both of these terms, there's no need to
17 construe.

18 And with that, I'd be happy to answer any other questions or
19 otherwise reserve the rest of my time for rebuttal.

20 JUDGE BUI: Okay.

21 Do you have any other questions, Judge Daniels?

22 JUDGE DANIELS: I don't have any more at the moment.

23 MR. FOWLES: Thank you.

24 JUDGE BUI: Okay. So we save your time for rebuttal.

25 MR. FOWLES: And to clarify, is that 13 minutes out of 60 or out
26 of --

1 JUDGE BUI: Yes.

2 MR. FOWLES: -- 45?

3 JUDGE BUI: Out of 60.

4 MR. FOWLES: Okay.

5 JUDGE BUI: You have 13 minutes left.

6 MR. FOWLES: Thank you.

7 JUDGE BUI: Let me reset the timer for a minute. Are you ready,
8 sir?

9 MR. DOWELL: I'm ready, Your Honor.

10 JUDGE BUI: Thank you. Please proceed.

11 MR. DOWELL: Again, Anthony Dowell on behalf of the Patent
12 Owner. We believe that the briefing and the record that's developed in the
13 case has led to two central issues. And those are critically whether Yurt
14 discloses substantially real time delivery of content and whether it has the
15 central controller described in Claim 2. And of the independent claims, the
16 critical limitation in Claim 1 is that "substantially real time" in Claim 1.

17 And I want to go into some of the other elements. You know,
18 we've not substantially briefed that or, you know, those are -- or those are
19 not critically in dispute. It is -- we do need to show -- we need to -- we need
20 to rebut that Yurt disclosed is "substantially real time." That's critical for
21 Claim 1. And for Claim 2, which does not include that limitation,
22 substantially real time, we need to show or we need to rebut Apple's
23 argument that the central controller with the additional limitations are
24 disclosed in Yurt. Those are the -- those are the two key issues as we see it.

25 JUDGE BUI: Before you proceed, our understanding is that the
26 term -- "substantially real time" was added during the prosecution of the '128

1 patent.

2 MR. DOWELL: That's correct, Your Honor.

3 JUDGE BUI: So there's no definition anywhere from the original
4 disclosure of the '128 patent regarding that claim?

5 MR. DOWELL: Right.

6 JUDGE BUI: Okay. So evidently, the applicant in that case added
7 the term --“substantially real time” in an effort -- along with other
8 limitations, to overcome the prior art at that time before the examiner.

9 MR. DOWELL: And that specifically was the Verbiest.

10 JUDGE BUI: The Verbiest reference?

11 MR. DOWELL: The Verbiest reference?

12 JUDGE BUI: Yes.

13 MR. DOWELL: And I know I -- I'm not supposed to --

14 JUDGE BUI: Yes.

15 MR. DOWELL: -- direct you to follow the -- or the prosecution
16 history, but we believe -- and Verbiest actually cites Yurt.

17 JUDGE BUI: Right.

18 MR. DOWELL: And it's our view they do the exact same thing.
19 And that substantially real time limitation is what got us past Verbiest and I
20 think --

21 JUDGE BUI: Not just that limitation.

22 MR. DOWELL: And what?

23 JUDGE BUI: That's not just the limitation that the applicant were
24 arguing before the examiner.

25 MR. DOWELL: No.

26 JUDGE BUI: Yeah, okay. So one of them, I think two or three

1 other features.

2 MR. DOWELL: Right.

3 JUDGE BUI: Okay. And that would overcome the 103 rejection
4 based on Verbiest.

5 MR. DOWELL: Right.

6 JUDGE BUI: And I'm going to ask you several questions about
7 the Verbiest reference.

8 MR. DOWELL: Okay.

9 JUDGE BUI: Because it's awfully accurate reflection of what the
10 state of the art was at that time. Because the Verbiest reference was
11 published back in 1996 and there, you have a clear disclosure between the
12 distribution system, you know, having multiple distribution centers in
13 different regions of the country. And then you have a central controller,
14 right? So you have that dynamic, that relationship between the center
15 controller relative to a bunch of different distribution centers. That's already
16 been disclosed by the Verbiest, okay?

