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IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

- - -

SEARCH AND SOCIAL MEDIA PARTNERS, LLC,  
Plaintiff,  
v.  
FACEBOOK, INC., INSTAGRAM, INC.,  
and INSTAGRAM, LLC,  
Defendants.  
: CIVIL ACTION NO.  
:  
:  
:  
:  
: 17-1120-LPS-CJB  
:

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LOCATION BASED SERVICES, LLC,  
Plaintiff,  
v.  
SONY ELECTRONICS, INC.,  
Defendant.  
: CIVIL ACTION NO.  
:  
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:  
: 18-283-LPS-CJB  
:

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MOAEC TECHNOLOGIES, LLC,  
Plaintiff,  
v.  
DEEZER S.A. and DEEZER INC.,  
Defendants.  
: CIVIL ACTION NO.  
:  
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:  
: 18-375-LPS-CJB  
:

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(Captions continued on page 2)

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Wilmington, Delaware  
Friday, February 8, 2019  
Section 101 Motion Hearing

- - -

BEFORE: HONORABLE LEONARD P. STARK, Chief Judge  
HONORABLE CHRISTOPHER J. BURKE, Magistrate Judge

- - -

1 -----  
 2 MOAEC TECHNOLOGIES, LLC, : CIVIL ACTION NO.  
 3 Plaintiff, :  
 4 v. :  
 5 SOUNDCLLOUD LIMITED and SOUNDCLLOUD, INC., :  
 6 Defendants. : 18-376-LPS-CJB  
 7 -----  
 8 MOAEC TECHNOLOGIES, LLC, : CIVIL ACTION NO.  
 9 Plaintiff, :  
 10 v. :  
 11 SPOTIFY USA, INC., :  
 12 Defendant. : 18-377-LPS-CJB  
 13 -----  
 14 LOCATION BASED SERVICES, LLC, : CIVIL ACTION NO.  
 15 Plaintiff, :  
 16 v. :  
 17 FANTASTIC FOX, :  
 18 Defendant. : 18-1424-LPS-CJB  
 19 -----  
 20 LOCATION BASED SERVICES, LLC, : CIVIL ACTION NO.  
 21 Plaintiff, :  
 22 v. :  
 23 MAPILLARY INC., :  
 24 Defendant. : 18-1425-LPS-CJB  
 25 -----  
 26 APPEARANCES:  
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 28 BY: STEPHEN B. BRAUERMAN, ESQ.  
 29 and  
 30 Brian P. Gaffigan  
 31 Registered Merit Reporter

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

21 (REPORTER'S NOTE: The following Section 101  
22 hearing was held in open court, beginning at 10:01 a.m.)  
23 CHIEF JUDGE STARK: Good morning.  
24 (The attorneys respond, "Good morning, Your  
25 Honor.")

1 CHIEF JUDGE STARK: The plaintiffs.

2 MR. STPH-AO: MOAEC Technologies.

3 CHIEF JUDGE STARK: Is it MO-A-EC (phonetic)?

4 Is that what I should say?

5 MR. FARNAN: Yes, Your Honor.

6 CHIEF JUDGE STARK: All right.

7 MR. FARNAN: Thank you, Your Honor.

8 CHIEF JUDGE STARK: Thank you.

9 Good morning to you.

10 MR. MAY: Good morning.

11 MR. MOORE: Good morning, Your Honor.

12 CHIEF JUDGE STARK: Good morning.

13 MR. MOORE: David Moore from Potter Anderson on

14 behalf of defendant Spotify. With me today from Morrison

15 Foerster are Stefani Shanberg.

16 CHIEF JUDGE STARK: Good morning.

17 MR. MOORE: Michael Guo.

18 CHIEF JUDGE STARK: Good morning.

19 MR. MOORE: John Douglass.

20 CHIEF JUDGE STARK: Good morning.

21 MR. MOORE: And also helping us out today is

22 Mike Pistilli.

23 CHIEF JUDGE STARK: Good morning to all of you.

24 Good morning.

25 MR. RAWNSLEY: Good morning. Jason Rawnsley

1 CHIEF JUDGE STARK: Please have a seat.

2 We are here in seven different cases. It's

3 really three sets of related cases that we're going to

4 be considering together. I'll have more to say about the

5 ground rules and how we're going to proceed today.

6 I'm joined on the bench with my colleague, Judge

7 Burke.

8 Good morning, Judge Burke.

9 MAGISTRATE JUDGE BURKE: Good morning.

10 CHIEF JUDGE STARK: Judge Burke will be here

11 with me all day; and I will talk a little bit more about

12 his role as well and the assistance he is providing to me.

13 But before we go any further, I want to have

14 everyone note their appearances and make sure that we do

15 have somebody here representing the parties in each of the

16 seven cases that are going to be argued.

17 So, Mr. Farnan, do you want to start us off?

18 MR. FARNAN: Good morning, Your Honor.

19 CHIEF JUDGE STARK: Good morning.

20 MR. FARNAN: Joseph Farnan, Farnan LLC. With

21 me today is Leonard Gail and Christopher May from Massey &

22 Gail. With Your Honor's permission, Mr. May will be arguing.

23 CHIEF JUDGE STARK: And who are you all

24 representing?

25 MR. FARNAN: I'm sorry. The MOAEC plaintiffs.

1 of Richards Layton & Finger. I'm joined this morning by

2 R. Scott Roe of Gibson Dunn; and we're representing the

3 SoundCloud defendants in Civil Action No. 18-376.

4 CHIEF JUDGE STARK: Good morning to you all.

5 Good morning.

6 MR. SCHLADWEILER: Good morning, Your Honor.

7 Ben Schladweiler from Greenberg Traurig on behalf of

8 defendant Deezer. I'm joined today by Josh Raskin from our

9 New York office.

10 CHIEF JUDGE STARK: Good morning to all of you.

11 MR. RASKIN: Good morning.

12 CHIEF JUDGE STARK: I do want to make sure and

13 have the appearances on the record for the other two sets of

14 cases, so next is Location Based Services, the LBS cases.

15 Good morning.

16 MR. BRAUERMAN: Good morning, Your Honor. Steve

17 Brauerman from Bayard. I am joined by Neil Massand from Ni,

18 Wang & Massand. With Your Honor's permission, Mr. Massand

19 will make the arguments on behalf of Location Based Services

20 in all three of those cases.

21 CHIEF JUDGE STARK: That's fine. Good morning.

22 Good morning.

23 MS. PALAPURA: Good morning, Your Honor. It's

24 Bindu Palapura from Potter Anderson on behalf of the

25 defendant Sony in Civil Action 18-283. With me today is Lew

1 Popovski and Joshua Stein from Patterson Belknap. Also with  
 2 us from Sony is Ryan Pullman.  
 3 CHIEF JUDGE STARK: Okay. Good morning to all  
 4 of you.  
 5 Good morning.  
 6 MR. EGAN: Good morning, Your Honor. It's Brian  
 7 Egan from Morris Nichols on behalf of Mapillary. With me  
 8 today are Michael Bonella and Joseph Klinicki, both from  
 9 Condo Roccia.  
 10 MR. BONELLA: Good morning, Your Honor.  
 11 CHIEF JUDGE STARK: Good morning.  
 12 Good morning.  
 13 MS. JACOBS: Good morning, Your Honor. Karen  
 14 Jacobs and Jeff Lyons from Morris Nichols on behalf of  
 15 Fantastic Fox and Flicker in the 18-1424 matter. And we  
 16 have here with us today, Jerry Selinger from Patterson +  
 17 Sheridan.  
 18 MR. SELINGER: Good morning, Your Honor.  
 19 CHIEF JUDGE STARK: Good morning to you as well.  
 20 I think that leaves our last case, Search and  
 21 Social Media Partners or SSMP.  
 22 Good morning again.  
 23 MR. BRAUERMAN: Good morning again, Your Honor.  
 24 Steve Brauerman from Bayard. I'm joined in the Search  
 25 and Social Media Partners cases by Seth Ostrow and Sarah

1 Pfeiffer from Meister Seelig & Fein. With Your Honor's  
 2 permission, Ms. Pfeiffer will address the Court in those  
 3 matters.  
 4 CHIEF JUDGE STARK: That's fine. Good morning  
 5 to you.  
 6 MR. OSTROW: Good morning.  
 7 MS. JACOBS: For Facebook, Your Honor, Karen  
 8 Jacobs and Jennifer Ying from Morris Nichols. We have here  
 9 with us today, Phillip Morton and Emily Terrell from Cooley  
 10 as well as Kathy Duvall from Facebook; and Mr. Morton will  
 11 handle the argument today.  
 12 CHIEF JUDGE STARK: Okay. That's fine.  
 13 Good morning again to all of you.  
 14 So before we get started with argument in the  
 15 first case, I have a few things I want to say, and then I  
 16 will turn to Judge Burke to see if he has anything he wants  
 17 to say.  
 18 So as I noted already, we're here in seven  
 19 different cases, really three sets of cases when you count  
 20 the related cases. When I docketed the order scheduling  
 21 this hearing, there were actually nine cases or five sets of  
 22 related cases. Two of the cases or at least two sets of the  
 23 Section 101 motions went away.  
 24 This is all, I will admit, something of an  
 25 experiment. We'll see how it goes.