17 But I'm going to wait and ask questions regarding that reference a
18 little bit later, but purposes of your argument, please proceed.

19 MR. DOWELL: Okay. We have not argued for a construction of
20 "substantially real time." We don't believe there needs to be one. I believe
21 we all know what it means. You know, it's real time delivery of media. It
22 was television transmissions. It was radio transmissions. It's, as Your
23 Honor described the beginning, that we have two of the judges on a
24 livestream. So we understand what that technology is. It's a livestream. It's
25 not buffering. It's not compression. It's not storing something to watch later.

26 JUDGE BUI: Right.

1 MR. DOWELL: Now, so we have not -- we have not argued for a
2 construction because we believe the plain meaning of real time is known.
3 And I believe what's going on is Apple, knowing that deficiency in Yurt,
4 that it does not disclose substantially real time transmissions, they then need
5 "available for immediate viewing" to also mean real time. And that is a
6 requested construction. So we're kind of in a bizzarro world where it's -- the
7 argument is that we are requesting a construction when we believe the plain
8 meaning of the term is understood.

9 JUDGE BUI: So we are a little baffled regarding your position of
10 these terms. On one hand, you are taking a position that the plain ordinary
11 meaning would apply to these two terms, correct?

12 MR. DOWELL: Yes.

13 JUDGE BUI: But in your preliminary response and our
14 subsequent response to the DI, you take the position that these terms require
15 additional clarification.

16 MR. DOWELL: They require clarification with additional
17 elements in the claims.

18 JUDGE BUI: It's not in the claim. The two -- and we're going to
19 talk about those limitations in a minute, right? But if it is plain ordinary
20 meaning then we don't really need a claimed construction, do we?

21 MR. DOWELL: No, we don't.

22 JUDGE BUI: Okay. So as you know, you know, there's an old,
23 well-known adage in patent law, that is, the name of the game is the claim,
24 right?

25 MR. DOWELL: Right.

26 JUDGE BUI: So it's got to be in the claim or it's not. If it's not in

1 the claim, we are not allowed to import limitation outside of the claim into
2 the claim.

3 MR. DOWELL: Correct.

4 JUDGE BUI: Right? And there's an order of -- there are rules of
5 claim construction in the *Phillips* case, I'm sure you understand, that we
6 don't go to prosecution history or even external, extrinsic evidence unless
7 there's ambiguity in the claim.

8 MR. DOWELL: Right.

9 JUDGE BUI: So these two terms, is there any ambiguity? Seems
10 to me -- seems to us that both you and the petitioner are agreeing the plain
11 ordinary meaning, that the term would apply.

12 MR. DOWELL: We believe that the plain ordinary meaning
13 should apply.

14 JUDGE BUI: Okay.

15 MR. DOWELL: And we believe that Apple, though, is seeking to
16 expand the plain ordinary meaning into the -- into a definition that allows for
17 immediate viewing, which could be buffering, could be sending package
18 data, -- and storing.

19 JUDGE BUI: And my understanding -- our understanding is that
20 the claims, both Claim 1 and 2 don't require immediate viewing or anything
21 like that. They simply require a transmission of the selected file. And that
22 fact, whether it could be video or audio, right?

23 MR. DOWELL: Correct.

24 JUDGE BUI: And it got transmitted from point A from the server,
25 I would assume, at the distribution center, straight to the -- to your home,
26 okay? That's all the claim requires. It doesn't require what you do with that

1 selected audio or video file.

2 MR. DOWELL: Correct. Well, and Claim 1 requires that it be
3 transmitted substantially real time.

4 JUDGE BUI: Yes. Well, substantially because in real time, as
5 you know and those who work in the industry know, that you cannot
6 -- nothing is going to happen instantaneously, right?

7 MR. DOWELL: Right.

8 JUDGE BUI: Even with a signal that goes into outer space, comes
9 back, that takes a delay -- there's a delayed effect. And whether you use a
10 cable as the underlying channel, communication network, or anything else,
11 Internet, for example, there's a lot of delay involved. So -- it's impossible
12 -- virtually impossible to avoid delay.

13 And once again, I would understand that when you talk about real
14 time, it's typically about substantially a little bit delay involved. And that
15 delay is accounted for in the '128 patent and the Yurt reference, and a
16 number of other prior record references including Verbiest, okay? So if the
17 position is that the plain ordinary meaning of those two terms apply, we are
18 not sure where the dispute lies. You know, -- why do we need to be
19 concerned with additional clarifications?

20 MR. DOWELL: Well, the clarification is that Yurt does not
21 disclose "substantially real time."

22 JUDGE BUI: Okay.

23 MR. DOWELL: Our position is any kind of buffering --

24 JUDGE BUI: Yeah.

25 MR. DOWELL: -- any kind of enablement of playback in that
26 way, compression, that is not substantially real time. That is not what is

1 understood by that term in its plain meaning.

2 JUDGE BUI: Okay. Please go ahead. Explain to us why that
3 term signifies something else that we are not familiar with right now.

4 MR. DOWELL: Well, in every one of our arguments, we've
5 attempted to show not that Apple is trying to expand the term just to fit the
6 mold of Yurt that allows for -- and Yurt includes in its abstract, certainly in
7 its claims, that it -- you know, that it requires buffering. In Yurt's abstract,
8 Yurt talks about transmitting selected audio and video material in a fraction
9 of real time. Now, a fraction of real time, that necessarily would require
10 some kind of compression that then is -- that is translated with software at
11 the end user. And that is not substantially real time. That's in fact teaching
12 away from what is claimed in the patent.

13 And our expert, Dr. McCulloh, explained one of the reasons for
14 this at the time was, there was no dependable -- or why it was revolutionary
15 is because Internet systems were not all the same speed. They were, you
16 know, just interconnected networks. Some that are solid, some that are
17 sketchy, and every different kind. So this concept of routing and going to
18 different databases, based on the region, did not suggest doing it in real time.
19 It suggested what all of them -- I believe Real Audio, all of the ones on the
20 timeline did, which was, you know, use compression, use decoding. You
21 know, I -- as we talk, we all know -- remember the days when you'd
22 download a file and you see that data thing going or the --

23 JUDGE BUI: I think you have it little -- slightly little backward.
24 So the claim requires from the distribution center, if you look at the claim,
25 both the preamble is talking about distribution of that file to the end user.
26 And then in Step 4(d) of Claim 1, I think, "substantially transmitting" refers

1 to the selection and transmission to the end user. That select audio is
2 transmitted to the end user, in “real time” or “substantially real time”.

3 So all the talk about additional clarification, that would happen at
4 the end user, whether you want to use it for subsequent viewing -- you
5 know, you can record it or save it but for later or for subsequent viewing for
6 watching the movie the next day or two. Or even doing the immediate
7 viewing, like livestreaming. That's what we have today, right? But that
8 -- all that happen at the receiving end. So at the transmission end, all the
9 claim requires is sending that file in real time to the end user.

10 MR. DOWELL: But -- and we submit that real time would
11 require, if it's a music file, for example, it's being transmitted as it's being
12 listened to. That would be real time versus, you know, you wouldn't have to
13 wait to transmit an audio file. It could be sent in a burst. It could arrive
14 quicker than it -- the time it takes to listen to. And so we believe real time
15 means that it's being transmitted from the --

16 JUDGE DANIELS: I'm sorry to interrupt you all. I lost Detroit. I
17 need to get Judge Szpondowski. Could we pause, please?

18 JUDGE BUI: Yes. Can you hold? Put the reporter on hold for a
19 minute.

20 (Whereupon, the above-entitled matter went off the record and
21 resumed following a brief recess.)

22 JUDGE BUI: Let's begin again.

23 MR. DOWELL: And to further on that point, you mentioned that
24 there could be some kind of storage or -- you know, for playback later.
25 That's certainly mentioned in the specification, okay? But not -- that's not
26 what's claimed. The claim is where it says -- and this is key, in Claim 1,

1 where it says recording. And Your Honor had asked about that specific
2 wording before. It's not recording the file. It's recording the digital audio
3 files requested by said user.

4 And said user address it in a database. And the point of that goes
5 to the other features of the invention is that the -- is that information is being
6 tracked about users. So we know that, you know, this person likes sports.
7 And this person likes the reality shows and that marketing then could go to
8 specific targets based on recording not the file but the files requested.