1 I was motivated to schedule this experiment  
 2 when I first noticed, to no one's surprise, I had a lot of  
 3 Section 101 motions on my docket. Many of them were  
 4 referred to Judge Burke. I have also noticed, as I'm  
 5 sure everyone here has, that the Federal Circuit has been  
 6 somewhat active in the area of Section 101 law, and they  
 7 have continued to be active, oftentimes even after I have  
 8 read the briefs, prepared for a hearing, had oral argument,  
 9 and in the time it takes me to go from oral argument to  
 10 writing and reviewing and finishing an opinion, oftentimes  
 11 it happens that there are additional cases that come out  
 12 from the Federal Circuit, leaving two additional arguments  
 13 frequently as to how the decision that has already been  
 14 argued should maybe be changed or altered in some fashion.  
 15 So I noticed all of that.  
 16 I also have noticed from presiding at a lot of  
 17 101 arguments, there tends to be a lot of commonalities in  
 18 the arguments to be heard, a lot of the same cases are  
 19 discussed, a lot of the same questions are asked.  
 20 So it occurred to me that perhaps there may be  
 21 some efficiencies to be gained by doing something like this  
 22 experiment and hearing multiple motions in multiple cases  
 23 on the same day. I'm hopeful that this will turn out to be  
 24 a successful experiment. Reasonable minds may differ on  
 25 that, but I will certainly be evaluating that from my own

1 perspective throughout the day and beyond.  
 2 I'll set out some of the ground rules for how  
 3 the arguments are going to go in just a moment, but I did  
 4 want to give Judge Burke a chance to say anything else he  
 5 would like to say.  
 6 MAGISTRATE JUDGE BURKE: Welcome, everybody.  
 7 Thanks to Chief Judge Stark for allowing me to participate.  
 8 Just for me, I will just say that I view my role  
 9 here, obviously as Chief Judge Stark has said and will say,  
 10 he will be the one who will be resolving the motions before  
 11 us today. I view my role as providing another set of eyes  
 12 and ears and another prompter of questions that may help  
 13 him in making the ultimate decisions as to these motions  
 14 whenever he does.  
 15 So I'm pleased to be here and look forward to  
 16 it.  
 17 CHIEF JUDGE STARK: Great. All right. Thank  
 18 you.  
 19 So in terms of the ground rules, the first set  
 20 of rules relate to Judge Burke. He is here. He is here at  
 21 my invitation. He is assisting me. The decisions are in  
 22 front of me. I will make the decision.  
 23 There will be no Reports and Recommendations,  
 24 but he is not a potted plant. I have encouraged him to ask  
 25 whatever questions he wants, and I encourage you to answer

1 his questions just as if they came from me. As you probably  
2 know, he has a great depth of experience in Section 101  
3 cases, and so his participation will be of great assistance  
4 to me.

5 As was noted in the order, I am expecting that  
6 all of the parties in all of the cases will be represented  
7 here throughout the day. The first couple of hours of the  
8 proceeding are essentially structured so you know the order  
9 in which we're doing the arguments and you know how much  
10 time is allocated to you, but we have additional time this  
11 morning. That is, we're going to go perhaps until as late  
12 as 1:00 o'clock today, and so there will be some time after  
13 we finish the three main arguments.

14 At that point, everyone who has entered an  
15 appearance is on the hook. We may have particular questions  
16 for any one of you. We may also just throw out some general  
17 questions and say anyone here who wants to answer them,  
18 we're happy to hear your answers.

19 So it's important that you be here between now  
20 and 1:00, and then come back between 4:00 and 5:00 because,  
21 again, you're all on the hook for possibly having a question  
22 thrown at you in that time frame as well.

23 We are creating just one single transcript. This  
24 same transcript of the hearing will be docketed in all seven  
25 of the cases being argued today. What that means to me is

1 that the record of the hearing is going to be identical in  
2 all seven of the cases, and I feel no need therefore to repeat  
3 things throughout the course of the day.

4 So if I happen to say something, I don't know,  
5 about a particular case or my view of the law when talking  
6 to the MOAEC parties, I don't feel I need to say it again  
7 necessarily when talking to the LBS or SSMP parties. It  
8 goes throughout the rest of the day.

9 Now, that said, I will be, I promise, careful  
10 in making my decisions not to attribute if a concession, for  
11 instance, is made by an attorney, a concession from one  
12 party attributed to a party in a different case. We won't  
13 do that. That would be unfair. But the things I say may  
14 potentially apply across all of the cases.

15 Also, because there are a lot of you and a lot  
16 of moving parts, please identify yourself and the party that  
17 you are appearing on behalf of or sometimes on defendants'  
18 side you may be, although you only represent one party, you  
19 might be speaking for multiple parties. Please be careful  
20 each time you come back to the podium to remind us of that.  
21 That will certainly help the court reporter.

22 That was it for my ground rules.

23 I guess I will say to the first set of counsel,  
24 any questions before I turn on the clock and get started  
25 with the arguments?

1 MR. FARNAN: No, Your Honor. Thank you.

2 CHIEF JUDGE STARK: No.

3 MS. SHANBERG: No, Your Honor.

4 CHIEF JUDGE STARK: Then the first set of cases  
5 are what I will try to call the MOAEC cases. We'll hear  
6 from the defendants.

7 MS. SHANBERG: Good morning, Your Honor.

8 CHIEF JUDGE STARK: Good morning.

9 MS. SHANBERG: Thank you for having us in today.  
10 We're pleased to be a part of your experiment.

11 I have been saying MO-AEC (phonetic) for about  
12 a year now so I don't intend any disrespect but may not be  
13 able to change the pronunciation during the course of my  
14 discussion today.

15 CHIEF JUDGE STARK: Understood.

16 MS. SHANBERG: So I am Stefani Shanberg, and I  
17 represent Spotify in this matter, but I'm speaking today on  
18 behalf of all of the defendants, that includes Deezer and  
19 SoundCloud.

20 We are here today to discuss a single patent,  
21 the '539 patent, that expired last year. I want to start  
22 out orienting the Court by talking about the invention story  
23 that MOAEC talks about in the complaint that it filed in  
24 this action. The invention story says a lot about what  
25 we're going to be talking about today.

1 Mr. Looney, who is the primary named inventor  
2 on the patent, was a disc jockey, and he disc jockeyed for  
3 birthday parties and other types of affairs and recognized  
4 that he needed a way to more easily access his music  
5 collection with a small amount of information.

6 So what Mr. Looney did, as MOAEC tells us in its  
7 complaint, is he came up with a way to organize his music by  
8 category. What we will see as we talk about the patent  
9 today is that he is very clear that he did that using his  
10 personal computer, a personal computer and conventional  
11 components.

12 Everything we're going to discuss today is  
13 going to harken back to this '539 patent invention story.  
14 Consistent with the story, this is not an invention in a  
15 technological field. It doesn't improve the functioning of  
16 any computer. It just allows a user to access their music  
17 collection by category on commercially available hardware  
18 that performs its expected function.

19 So we're going to quickly get into this *Alice*  
20 two-part test. I have about 14 minutes of prepared remarks  
21 for Your Honors this morning, but first I want to orient  
22 the Court by an overview of the three claims that MOAEC  
23 identifies as representative claims in its letter briefing  
24 to this Court.

25 CHIEF JUDGE STARK: Which claims do you think I

1 need to decide?

2 MS. SHANBERG: The defendants believe the  
3 Court needs to decide all the claims based on the three  
4 representative claims identified by MOAEC. I can get into  
5 more detail on that.

6 CHIEF JUDGE STARK: Is it essentially because  
7 the plaintiff hasn't told you that they are not suing you on  
8 all of the claims?

9 MS. SHANBERG: That is correct, Your Honor. I  
10 have a slide that shows this. I don't think we need to go  
11 to it right now.

12 Their infringement contentions assert 11 claims  
13 against each of the three defendants, but they also reserve  
14 the right to change the claims, amend the claims, assert  
15 more claims. So defendants briefed all the claims in their  
16 Section 101 motion.

17 MOAEC responded briefing essentially claim 1,  
18 and there is a couple of sentences about the other claims.  
19 I again have a slide on that. I don't think Your Honor  
20 needs to see it right now.