9 JUDGE BUI: But isn't that the reason why Logan is being used for
10 the combination of Yurt and Logan --

11 MR. DOWELL: That --

12 JUDGE BUI: -- for the combination?

13 MR. DOWELL: Exactly.

14 JUDGE BUI: Okay.

15 MR. DOWELL: That's what Logan is needed for to bring that
16 feature in. That is certainly not in Yurt.

17 JUDGE BUI: Right. Okay.

18 MR. DOWELL: And then if we go to Claim 2, without the
19 "substantially real time" limitation, that has more layering on as to elements
20 needed for the central controller. And, well, before I go to Claim 2, back at
21 Claim 1, the central controller -- it's a central controller and we acknowledge
22 that Yurt has a central controller, but it has to be connected to said network
23 interface of each of said distribution centers for routing digital audio data
24 files between said distribution centers. There's nothing in Yurt about this
25 routing between the distribution centers. We acknowledge -- that's on Page
26 21 of Apple's --

1 JUDGE BUI: If I recall correctly, I did ask the Petitioner's counsel
2 that precise question.

3 MR. DOWELL: Exactly.

4 JUDGE BUI: And he was able to point out exactly where you're
5 talking about, the identification of selective file and to be able to retrieve
6 that among various different distribution centers. So that seemed to me
7 -- seemed to us that disclosure from Yurt would at least teach or suggest that
8 limitation you're talking about.

9 MR. DOWELL: I -- from what he quoted, it talks about -- I did
10 not see it. I did not see that disclosure. I did not see it routing information
11 between the distribution centers. And it's certainly not in -- on that chart and
12 I don't see it in the text of Yurt anywhere that somehow items are routed
13 between distribution centers. And --

14 JUDGE BUI: So let me follow up with a question regarding the
15 claim construction issue again. Okay. So you agree with the petitioner that
16 the plain ordinary meaning of the term of both the "substantially real time"
17 and "central controller" should apply? But you also argue in the -- in your
18 response to the DI that additional clarification is necessary. And you argue
19 that the term "substantially real time" requires some sort of playback while
20 transmission is ongoing. That's the first position, right?

21 And then subsequently in the second reply to the petitioner reply,
22 that's Paper 15, you would then argue that it actually requires different
23 clarification. That requires some sort of coordinated system behavior in
24 response to the user request. And I'm -- and we are -- to be honest with you,
25 I'm trying to figure out where that clarification would come from.

26 MR. DOWELL: Well, the point we make with the -- by using the

1 word clarification is that more is required. “Substantially real time” should
2 be given us plain meaning, but more is required in the claims that flush out
3 the entire invention.

4 JUDGE BUI: But you've been in -- you've been practicing law for
5 a long time. You know that under the rule of claim construction and
6 *Phillips*, we are not supposed to import limitations from the specification, or
7 anywhere else for that matter, as part -- and import those additional
8 extraneous information as part of the claims.

9 MR. DOWELL: Correct.

10 JUDGE BUI: Okay.

11 MR. DOWELL: Understood.

12 JUDGE BUI: So that is always the tension when it comes to claim
13 construction issues.

14 MR. DOWELL: Absolutely.

15 JUDGE BUI: How much -- what is your line, okay?

16 MR. DOWELL: And our position is that there's more in the claims
17 that has to be considered as well.

18 JUDGE BUI: When you're talking about consideration, does that
19 mean importation of additional clarification?

20 MR. DOWELL: No.

21 JUDGE BUI: Or just hanging out there, trying to help us, trying to
22 understand what the term really means?

23 MR. DOWELL: It's not to help understand what the term means.
24 We know what real time – “substantially real time” means, and it should be
25 given that plain ordinary meaning, and that is not buffering or compression
26 as disclosed in Yurt is our --

1 JUDGE BUI: Yes. We don't need to worry about buffering or
2 anything else for that matter.

3 MR. DOWELL: Right.

4 JUDGE BUI: We simply say that, okay, if I'm running the
5 distribution center, and you request a file, a music file or a movie, for
6 example, and even back the '90s that were available, and you see that in the
7 Verbiest reference, right?

8 All I'm doing right now is, upon your request, I am sending you,
9 transmitting that selected file. That file could be audio or video. I'm
10 sending to you while you're asking, so that would mean in real time or
11 "substantially real time" in the context of your '128 patent. Do I need
12 additional clarification?

13 MR. DOWELL: No. No. That was an unfortunate term in the
14 briefing to -- we do not need some additional clarification on the meaning of
15 that term.

16 JUDGE BUI: Okay. All right. So I just want to make sure that
17 those additional clarifications don't get all caught up.

18 MR. DOWELL: Yeah. I -- me too. And I -- and as you noted,
19 you know, at the kickoff, that term was used for -- it was put in there for a
20 reason. It's a limitation to get past the prior Yurt and --

21 JUDGE BUI: We understand. We understand exactly why you
22 wanted to do that, okay?

23 MR. DOWELL: Absolutely. If I could go to Claim 2 in the
24 central controller, additional limitations are included in Claim 2 for the
25 central controller that there's not even -- that I recall -- well, they're at least
26 not fairly argued -- reasonably argued to be disclosed in Yurt, and that

1 would be Claim 2(b), the central controller. It must receive file import
2 requests from a requesting distribution center.

3 It must search the library. It must instruct the other distribution
4 center to retrieve and transmit the requested data file. So those additional
5 details on how the central controller operates, that's in the claim in Claim 2,
6 independent Claim 2, are not disclosed in Yurt.

7 JUDGE SZPONDOWSKI: Counsel, why doesn't the dispatching
8 control software in association with the remote order processing and item
9 database teach those limitations to Yurt?

10 MR. DOWELL: Well, because they don't -- it doesn't show that
11 they receive file import requests that includes information on the files.
12 That's -- I mean, that level of detail is not -- is -- it's not shown in any type of
13 routing or coordination that is activated by the central controller.

14 It's, you know -- a bicycle hub, you know, it has spokes, and that's
15 all that's shown in Yurt. It doesn't show some kind of control by the central
16 hub that we have that is included in the claims of the patent. Again, I would
17 note that Yurt throughout its disclosure and in its claims, it talks about
18 transmitting audio/video material in a fraction of real time.

19 It talks about doing it for immediate viewing, but that is not the
20 same as transmission in real time. A fraction of real time is not real time.
21 There's some -- something else is going on to get a fraction of real time.
22 And --

23 JUDGE BUI: Even if that were the case, and even if your
24 contention is true, just real time is not substantial real time, right? Wouldn't
25 that also -- the difference, wouldn't that also be obvious to one skilled in the
26 art?

1 MR. DOWELL: No, it absolutely would not be obvious because
2 during the '90s, you know -- and Dr. McCulloh covers this. During the '90s,
3 all the technology was going on developing, you know, things like Real
4 Audio, and LimeWire, and those kind of things that had databases that could
5 be downloaded on a computer. Sometimes you had separate software to
6 decode it, and there was a lot of technology directed to, you know, MP3 and
7 coding, music systems, and all that. That was the direction it was going.

8 And as Dr. McCulloh explained, what was revolutionary or what
9 was -- what had the foresight in the Johnson patent was that substantially
10 real time transmissions could be used in a distribution type network to
11 retrieve audio and video content as opposed to the early internet was about
12 coding, and decoding, and buffering, and compression. This is different.
13 This is transmission.

14 This is what we known -- we've known for 80 years, you know,
15 and longer than that for radio. We've known it for -- you know, TV for, you
16 know, 80 years. This is what this is directed to and using that same type of
17 transmission technology and databases more in a real time TV radio type
18 concept rather than the software developed buffering and compression that
19 was all the rage in the '90s.

20 And I guess I would make a couple points from my slides, looking
21 at Slide 2, that the '128 Patent solved the broader and commercial and -- the
22 broader commercial and technical problem, how to deliver content in
23 "substantially real time" while also capturing user specific information. And
24 that was really the -- this combination, and this is a patent argument as old as
25 time. You know, there's nothing new under the sun. It's just what we
26 combine.

1 JUDGE BUI: So the combination in this case, in your view, is
2 what?

3 MR. DOWELL: That is our -- our position is that the combination
4 is what was revolutionary, and what was patentable, and what makes this
5 non-obvious.