21 I think there is a decent argument that they  
22 waived because they didn't actually present argument on all  
23 the claims but now that they have identified these three  
24 representative claims, they have actually made it quite easy  
25 for us to address those three claims today and to resolve

1 all claims as a result of those.

2 CHIEF JUDGE STARK: And the three are 1, 6 and  
3 15?

4 MS. SHANBERG: That's correct, Your Honor. I'm  
5 going to walk through those briefly right now.

6 So what we see here is we have claim 1 on  
7 the screen. It covers a music organizer and entertainment  
8 center. That music organizer entertainment center has  
9 memory for storage of music by category.

10 It has a processor for receiving the music  
11 based upon those categories. The music is compressed and  
12 decompressed. There is a network interface for receiving  
13 the music; and the music organizer has a display with  
14 buttons for categories.

15 Finally, you will see an element that was added  
16 during reexamination of these patents relating to whether  
17 music is owned by the user.

18 We now turn to the next slide which you will see  
19 is claim 15 and claim 6. Claim 15 is the other independent  
20 claim. It's the computer readable medium/method claim  
21 version of claim 1. There is one difference, and we'll get  
22 to that when we talk about inventive concepts.

23 Claim 6 adds what MOAEC calls the audio playback  
24 limitation. It also mentions playlists which is unique from  
25 claim 1. We'll talk about that when we get to the inventive

1 concept as well.

2 Moving along to the defendants' abstract idea.

3 Accessing music by categories captures the entire heart  
4 of this invention. You set aside the elements that are  
5 admitted throughout the specification as being just  
6 conventional hardware components. What you are left with is  
7 it is accessing music by category.

8 So if you are not taking into account the  
9 invention has a memory, and you are not taking into account  
10 that it runs on a conventional processor at the heart of the  
11 invention, then all you are left with is the ability to  
12 access music by category.

13 That abstract idea at the heart of these  
14 claims is reinforced time and time again throughout the  
15 specification. Here we have the quote from the abstract,  
16 playing music according to a variety of predetermined  
17 categories.

18 On the next page, we have a number of admissions  
19 that are very highly relevant to the identification of the  
20 thrust of these claims.

21 The field of the invention reinforced this is the  
22 abstract idea of the claim. Then the patent describes that a  
23 large amount of music can now be stored on a small device,  
24 so the object of the invention, according to the express  
25 language of the patent, is to take advantage of existing data

1 compression storage and processing capabilities to provide  
2 the user with the ability to play back music by category.

3 The specification also gives examples of these  
4 categories which just further demonstrates how abstract and  
5 conventional they are. It talks about things like song  
6 titles, artists, dance speed of the music, whether or not  
7 the user owns the music. And it tellingly describes the  
8 claims of the patent as directed towards a convenience in  
9 music playback.

10 Moving along to a human user analogy. Now,  
11 this isn't a case where we're trying to say it's invalid,  
12 Your Honors, because a human can do all of this in their  
13 head. This is just an analogy to show Your Honors the  
14 abstract idea behind these claims.

15 Music, of course, has been organized by category  
16 whether at a record store or by a disc jockey, on a mix  
17 tape, via billboard charts, by category for a very long time.

18 Here, we illustrate a way that organizing human  
19 activity including accessing music by category can be  
20 performed by a disc jockey.

21 CHIEF JUDGE STARK: I don't think you need to  
22 run through that again. Talk about copyright infringement  
23 and this ownership category flag. The plaintiffs seem to be  
24 putting a lot of weight on that.

25 MS. SHANBERG: Sure.

1 CHIEF JUDGE STARK: Why are they wrong with  
2 that?

3 MS. SHANBERG: So let's go to slide 36, please.  
4 The reason they're wrong about that is  
5 multifold. So, first of all, we should think about how the  
6 ownership category flag got into the claims. The ownership  
7 category flag wasn't in the original claim. There is nary a  
8 mention of it. There is one mention of it in the  
9 specification. It is not the heart of the invention. It is  
10 an element that was added to overcome prior art during the  
11 reexamination proceeding.

12 So while it might add one specific example of a  
13 narrower category, it doesn't change the abstract idea at  
14 the heart of the claims. The patent is directed towards  
15 accessing music by category. That is Step 1.

16 Then in terms of this copyright infringement  
17 issue, Rule No. 1, there is nothing about it in the claim.  
18 You have the element relating to the ownership category flag  
19 in claims 1, 15, at the top of your slide 36 here.

20 All it says is the ownership category flag  
21 indicates which music selection from the list of all these  
22 music selections are currently resident on the storage  
23 device. It doesn't say whether or not a user can playback  
24 music. It doesn't say that they can't playback music. It  
25 doesn't say what happens if they do or do not own it. It

1 just says it's going to tell us whether or not it's owned.

2 I looked to cases relating to user interfaces  
3 and displays, I looked at cases relating to filtering, and  
4 this is actually far worse than any of those because it's  
5 just one category. It's just information.

6 In terms of the copyright infringement issue  
7 identified by plaintiff, the patent talks about, in one  
8 place the patent talks about copyright infringement  
9 problem. It is not talking about the ownership category  
10 flag whatsoever in that section. That is in column 7 of the  
11 patent, and it talks about an encryption key that prevents  
12 copyright infringement and unauthorized playback. That has  
13 absolutely nothing to do with the ownership category flag  
14 which the specification mentions exactly one time down in  
15 column 14, lines 4 through 13, saying, just like the claims  
16 say, that the ownership column is provided to indicate  
17 whether music accompanying the title is present in the  
18 user's own database.

19 MAGISTRATE JUDGE BURKE: There is a key part of  
20 the plaintiff's answering brief where I think they're making  
21 the argument about the purported kind of step forward in  
22 terms of addressing the problem of copyright infringement,  
23 and they say: whether the patent claims are directed to a  
24 problem unique to digitized music, the ability to control  
25 the manner in which music can be accessed based in part on

1 the use of flags, including an ownership category flag, is  
2 essential to addressing the very real and important issues  
3 of copyright infringement and unauthorized use.

4 I certainly take your point that the reference  
5 in the claim to ownership category flag talks about  
6 residency on the device.

7 If you further make your point to the extent  
8 that the claim was attempting to do something like what the  
9 plaintiff says it's attempting to do, what would you expect  
10 to see in the claim if you don't see it? What kind of  
11 language would get to that, that is not there?

12 MS. SHANBERG: That is a great question. I  
13 don't think you can even tie it to any element in the  
14 current claims. So it would require an entirely new element  
15 that somehow related to whether or not music could be played  
16 back based upon encryption and decryption, if you were going  
17 to be consistent with the disclosure in the specification.

18 CHIEF JUDGE STARK: Is the encryption key  
19 captured in any of the claims?

20 MS. SHANBERG: There are a handful of unasserted  
21 dependent claims that do mention encryption.

22 CHIEF JUDGE STARK: And so your contention would  
23 be those aren't?

24 MS. SHANBERG: I mean they're still -- I can go  
25 to those claims, Your Honor. Those are also disclosed as

1 being conventional. And I have a slide regarding dependent  
2 claims. When I get there, I will point out to you where  
3 the cites are, that the encryption and decryption is also  
4 conventional.

5 But going back to Your Honor Burke's question, I  
6 am familiar with that argument in the brief, and it doesn't  
7 have an adequate citation. It doesn't have anything to the  
8 actual specification or the claims, because when you look  
9 at the specification of the claims it's simply not there.

10 MAGISTRATE JUDGE BURKE: Relatedly, there is  
11 an earlier portion of the plaintiff's brief where they note  
12 that the Examiner expressly seemed to look to the presence  
13 of the ownership category flag to get over at least some  
14 aspect of the prior art. There is also a tension to what  
15 does a successful argument like that in front of the  
16 Examiner perhaps have to do with the element, it is more  
17 of a Step 2 element as to conventionality. We're something  
18 unconventional. We got over the prior art because we  
19 utilize the flag.

20 Is that an argument in some way to generate a  
21 fact question about Step 2? Why is it not in this case?

22 MS. SHANBERG: So let's flip to slide 5 which  
23 isn't a terrible useful slide because it has cites, but it  
24 does talks about the juxtaposition of 102 and 103 with 101.  
25 I know Your Honors are familiar with that, but

1 just because they had to add a narrower limitation to  
 2 overcome prior art doesn't mean that that narrow limitation  
 3 is anything that conventional. It doesn't mean that narrow  
 4 limitation makes the patent claims eligible. Of course, the  
 5 reexam had to do with Section 101. So in this circumstance,  
 6 we would maintain it's completely irrelevant.

7 There is a very good quote in the *BSG* case which  
 8 comes up in my Step 2 analysis on. I believe we have it --  
 9 one moment, Your Honor. Do you guys know what slide that is  
 10 on?