6 JUDGE BUI: If you look at Slide 4, you rely on an expert to
7 testify that, you know, the true innovation of '128 Patent is about
8 orchestration, content discovery, centralized management, distributed
9 routing, all that, aren't those -- aside from the tracking and billing issue, the
10 other four, the first four, aren't they disclosed by the Verbiest reference?

11 MR. DOWELL: I believe that's -- I believe they are, yes.

12 JUDGE BUI: Okay. So it's not revolutionary, right?

13 MR. DOWELL: Well, the --

14 JUDGE BUI: If all you do is those features are disclosed by the
15 Verbiest reference and all you're doing is just making sure that you track the
16 timing for billing purposes, you know, tracking which customer or what user
17 is using what file, you know, so you can send your bill now or your invoice.
18 And that's disclosed by Logan; isn't that correct?

19 MR. DOWELL: Correct.

20 JUDGE BUI: Okay. So the combination of Verbiest and Logan
21 would have all the claim limitations as well as the Yurt reference, which we
22 now have some dispute about, but --

23 MR. DOWELL: I believe that that's correct. And I forget what the
24 combination that -- well, I believe the examiner was using a combination of
25 Verbiest with another as well.

26 JUDGE BUI: McCulloh. McCulloh.

1 MR. DOWELL: McCulloh. That's it.

2 JUDGE BUI: Okay.

3 MR. DOWELL: And so, you know, I think we're back to the same
4 -- back to the same place that it is in every patent, you know, nothing new
5 under the sun. It's always a combination of something, and we don't believe
6 it was obvious because as Dr. McCulloh notes, that's not the way the
7 industry was going. That's not -- you know, it's easy to sit here now
8 knowing how Apple -- for example, Netflix, how they operate now and
9 knowing, you know, it -- it's weird sometimes.

10 You know, I get on YouTube, and I watch something. And next
11 thing you know, I'm being fed all this, you know, other woodworking videos
12 and, you know, things that -- it learns what I'm interested in. And this patent
13 filed in the '90s foresaw these types of developments, to be able to track a
14 user, understand, know what that information -- know what that person
15 wants to see.

16 And that has incredible value today. And as Dr. McCulloh said,
17 that wasn't obvious to do. That wasn't the direction the industry was going,
18 because for one, the Internet was a mess. I mean, it was -- it worked.

19 JUDGE BUI: Not quite, but three of us, all three of us on the
20 panel actually lived through that phase, that period in the '90s, okay?

21 MR. DOWELL: Exactly.

22 JUDGE BUI: I still have an AOL account, okay?

23 MR. DOWELL: Right.

24 JUDGE BUI: Email. Okay. So we are familiar with the evolution
25 of the technology, okay? And the explosion of the Internet, and ecommerce,
26 which led up to the dot com bubble. You know, all that, okay?

1 MR. DOWELL: Yes.

2 JUDGE BUI: But it seemed to me that if you are saying the
3 combination of these -- all of these features that you identify in Slide 4,
4 okay, in combination with the ability to track for billing purposes, and those
5 four features already disclosed by Verbiest, and then Verbiest could very
6 well be used in combination of Logan in addition to your reference, right?

7 MR. DOWELL: Well -- and I don't remember exactly what's in
8 Verbiest. It's not being raised in this proceeding, and so we focused on Yurt,
9 and it does not have, you know, the elements that are required to have to
10 bring Logan in.

11 JUDGE BUI: Yes. You spent a great deal of time in both the
12 response -- to the DI and the subsequent sur-reply, to paint this background
13 information, the state of the art back in the '90s all the way up to -- leading
14 up to the invention, right?

15 MR. DOWELL: Yes.

16 JUDGE BUI: So the state of the art, you even formulated some
17 sort of hindsight arguments against the background information. And
18 normally when we are -- when we are referring to hindsight, hindsight is
19 really for a combination of references.

20 MR. DOWELL: Correct.

21 JUDGE BUI: We don't really use that for -- to describe the state of
22 the art in the background, right? So I wonder why the background of
23 information would be so relevant as opposed to unpacking whether the
24 combination failed to disclose certain limitations in the '128 patent?