11 In any event, *BSG* essentially says just because  
 12 you narrow an abstract idea doesn't make it any less  
 13 abstract. And we'll talk about that when we get to ordered  
 14 combination.

15 CHIEF JUDGE STARK: All right. Well, I'm going  
 16 to save some time for you for rebuttal so you only have two  
 17 more minutes, but let me ask you: On claim construction for  
 18 this category flag term, that has already been construed; is  
 19 that right?

20 MS. SHANBERG: Yes, that is right. Secondly,  
 21 because MOAEC agreed that the Court could document the  
 22 *Pandora* court's construction for the purpose of this motion,  
 23 and that is something defendants have been maintaining all  
 24 along, there is no dispute as to that claim construction,  
 25 and that claim construction frankly makes matters worse

1 because it just says --

2 CHIEF JUDGE STARK: It doesn't say anything  
 3 about ownership, does it?

4 MS. SHANBERG: It just says information  
 5 essentially. It says information about the category.

6 Your Honors, if I only have two more minutes,  
 7 then what I want to orient you to really quickly is a  
 8 handful of slides that you can certainly, if you feel like  
 9 it, review on your own that go through and show you where  
 10 the specification discloses every single element and even  
 11 combinations of elements, conventional.

12 So here we have the patent telling us that  
 13 the invention can be done on a personal computer with  
 14 conventional components. According to *Alice*, we can  
 15 practically stop the inquiry here. It is an abstract idea  
 16 conventional computer with conventional components.

17 You will see every single element throughout  
 18 is described as conventional, well known, commercially  
 19 available in many, many different citations throughout the  
 20 specification.

21 The specification should give Your Honors the  
 22 comfort that we're actually interpreting the patent properly  
 23 here as not directed to ineligible invention.

24 The other thing that MOAEC makes significant  
 25 issue is this idea of the -- let me just show you while

1 we're here. You can see the three claims that relate to  
 2 encryption and decryption on slide 28. You can see that  
 3 at line 7, 12 through 14 of the patent, encryption and  
 4 decryption as disclosed in the patent are also disclosed as  
 5 being conventional.

6 CHIEF JUDGE STARK: Okay. I'm going to stop you  
 7 there and save five minutes for your rebuttal.

8 MS. SHANBERG: All right. Thank you, Your Honors.

9 CHIEF JUDGE STARK: Thank you. We'll hear from  
 10 MOAEC.

11 Good morning.

12 MR. MAY: Good morning, Your Honor. Christopher  
 13 May from Massey & Gail for the plaintiff MOAEC Technologies.

14 Before we get started with an analysis of the  
 15 case, I'd first like to give you an understanding of what  
 16 this invention is I think is a bit different from what Ms.  
 17 Shanberg would have you believe this invention is.

18 Now, for that, we need to go back to the  
 19 mid-1990s. And in the mid-1990s, if you wanted to have  
 20 music, there were three basic ways that you could have that  
 21 music. You could have it on a CD. You can have it on  
 22 records. You could have it on tape. In each of those  
 23 instances, if you were going to have that music, you were  
 24 going to have it in front of you.

25 Most importantly, you were not going to be able

1 to know, for lack of a better term, what you did not know.

2 That is, if there was a specific category of music that you  
 3 were interested in, say, 70s music or rock music. If you  
 4 had that, if you had those CDs in front of you, you could  
 5 say, okay, I know that this particular music is 70s music,  
 6 but you would have no way of knowing what other music there  
 7 was out there that you could potentially get access to that  
 8 was also in that category.

9 That is what Mr. Looney's invention really  
 10 showed. What Mr. Looney's invention allowed a user to do,  
 11 through the use of category flags, including an ownership  
 12 category flag, was to be able to understand and control  
 13 access to music in a context of where that music was stored.  
 14 Was that music stored with the user in a storage device or  
 15 was that music stored remotely?

16 So having given the Court an understanding of  
 17 what we believe this invention is directed to, I'd like to  
 18 actually start in reverse and start with Step 2 of *Alice*, if  
 19 that is okay with the Court.

20 CHIEF JUDGE STARK: That's fine.

21 MR. MAY: So in order for the defendants to meet  
 22 their burden as to whether or not by clear and convincing  
 23 evidence not only the limitations but the ordered combination  
 24 of limitation is well understood, routine and conventional,  
 25 there are only three things they can rely on. They can rely

1 on the specification, they can rely on file history, and they  
2 can rely on what is in our complaint.

3 I would submit that none of those things  
4 demonstrate by clear and convincing evidence that this  
5 is a well understood, routine, conventional combination.

6 In particular, I'd like to focus on the  
7 ownership category flag limitation because I think the  
8 defendant is basically attempting to glide over that  
9 particular limitation in their analysis.

10 First, they make a lot of the idea that the  
11 ownership category is the heart of the invention or there  
12 is some sort of heart of the invention to access music by  
13 category, and that is not really what we're looking at here.  
14 We're supposed to look at each limitation, determine if  
15 there is an abstract idea and then determine if the  
16 limitations are well understood, routine and conventional  
17 combination.

18 So with respect to slide 19 -- and if I could  
19 have, if you could put slide 19 back up.

20 So the plaintiffs point to line 14, columns 4  
21 through 13 and say that was shown in the specification to be  
22 a conventional system.

23 I would submit that there is nothing in that  
24 section that says that this is at all conventional.

25 Now, we don't argue that there are certain

1 things within claim 1 that certainly are conventional and  
2 are used in a conventional manner.

3 CHIEF JUDGE STARK: Let's put it the other way.

4 In Step 2, what is not conventional?

5 MR. MAY: We would submit that the ownership  
6 category flag and specifically the use of the ownership  
7 category flag in this context is not a well understood,  
8 routine, and conventional item.

9 CHIEF JUDGE STARK: What is the use of the  
10 ownership category flag in the claims, which, by the way, it  
11 was not at least expressly in the original claims; correct?

12 MR. MAY: That's correct. It was added on  
13 reexam post-*Alice*.

14 CHIEF JUDGE STARK: So after the reexam, what  
15 is the ownership category flag doing for us in a  
16 non-conventional way in the claims?

17 MR. MAY: What the ownership category flag is  
18 doing is it's allowing a user to understand not just what  
19 information is present on his storage device, what music  
20 files are present on the storage device, but what other  
21 information, what other music is accessible to him but is  
22 not present on the device?

23 CHIEF JUDGE STARK: It's some sort of catalog?

24 MR. MAY: Yes, it can be a catalog. It can be  
25 something where the user, for example, if he is connected to

1 a remote network, as is described in the claims, the user  
2 may be able to access the information directly from storage  
3 device or the user may be able to access that information  
4 remotely through the network interface or if it is  
5 disconnected from the network interface, the user can see  
6 that information is available to me, but it's not actually  
7 on my storage device.

8 CHIEF JUDGE STARK: Where is, in the record,  
9 the limited record we're allowed to look at, emphasize where  
10 is there even a factual dispute to indicate that is not  
11 conventional --

12 MR. MAY: If you will look --

13 CHIEF JUDGE STARK: -- at the time.

14 MR. MAY: Um-hmm. Again, if you look at  
15 columns 14 and 13, there is nothing that says conventional.  
16 And I would also point the Court to the reexamination in  
17 which the Patent Office itself found not only that the  
18 ownership category flag was not well understood, routine,  
19 conventional, it actually found that the ownership category  
20 flag did not exist in the prior art at all. So I would  
21 take issue with the idea from the defendants that we are  
22 attempting to do some 102 or 103 analysis.

23 MAGISTRATE JUDGE BURKE: Is it fair to say, Mr.  
24 May, there is nothing in this patent specification that says  
25 anything like whether, as to the ownership category flag or

1 otherwise, this was the problem, this is how this invention  
2 is overcoming this problem? This is how the computer  
3 technology asserted in the claims is solving the problem  
4 that was otherwise difficult to solve vis-à-vis the prior  
5 art. It is that kind of language in this kind of patent  
6 specification, am I right?

7 MR. MAY: Could you please repeat? Because I'm  
8 not quite sure I understood it.

9 CHIEF JUDGE STARK: When Judge Stark was asking  
10 you where in the patent does it indicate that the  
11 utilization of ownership category flags in the claims is an  
12 unconventional approach to solving a problem in computer  
13 technology, you pointed to column 14, but I think what you  
14 ended up saying was it doesn't say it's not and it doesn't  
15 say it is.

16 I guess it just underscored for me, this patent,  
17 when you read it, when you read the spec, a lot of patents  
18 you might read a spec and say let me tell you what was going  
19 on in the art, let me tell you why this was creating  
20 problems for folks who were trying to determine what kind of  
21 music they had access to and what kind they didn't. Let me  
22 tell how this invention overcomes those problems. Let me  
23 tell you why this is a step forward to solving the problem  
24 in computer technology. I don't see that kind of language  
25 anywhere in the spec, but do you?

1 MR. MAY: I would say no, Your Honor. There is  
 2 not a specific statement that this product, that this is  
 3 being used in an unconventional way, but I would say that  
 4 on this limited record, and with the requirement that  
 5 defendants prove it by clear and convincing evidence, they  
 6 have the burden to show that this is well understood,  
 7 routine, and conventional.

8 CHIEF JUDGE STARK: But why haven't they met it?  
 9 They have pages of slides, and it's in their briefing, too,  
 10 that points to, it seems, every limitation in the claims and  
 11 says and shows where in the specification it says this is  
 12 conventional or it was routine essentially.

13 MR. MAY: I would dispute that particularly  
 14 with the ownership category flag that that is actually what  
 15 they show. And I believe that that is a dispute among the  
 16 parties.

17 CHIEF JUDGE STARK: Do you say there is a  
 18 dispute on anything other than the ownership category flag?

19 MR. MAY: I believe that the other limitations,  
 20 yes, in particular with claim 1, yes.

21 CHIEF JUDGE STARK: What else?

22 MR. MAY: Excuse me?

23 CHIEF JUDGE STARK: What other limitations or  
 24 elements do you think the specification doesn't already come  
 25 right out and admit is conventional or routine?

1 category flag? What is its function? It is to tell you  
 2 whether or not the music selection is resident in the  
 3 storage device, whether it is there. What about that has to  
 4 do with -- I mean I think you used the word "license" at  
 5 some point or "authorized use" or "copyright infringement."  
 6 What about telling you the resident selection that is  
 7 resident in the storage device has to do with the other  
 8 concepts?

9 MR. MAY: For that, I point you back to the  
 10 specification, particularly the fact that this particular  
 11 device, and I would point out that this is a particular  
 12 device, this product was sold. I will concede that is  
 13 outside the specification but that is something that I think  
 14 is important. That this particular device was described in  
 15 the context of music being able to be accessed only after  
 16 the user had obtained a license to that music.

17 That was what the ownership category flag was  
 18 showing. Not just that it was present on the storage device  
 19 but that the user had access to that music and talks about  
 20 the encryption key that the user can use in order for the  
 21 machine to recognize, all right, you have access to this  
 22 music. It can be downloaded on to a storage device.

23 MAGISTRATE JUDGE BURKE: I guess the following  
 24 question is, is there anything that gets to that in the  
 25 claims?

1 MR. MAY: I believe that the ownership category  
 2 flag is the limitation that is not well understood and  
 3 routine, but I would also submit that is the combination of  
 4 the elements that that is also not well understood, routine,  
 5 and conventional, not just the actual ownership category  
 6 flag itself, but that combination, that particular data  
 7 structure being used in that particular way.

8 CHIEF JUDGE STARK: All right. Talk about the  
 9 prevention of copyright infringement. Does this invention  
 10 have anything to do with that? And, if so, how?

11 MR. MAY: Yes, we believe that it does. And  
 12 what this invention does is with respect to the ownership  
 13 category flag, the fact the information is not present on  
 14 the user storage device, and in order to get that information,  
 15 the user is going to have to meet its not burden, excuse me,  
 16 but prove that it has some sort of a license to use this  
 17 information. There is nothing in this particular  
 18 specification that says that if the ownership category flag  
 19 is not present that the user has the ability to access or  
 20 download that information.

21 So, yes, with respect to the driver, that is how  
 22 we would say the ownership category flag is to be used.

23 MAGISTRATE JUDGE BURKE: I'm not sure I  
 24 understood what you just said. In the claim itself, and I  
 25 think the spec supports this, says what is the ownership

1 MR. MAY: If you are asking the claim actually  
 2 says that there cannot be copyright infringement, no. I  
 3 concede that.

4 MAGISTRATE JUDGE BURKE: Or in short of that, is  
 5 there some term in the claim that you think means that even  
 6 though it literally doesn't use those words?

7 MR. MAY: I think that may be a debate between  
 8 the parties as to what exactly the term "ownership" means.  
 9 They said for their purposes what they think ownership  
 10 means, and I would submit ownership was not something that  
 11 was particularly at issue in the MOAEC Incorporated case  
 12 from 2008.

13 CHIEF JUDGE STARK: Is there anything in the  
 14 specification that links the ownership category flag to  
 15 copyright issues?

16 MR. MAY: Again, I will point to that section  
 17 of the specification where it talks about the fact that in  
 18 order for the information to get on to the storage device,  
 19 the user has to be able, through its encryption key, to  
 20 acknowledge that, yes, you have a license to this music. It  
 21 can be downloaded. It can be present in the storage device.

22 CHIEF JUDGE STARK: But I'm concerned that that  
 23 cuts against you. That seems to be a discussion of the  
 24 encryption key and not a discussion of the ownership  
 25 category flag.

1 If the thing in Step 2 that is going to save  
2 this patent is the ownership category flag, don't you need  
3 to get the concept of preventing copyright infringement into  
4 that element somehow?

5 MR. MAY: If you are asking is it -- if you are  
6 asking is it in the element, again, I would say that may be  
7 a dispute between the parties as to what exactly ownership  
8 means in that particular respect.

9 CHIEF JUDGE STARK: Have you identified this as  
10 a dispute? Have you proposed a construction? Have you said  
11 this motion is not ripe for decision because we haven't  
12 construed this?

13 MR. MAY: I mean we believe that this motion  
14 is not ripe for dispute in part because it sounds like  
15 there may be a dispute among the parties with respect to  
16 definition of category flag. We said for the purposes of  
17 this motion that the Court can adopt the construction of the  
18 Western District of Wisconsin court. The defendants have  
19 not put what their construction is.

20 CHIEF JUDGE STARK: I think they conceded that  
21 for this motion. So as I see it, I think all the Western  
22 District of Wisconsin said about category flag, it is an  
23 identifier associated with a media data selection where each  
24 identifier represents a predetermined characteristic of the  
25 selection, such as title, music, style, artist, et cetera.

1 If I say I'm adopting that construction for purposes of this  
2 motion, what is not conventional about your invention?

3 MR. MAY: Again, to go back, I would say that  
4 the ownership category flag is a unique data structure the  
5 Patent Office found was not present at all in the prior art.  
6 So I would submit to the extent it is not present at all in  
7 the prior art, it simply cannot be conventional.

8 CHIEF JUDGE STARK: What claims do you think I  
9 need to address?

10 MR. MAY: I think you need to address claim 1  
11 and claim 15, although I believe that claim 1 and claim 15,  
12 the analysis is basically going to be similar.

13 CHIEF JUDGE STARK: There is an argument that  
14 you heard reference to this morning that you have waived  
15 your ability to defend the eligibility of anything other  
16 than claim 1. Respond to that because of how your original  
17 briefing was.

18 MR. MAY: Okay. We would submit that with the  
19 exception of the fact that claim 15, claim 15 refers to  
20 category markers, claim 1 refers to category flags. And  
21 claim 15 specifically requires that the category markers be  
22 present in a database, claim 1 does not. So the extent that  
23 those two things are different, then, yes, we would say that  
24 you need to address claim 1 and claim 15 separately.

25 If the Court believes that those two things are

1 not relevant, then you very well could address claim 1 and  
2 claim 1 alone.

3 CHIEF JUDGE STARK: Do you agree that it's the  
4 claims and not just the specification that have to include  
5 the inventive concept?

6 MR. MAY: We believe that, yes, the claims will  
7 need the inventive concept.

8 If I could?

9 CHIEF JUDGE STARK: Yes.

10 MR. MAY: I'd like to turn to the Step 1  
11 analysis right now.

12 CHIEF JUDGE STARK: Sure.

13 MR. MAY: First, I'd like to go to defendants'  
14 claims that the abstract idea here is accessing music by  
15 category or is a graphical user interface with buttons.  
16 That is in the defendants' brief.

17 We would submit that this is the sort of high  
18 level abstraction. That is exactly what the Supreme Court  
19 warned against in the *Deere* case and in the *Enfish* case.

20 MAGISTRATE JUDGE BURKE: On that front, on page  
21 9 of your brief, you said the patent is not, as Spotify  
22 claims, directed to the abstract idea of accessing music  
23 by category which is what I think you are saying now.

24 MR. MAY: Yes.

25 MAGISTRATE JUDGE BURKE: On page 11 of your

1 brief, you say the patent claims is directed to the concrete  
2 problem of controlling the manner in which music can be  
3 accessed.