25 MR. DOWELL: Well, I thought it was -- you know, our direction
26 in that was that it -- there was no -- it's not obvious to combine the

1 references. It -- because the industry was not going in that direction because
2 that was not what was happening in the '90s.

3 It wouldn't have been obvious to just pick these pieces up and put
4 them together and then that's -- you know, and have a workable product. So
5 that's why we include that background. It actually taught away from this
6 combination. It was going in a different direction. The technology and --

7 JUDGE BUI: Which direction was that? That we going away
8 from here?

9 MR. DOWELL: It was going towards compression and decoding
10 software, and that for music and video distribution, it was going towards
11 buffering, compression, you know, package files, not live, real time
12 transmission.

13 JUDGE BUI: Okay.

14 MR. DOWELL: Okay. Anything else or you had a -- you had a
15 couple other things, I thought.

16 JUDGE BUI: No, not for now.

17 My colleagues?

18 JUDGE SZPONDOWSKI: Yeah. I'd like you to touch on this
19 level of skill in the art issue because we have disputed -- or I guess we have
20 competing proposals from you and Petitioner about what the level of skill in
21 the art should be. And I --, reading them, I tend to agree with the Petitioner
22 that your level of skill seems higher. And so what's your response to
23 Petitioner's argument that Mr. Johnson doesn't qualify under either
24 Petitioner's or your definition of skill in the art?

25 MR. DOWELL: I guess our -- the first response would be we
26 believe Dr. McCulloh certainly does, and Counsel is correct --

1 JUDGE SZPONDOWSKI: But you haven't put forth Dr.
2 McCulloh as an expert for obviousness or claim construction, right?

3 MR. DOWELL: Certainly not for claim construction.

4 JUDGE SZPONDOWSKI: I didn't see any obviousness positions
5 from him in his declaration. That all seemed to come from Mr. Johnson.

6 MR. DOWELL: Okay. And we do acknowledge, and Mr.
7 Johnson had recognized this in his deposition, that he was more of the
8 marketing and music background person, and the other inventor was the
9 technical, you know, Internet background and worked with him on the -- on
10 that technical side of it. So he, you know, I acknowledge your -- the
11 understated position and your question.

12 JUDGE BUI: So under your own proffered level of one skill in the
13 art, the co-inventor, Mr. Johnson, wouldn't qualify as an expert in this case,
14 right?

15 MR. DOWELL: I guess I'd have to acknowledge that, Your
16 Honor.

17 JUDGE BUI: Okay.

18 JUDGE SZPONDOWSKI: Yeah. I think you might be better off
19 with Petitioner's proposal.

20 JUDGE BUI: Okay. Any other questions?

21 MR. DOWELL: Thank you, Your Honor.

22 JUDGE BUI: Well, we can -- I'll give you some time to remove
23 the computer.

24 Mr. Jarratt, your rebuttal. Rebuttal, 30 minutes. You might not
25 need them all.

26 MR. FOWLES: We'll try and keep it short. I am going to put

1 slides up one more time though. See if it works. Okay. All right. So let us
2 -- I just wanted to make one point in rebuttal. Let -- if we could go to Slide
3 46, a couple points with respect to “substantially real time”.

4 We're happy to hear that there actually is no dispute with respect to
5 whether construction is necessary, so that resolves an issue for this board.
6 But more particularly, I wanted to note that Claim 1 -- oh, it disappeared.
7 Claim 1 does not require anything related to excluding or including
8 compression. That is just not an issue.

9 JUDGE BUI: Right.

10 MR. FOWLES: Nuts and --

11 JUDGE BUI: That compression is handled at the receiving end,
12 and the claim doesn't require for the receiving end to do anything?

13 MR. FOWLES: That's correct. I believe my colleague also
14 mentioned that their invention requires no coding or decoding, and that
15 would be contrary to the invention. And I just want to direct this panel to at
16 least Claim 6 of the '128 Patent that I don't have here, which actually talks
17 about decoding circuitry. And note that in fact their own patent talks
18 multiple times about coding, encoding and decoding, and so this very much
19 was something part of their application. Now, again, Claim 1.