4 MR. MAY: Um-hmm.

5 MAGISTRATE JUDGE BURKE: I mean it's as if you  
6 said it's not directed to this and then it is. But what is  
7 it that you were trying to say there that is something more  
8 than the concept of accessing music by category?

9 MR. MAY: We believe that the idea here is, as  
10 I said, is the ability to -- excuse me -- is the ability to  
11 control a music file specifically in the context of where  
12 that music file is stored. That is the idea that we believe  
13 is part of this. We believe that, A, that is not an  
14 abstract idea, and, B, that this is a very specific way  
15 of performing the abstract idea even if the defendants'  
16 position that this is nothing but the abstract idea of  
17 accessing music by categories is accepted.

18 CHIEF JUDGE STARK: But that is Step 1. Why is  
19 what you just said not an abstract idea, the ability to  
20 control a music file in the context of where it is stored.  
21 What is not abstract about that?

22 MR. MAY: What is not abstract about that is  
23 the fact that this is being done in a very specific manner.  
24 This is being done through the use of, as we said, ownership  
25 category flag.

1 CHIEF JUDGE STARK: Why isn't that Step 2  
2 response? I understand there can be overlap between Step 1  
3 and Step 2, but why shouldn't I take your response to be  
4 that, yes, it is abstract but it doesn't fail on Step 2?

5 MR. MAY: Because we understand that under the  
6 abstract idea, that there is also a question of whether or  
7 not you have complete and total preemption of the idea. We  
8 would submit that this is not a situation where the idea is  
9 completely preempted and for that, again, I would go back to  
10 the *MOAEC Incorporated* case from 2009 where the court there  
11 found that there was a way to practice these claims that did  
12 not infringe. So to the extent that they're saying this  
13 completely preempts the field as an abstract idea, we would  
14 say, no, it's not, and another court has already found that.

15 MAGISTRATE JUDGE BURKE: Step 1, just quickly.  
16 If the question is, as to Step 1, what is the thrust of this  
17 patent claim? And your assertion is the thrust is more than  
18 the asserted idea because of the inclusion of the ownership  
19 category flag, I mean how could one say that the thrust of  
20 the claim relates to that when that term is used at most  
21 once in the entire patent on 14?

22 I mean how do you make the case that that is the  
23 heart of this patent when there is just not the stuff to  
24 back it up in the spec?

25 MR. MAY: This limitation is present in every

1 single claim. And this limitation, as you noted earlier, it  
2 was added on reexamination. So as the Patent Office was  
3 looking at this particular invention, it found that there  
4 was sufficient information in the specification, in the  
5 file, in the other file history, to say that this is part  
6 of the invention. It may or may not have been a huge part  
7 of the invention but it was part of the invention. If it  
8 was not, it could not have met such Section 112 standards.

9 CHIEF JUDGE STARK: All right. Although your  
10 time is up, I know you have a motion for leave to amend.  
11 Help me understand what it is about this proposed amended  
12 complaint that would alter the analysis, if in fact it  
13 would.

14 MR. MAY: Okay. Your Honor, we would submit  
15 that the motion to amend and the motion to dismiss can  
16 basically be decided similarly.

17 If the Court believes that by clear and  
18 convincing evidence there is nothing in the specification  
19 or file history that would permit us to show that there is  
20 a factual dispute here, because anything I can say in the  
21 complaint would be contradicted by what is in the  
22 specification or file history, then, yes, we would concede  
23 that the motion would be futile.

24 The only thing I would say is I would ask the  
25 Court enter the amendment anyway so there is a complete

1 record before the Federal Circuit. If the Court finds  
2 that there is either an issue of fact here which precludes  
3 a motion to dismiss or that this is not directed to an  
4 abstract idea under Step 1, then we believe the amendment  
5 should be entered. There is no real prejudice here. We  
6 haven't added a claim. We haven't added a patent.

7 CHIEF JUDGE STARK: By "entered," do you mean  
8 grant the motion to amend?

9 MR. MAY: Yes.

10 CHIEF JUDGE STARK: Even if the motion to  
11 dismiss is granted?

12 MR. MAY: Yes, we would ask that the motion to  
13 amend would be granted just so the Federal Circuit has a  
14 complete record on appeal of what the actual complaint in  
15 front of them was.

16 MAGISTRATE JUDGE BURKE: But it sounds like you  
17 are conceding that the additions to that amended complaint  
18 don't really change the calculus over and above what your  
19 record would otherwise be in a meaningful way. Am I right?  
20 In other words, you are not going to argue differently than  
21 what you are saying now, which I think is this just really  
22 summarizes what you already have in front of you. Is that  
23 right?

24 MR. MAY: Yes. What I would say is in order  
25 for the defendants to meet their burden, they would have to

1 show that anything I plead is contradicted by what is in  
2 the specification and file history, in which case it is  
3 clear that I can't contradict what is in the specification  
4 or file history and issue that to generate a dispute.

5 So if that is the conclusion that Your Honors  
6 has come to, then I would concede in that case the motion to  
7 amend would be futile, but in the event that you don't come  
8 to that conclusion, then the motion to amend should be  
9 granted and the amended complaint should be entered.

10 CHIEF JUDGE STARK: You would agree any  
11 infirmities that any court might find in the current  
12 operative complaint are also equally found in the proposed  
13 amended complaint?

14 MR. MAY: I would argue that, yes, if everything  
15 that is in -- if things that are in the amended complaint  
16 are contradicted by clear and convincing evidence by what is  
17 in the spec, yes, there would be.

18 CHIEF JUDGE STARK: And I should be clear my  
19 question is too broad in part because you all know there  
20 is essentially an *Iqball Twombly* component to the motion to  
21 dismiss as well which we're not arguing about today.

22 MR. MAY: My understanding is the defendants have  
23 at least, at least conceded on that portion of the motion. I  
24 may be wrong on that, but that is my understanding.

25 CHIEF JUDGE STARK: All right. We'll try to

1 clarify that, but in terms of on the 101 question, there  
2 is no material difference in your view. You would concede  
3 that there is not a material difference in terms of the  
4 amended complaint versus the original complaint. If the  
5 original complaint doesn't survive this motion to dismiss,  
6 then the amended complaint can't either.

7 MR. MAY: Yes. I would submit that if the  
8 defendants have proven their verdict, there can be no  
9 complaint that I would plead that would meet my burden.

10 CHIEF JUDGE STARK: All right.

11 MR. MAY: Thank you.

12 CHIEF JUDGE STARK: Thank you very much. We'll  
13 get Ms. Shanberg.

14 Will you just start because I will forget --

15 MS. SHANBERG: Yes.

16 CHIEF JUDGE STARK: -- on those two points, are  
17 you still pressing the *Iqbal Twombly* question? And if you  
18 to prevail on the 101 question, how do you feel about us  
19 granting the motion to amend nonetheless?

20 MS. SHANBERG: So, Your Honors, with regard  
21 to the *Iqbal Twombly* motion, we still believe that the  
22 complaint is futile in its infringement allegations, but at  
23 this stage in the case, after we received infringement  
24 contentions and an amended complaint, with regard to the  
25 *Iqbal Twombly* type paragraph, we are no longer pursuing

1 out is that the reexamination only looks at the specific  
2 prior art that MOAEC put in front of the Patent Office. So  
3 it's an overstatement to say that the reexamination found  
4 this ownership category flag never existed before in any  
5 prior art. We don't know that. It's not relevant to  
6 conventionality regardless. But I think it's important to  
7 clarify that the reexamination was only looking at the prior  
8 art that MOAEC asks the Patent Office to look at.

9 Then the other thing that I think is plain from  
10 Your Honors' questions and from my colleagues' response is  
11 that none of this theory as to what the ownership category  
12 flag may or may not accomplish is actually in the claim or  
13 supported by the specification.

14 So while MOAEC certainly didn't raise any kind  
15 of a claim construction dispute at all relating to ownership  
16 category flag, there is certainly no plausible construction  
17 supported by these claims of the specification that would  
18 read in all of this functionality that supposedly existed  
19 in our product or in the inventor on the patent, intention  
20 for this patent. It didn't make it into the papers.

21 CHIEF JUDGE STARK: So oftentimes on a 101 at  
22 this early stage, with respect to claim construction, if  
23 the plaintiffs articulate a position, we'll simply say  
24 we're going to assume that is the correct construction for  
25 purposes of the motion. What I think I just heard you

1 that motion. We don't want Your Honors to spend your time  
2 analyzing that issue at this point.

3 With regard to the amended complaint on what  
4 MOAEC is calling a Section 101 amendment, it is essentially  
5 two paragraphs, we don't think it changes the calculus at  
6 all. I can -- I have a slide that tells you specifically  
7 why, but actually we don't have --

8 CHIEF JUDGE STARK: I can --

9 MS. SHANBERG: -- concern --

10 CHIEF JUDGE STARK: Okay.

11 MR. MAY: -- yes, with you granting the  
12 amendment and having that as part of the record if you are  
13 going our way on the Section 101 motion.

14 CHIEF JUDGE STARK: Okay.

15 MS. SHANBERG: If there was anything in that  
16 amendment that changed your mind or concerned you, we  
17 obviously want to respond to it, but I don't think it  
18 changes anything at all, and I think MOAEC --

19 CHIEF JUDGE STARK: That was just conceded, I  
20 think. Okay. Go ahead.

21 MS. SHANBERG: In terms of the rest of what you  
22 heard from counsel for plaintiff, there is not a lot that I  
23 think needs clarification or response, but obviously if Your  
24 Honors have any questions for me, I'm happy to answer them.

25 The one thing I was going to start out pointing

1 say, and even if you didn't say it, I'm interested in your  
2 answer to it, is there is sort of a plausibility limitation  
3 on that. You wouldn't assume that you might adopt an  
4 implausible construction. Is that what you are saying? And  
5 is that consistent with the law at this very early stage in  
6 this case?

7 MS. SHANBERG: Yes, Your Honor. I can find a  
8 case for you during our break. But it is absolutely the  
9 case that there is a plausibility limitation as to what you  
10 must assume, and what you must accept as fact. You don't  
11 have to accept attorney argument as fact. You don't have to  
12 accept things that are inconsistent with the specification  
13 as fact. You don't have to accept implausible claim  
14 construction.

15 Here, we have the additional situation where  
16 counsel for MOAEC didn't actually propose this term for  
17 construction during any of the briefing and has to this day  
18 never proposed an actual construction of "ownership category  
19 flag" that would take into account any of the functionality  
20 that they are today trying to tie to that very simple term  
21 within the claims.

22 MAGISTRATE JUDGE BURKE: More specifically, if  
23 you were going to say, look, we know from the claim, the  
24 last element of the claim that survived the reexam, what  
25 an ownership category flag is meant to do and what it does,

1 this is the way I think Mr. May was trying to import into  
2 that term something extra over and above what the claim  
3 clearly tells us it does or doesn't do.

4 MS. SHANBERG: So if I understand your question  
5 correctly, the claim limit is pretty clear. This ownership  
6 category flag is just a flag that tells you whether or not  
7 that music is resident on the user's device.

8 The specification is consistent with that.  
9 There is nothing more in the specification. So anything  
10 that Mr. May is trying to import isn't coming from the  
11 specification either.

12 MAGISTRATE JUDGE BURKE: What do you think he  
13 is trying to import, that is, the element of copyright  
14 infringement licensing? Is there something? What?

15 MS. SHANBERG: I heard reference to licensing.  
16 I heard reference to allow a user to understand what music  
17 is accessible and what music it could go out and get from  
18 elsewhere. I might be paraphrasing. I heard reference to  
19 copyright. But none of that is supported anywhere, nor did  
20 Mr. May actually propose a construction rather than just a  
21 theory as to what the ownership category flag might do in a  
22 different patent.

23 CHIEF JUDGE STARK: At this early stage, why  
24 should we not say that there is at least a factual dispute  
25 as to whether the ordered combination of elements including

1 the ownership category flag was not conventional, routine,  
2 and well understood, or to put it differently, that there  
3 is at least a dispute as to whether you all will be able  
4 to prove by clear and convincing evidence that that whole  
5 ordered combination including the ownership category flag  
6 was conventional, routine.

7 MS. SHANBERG: Put up slide 29.

8 This is our slide to discuss the ordered  
9 combination. What you are going to see here is not only  
10 does the specification -- I mean this is a gift. The  
11 specification aren't usually this explicit as to what was  
12 conventional and well known standard to those of ordinary  
13 skill.

14 Obviously, I don't have to spell out every  
15 single component, every single combination in great detail,  
16 but these are admissions within the specification that  
17 the central processing unit, which is the heart of the  
18 entertainment center, those are the specification, or it's  
19 not my own, can be coupled with well known commercially  
20 available hardware and can be interfaced with by one of  
21 ordinary skill. So that essentially wipes out the combination  
22 of everything in the claim other than this category flag.

23 Then you have the specification telling us that  
24 the association of database identifier of categories to  
25 music category objects to song data is also conventional.

1 So putting the conventional categorization,  
2 putting categorized music on conventional hardware in this  
3 patent doesn't yield any kind of unexpected result. What  
4 this does is exactly what you would expect it to do. It  
5 creates a system on commercially available hardware by which  
6 a user can access their music by category, which it sounds  
7 like we're all pretty much on the same page. It's the idea  
8 behind the claim.

9 CHIEF JUDGE STARK: All right. Your time is up.  
10 Is there anything else, Judge Burke?  
11 (Judge Burke indicates "no.")

12 CHIEF JUDGE STARK: No.

13 MS. SHANBERG: All right. Thank you, Your  
14 Honors.

15 CHIEF JUDGE STARK: Thank you very much for the  
16 helpful argument. We'll have the second team come up.  
17 (Counsel tables are filled with different counsel.)

18 CHIEF JUDGE STARK: Everyone all set up and  
19 where you want to be?

20 MR. POPOVSKI: I think so. If Your Honor wants  
21 to hear from the defendants first?

22 CHIEF JUDGE STARK: Yes, we will hear from the  
23 defendants first in the Location Based Services and LBS cases.

24 Good morning.

25 MR. POPOVSKI: Good morning, Your Honor. Lewis

1 Popovski on behalf of Sony Electronics and also arguing for  
2 my codefendants, Mapillary and Fantastic Fox.

3 CHIEF JUDGE STARK: Okay.

4 MR. POPOVSKI: Your Honor, we've been fortunate  
5 in our case, the briefing in our case has been particularly  
6 helpful to crystallize the issue into one question, one  
7 dispositive question. That is, do the claims fairly and  
8 primarily, are they directed to an improved data structure?

9 We believe they are not. We believe that if the  
10 claims are read at a reasonable level of granularity, they  
11 will point to the fact that they use conventional computer  
12 technology to implement an abstract concept. And the focus,  
13 of course, is going to be the claims. So if let me see if I  
14 can do this right.

15 This is claim 6. Claim 6 has a number of  
16 criteria to it, but the body of the claim really is the  
17 focus of it. It tells you what it is about, what it is  
18 trying to achieve.

19 It has some components there: processor,  
20 memory, mapping. But it really is trying to use those items  
21 to collect, to store, organize, and display images. That is  
22 the crux of this claim. That is the entire focus of the  
23 specification and this claim.

24 This is, like many of the cases in 101, that  
25 find the concept abstract, it's a use of a conventional

1 computer system to accomplish a task that it is meant to do.  
 2 We don't need to look much further than the specification  
 3 but the first three items:  
 4 "A computer system comprising."  
 5 That is pretty generic. There is no detailing  
 6 what this computer comprises other than the processor, and a  
 7 memory coupled to the processor.  
 8 There is certainly no improvement here in these  
 9 claims. We don't know which kind of processor it is, what  
 10 kind of processor it is, and the idea here doesn't care as  
 11 long as it processes.  
 12 You don't care how it is connected. It is  
 13 connected in standard, conventional way of using an ISA bus.  
 14 Memory, nothing special about this memory.  
 15 If you go to the specification, the  
 16 specification will tell you very much that this is a general  
 17 purpose computer. Those are its words.  
 18 Everything in that block 10 is a general purpose  
 19 computer. You will find the processor -- whoop -- the  
 20 processing unit here. You will find memory: system memory  
 21 and non-movable memory. The system memory includes a  
 22 Box 36, and a non-movable memory includes Disc Drive 41.  
 23 The next element, which is the crux of the  
 24 claim, the specification tells us are found in Box 36 and  
 25 Box 46. They're just in conventional memory.