20 Claim 2 doesn't say anything about encoding or decoding. I just
21 wanted to flag to this panel that actually was part of what was contemplated
22 in the '128 Patent. And finally, I directed us to Slide 46 because in
23 deposition, Mr. Johnson himself acknowledged that there would be a bit of
24 buffering. So in as much as we do look at what Mr. Johnson mentioned, you
25 know, all three things, buffering, compression, and certainly coding,
26 decoding are belied by what their own record says.

1 JUDGE BUI: And of course, all those buffering and compression
2 or whatever, that happened at the receiving end, and that's not necessarily
3 required by the claim transmission at the distribution center.

4 MR. FOWLES: That's correct.

5 With that, unless there are any questions, we thank you for your
6 time and rely on the record.

7 JUDGE BUI: Yes. Before you go though, I do have -- it just
8 occurred to me that I need additional clarification. Let's go back to the
9 -- let's go back to Claim 1.

10 This is on Slide 19, you know, and we talk about the limitation
11 4(e) of Claim 1 recording that individual audio file. Okay. Can you explain
12 to us where in the Yurt reference that limitation is taught?

13 MR. FOWLES: Certainly.

14 JUDGE BUI: And of course the recording feature would make
15 sense in terms of being further elaborated, further clarified by the Logan
16 reference.

17 MR. FOWLES: That's correct. So just stepping through Page 45
18 of our petition again, so in addition to this idea that Yurt already teaches,
19 that it is tracking the files that have been requested, the addresses of the
20 users, the addresses of the files.

21 Yurt describes that at, for example, Column 12, Lines 24 through
22 27. It further talks about, you know, at Column 8 -- Column 7, Column 8,
23 the -- Yurt has databases that track information about items. Now to
24 -- specifically to your question, Yurt says that one of its goals is to keep
25 track of information related to requests of user files.

26 JUDGE BUI: Where is that? Which slide?

1 MR. FOWLES: That's at Column 15. Let's look at Lines 38
2 through 41. If my device will actually load it.

3 JUDGE BUI: Where is it?

4 MR. FOWLES: Column 15.

5 JUDGE BUI: And?

6 MR. FOWLES: Lines 38 to 41.

7 JUDGE BUI: Thirty-eight and 41. Okay.

8 MR. FOWLES: If it loads.

9 JUDGE BUI: I got it.

10 MR. FOWLES: Okay.

11 JUDGE BUI: Keep track of the use -- keep track of the ID, the
12 chosen program, and prices, and all that.

13 MR. FOWLES: Yes.

14 JUDGE BUI: In fact, with that disclosure alone, you might not
15 even need Logan.

16 MR. FOWLES: That's correct. And in fact, in our petition, we do
17 say that Yurt alone renders obvious this limitation. We then turn to Logan
18 for added detail.

19 JUDGE BUI: Yeah. Okay. Thank you.

20 MR. FOWLES: Yes. Any other questions?

21 JUDGE BUI: I don't have any more questions.

22 MR. FOWLES: Then thank you all for your time. We'll rest on
23 our briefing for the remainder.

24 JUDGE BUI: Thank you for the briefing and for the arguments.
25 That would be -- that was very, very helpful for us and for both parties.

26 I think you have reserved time for rebuttal?

1 MR. DOWELL: We have nothing, Your Honor.

2 JUDGE BUI: Okay. Well, thank you, then. Then let's adjourn the
3 proceeding, then. Thank you very much for your effort, for your time this
4 morning.

5 (Whereupon, the above-entitled matter went off the record at 10:33
6 a.m.)

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Patent 6,182,128 B1

PETITIONER:

Scott Jarratt
Adam Fowles
Kalyani Joshi
HAYNES AND BOONE, LLP
scott.jarratt.ipr@haynesboone.com
adam.fowles.ipr@haynesboone.com
kalyani.joshi.ipr@haynesboone.com

PETITIONER IPR2026-00047 (joined):

Todd Siegel,
Frank Morton-Park
KLARQUIST SPARKMAN, LLP
todd.siegel@klarquist.com
frank.morton-park@klarquist.com

PATENT OWNER:

Anthony Dowell
DOWELL COMMERCIAL LITIGATION
aedowell@dowellcomlit.com

Richard McCaulley
McCAULLEY LAW GROUP
rmccaulley@mccaulleydowell.com