1 telling us how to collect data? No, it is not. It just  
 2 says do it. Is it telling you how to store data? It does  
 3 not. It is telling you just to do it. Is it telling you  
 4 how the table is associated with anything to accomplish this  
 5 test? It does not. That level of specificity is absent in  
 6 these claims. These claims are really about abstract idea  
 7 and applying computer technology, conventional computer  
 8 technology to achieve it. There is no specificity  
 9 whatsoever in anything here in the claims which is the focus  
 10 of our inquiry that would allow us to do anything else with  
 11 it.  
 12 The table, plaintiffs rely on the table quite  
 13 a bit for a lot of things, and some of the things relate to  
 14 *Enfish*, which we will get to.  
 15 But the specification calls this table -- it  
 16 tells you what it does. It says it holds metadata. That  
 17 is what tables do, they hold data. And they use pointers,  
 18 links, or other methods to accomplish the association.  
 19 Your Honor, this patent doesn't even care enough  
 20 about the technology to specify it. It says you can use  
 21 any other method to do it. It's wide open. There is no  
 22 improvement here. Go ahead and use what is available,  
 23 anything that is available, and accomplish the task.  
 24 The specification actually calls the table an  
 25 organizational tool. That really distinguishes this case

1 It also has the system bus here, and it has a  
 2 mouse. There is nothing new about this. The claims don't  
 3 purport to improve this at all.  
 4 The claims require a mapping module.  
 5 "Mapping module" is a coined term. It is  
 6 defined by its constituents here, which is a data store that  
 7 is configurable to collect. That is its function. A data  
 8 store is an item whose function is to collect and store  
 9 images. That is a computer memory.  
 10 If you go to the specification, it tells you  
 11 that the data store is something that is referred to as an  
 12 image catalog. That is what it says. It refers to it as a  
 13 repository for an image catalog. There is no improvement  
 14 to the data store. This is just using it in its  
 15 conventional way to achieve the abstract concept here in the  
 16 claims.  
 17 It is also identified in Figure 3. It is a data  
 18 store including an image catalog. That is the sum total  
 19 discussion of "data store" in the specification.  
 20 If we go to the next element of the claims, the  
 21 mapping module includes a table. And this table is, again,  
 22 its function is to associate metadata with pointers and  
 23 images in a timeline, in a location.  
 24 When we looked at these claims, Your Honor, we  
 25 looked and said: What is this mapping module doing? Is it

1 from any of the cases that find that abstract ideas aren't  
 2 abstract and are itself patentable. This organizational  
 3 table is being used as it's intended by this invention, by  
 4 this claim. It is not being improved by it. It's just  
 5 being used to accomplish the task.  
 6 That is the divining question in many of these  
 7 101 cases. We suspect here the answer is that because it is  
 8 using conventional technology to achieve the results of  
 9 collecting, storing, and associating data, it is abstract,  
 10 and it is invalid.  
 11 If there is any question that these claims are  
 12 divorced by technology, it is answered by column 8 in the  
 13 specification which tells you, hey, you can take our invention  
 14 and you can implement it individually, collectively by a  
 15 wide range of hardware/software/firmware, virtually any  
 16 combination thereof.  
 17 What is missing here, Your Honor, is any  
 18 reference to a specific data structure that is required to  
 19 accomplish these claims. It says "just do it" -- not to  
 20 borrow a Nike slogan.  
 21 MAGISTRATE JUDGE BURKE: Talk about copyright  
 22 infringement. (Laughter.)  
 23 MR. POPOVSKI: Guilty.  
 24 Here again, there are close calls in this type  
 25 of analysis. This isn't one of those instances. Every

1 Federal Circuit that encounters claims similar to this,  
 2 claims that are directed toward manipulation of data that  
 3 use computer conventional computer hardware and tools to  
 4 do it have found the claims wanting. In particular, in  
 5 our three page brief, we put in the *Move* case. That is  
 6 collecting, organizing information, displaying this  
 7 information of a digital map that can be manipulated by the  
 8 user is not patentable subject matter.

9 We urge the Court to read these cases. We cite  
 10 them in ours briefs. They're very, very helpful. Quite  
 11 honestly, they're pretty convincing to us. They're dead on.

12 CHIEF JUDGE STARK: As I understand it, I  
 13 think what plaintiffs are going to say is that with this  
 14 invention, you can have a timeline as well as location  
 15 display, time and location, and that there is something  
 16 non-abstract and non-conventional about that.

17 Why are they wrong?

18 MR. POPOVSKI: There is nothing in the  
 19 specification that tells you that the data structure is  
 20 unconventional. The spec hardly mentions it. The idea of  
 21 associating, organizing things in time and location, that is  
 22 as old as Methuselah. That has been done since time  
 23 immemorial.

24 Human beings organize things on time. Human  
 25 beings organize information based on location. You have a

1 that were made, decided to let that go because of other  
 2 elements and maybe the combination wasn't prior art. I  
 3 can't speak to that.

4 But I can speak to this analysis. This analysis  
 5 that focuses on the claim as a whole, the first part, and  
 6 the second part we'll get to in a moment, doesn't find that  
 7 organizing in time. Certainly, many of these cases have  
 8 that available. They organize pictures by time. They  
 9 organize things by location as well.

10 In the *Move* case, that was real estate. That  
 11 was all about location. Time, location, and other  
 12 parameters. The content we have from the *Electrical Power*  
 13 *Grid* case, that will tell you that the content that you use  
 14 is irrelevant to the abstract inquiry.

15 MAGISTRATE JUDGE BURKE: The claim doesn't require  
 16 utilization by time and location and other parameters, just  
 17 simply one of those optionalities; right?

18 MR. POPOVSKI: So claim 6 requires any one of  
 19 those optionalities. Claim 1 has to do with three: image  
 20 history parameter, location, and time.

21 MAGISTRATE JUDGE BURKE: It came up in the other  
 22 case. This may be a question maybe for the next hour, but  
 23 are you suggesting that an Examiner's decision that a piece  
 24 of the claim or the invention isn't found in the prior art  
 25 is irrelevant to the issue as to whether or not the computer

1 photo album at home. You may have taken it in 1980. It may  
 2 say 1980, and you may have pictures in your vacation to  
 3 Cancun or whatever the Court vacations and have those  
 4 items there. That is nothing more than just organizing  
 5 information the way human beings have done it since time  
 6 immortal.

7 MAGISTRATE JUDGE BURKE: You referenced the  
 8 prosecution history in which it was said by the patentee  
 9 that the utilization of images and the relationship between  
 10 the utilization images and their position on, for example, a  
 11 timeline was said to be the thing that got over the hump I  
 12 think with regard to the Examiner's objections. How does  
 13 that cut against what you just said about how people have  
 14 been associating images with timelines for a long time?

15 MR. POPOVSKI: It doesn't, Your Honor. That is  
 16 a different analysis. The novelty analysis that the Patent  
 17 Office does it differently from the 101 analysis, which  
 18 wasn't the query there. In 101, it is a broader query. If  
 19 you look at the claims, what do they do? Are they primarily  
 20 directed to an abstract idea or something new and novel?

21 A timeline is not novel. We used timelines  
 22 since again Methuselah was in high school. He probably  
 23 did it on a different device; but timelines are not novel,  
 24 they're not new. Maybe the Examiner, in viewing the prior  
 25 art that he had in front of him, in view of the arguments

1 technology is anything more than the conventional application  
 2 of these various parts? Is it irrelevant to it?

3 MR. POPOVSKI: So I don't know if I would say  
 4 it is completely irrelevant, Your Honor. It may be something  
 5 to consider. I don't think it's something you consider in  
 6 this case because it is just so pertinent. I mean it's  
 7 time. There is nothing novel about time. There is nothing  
 8 insignificant. There is nothing significant about it that  
 9 adds to the technology. Certainly, doing something,  
 10 organizing something by time is not, under our analysis, an  
 11 improvement to a data structure.

12 MAGISTRATE JUDGE BURKE: You were saying actually  
 13 the prosecution history wasn't relevant to the question of  
 14 conventionality. To the extent the plaintiff was arguing  
 15 the association of metadata with an image to a timeline  
 16 is the kind of step forward of the unconventional thing  
 17 here because you were saying, well, look at the prosecution  
 18 history. They never mention that. It wasn't relevant there  
 19 to you.

20 MR. POPOVSKI: That is exactly right. So we  
 21 pointed to that for the purpose of saying they didn't  
 22 mention a data structure there. That wasn't the criteria  
 23 that they argued, and it shouldn't be the criteria that  
 24 allows this to escape this rule.

25 MAGISTRATE JUDGE BURKE: Why is that relevant

1 about the first point? Why should we look to the prosecution  
2 history for that point but not for the issue of whether or not  
3 the association to a timeline in this computer context was  
4 unconventional?

5 MR. POPOVSKI: I think the Court can, I think  
6 the Court can look to the prosecution history and make up  
7 its mind what it says. I think when you look at this case,  
8 when you look at the prosecution history, it is clear to  
9 us the 101 analysis is not informed by the time as an  
10 organizing method.

11 CHIEF JUDGE STARK: Which claims do I have to  
12 make a determination on?

13 MR. POPOVSKI: Your Honor, we have a complaint  
14 that asserts all the claims, one or more claims against us.  
15 We put that first page in our brief. We briefed every one  
16 of the seven claims, and for the first time, and I must say  
17 I would be remiss if I didn't point out that we did not take  
18 the Court's order to submit a three page letter as a license  
19 to start incorporating new arguments into the issue. There  
20 were many incorporated here. We didn't do so.

21 But the claims, we briefed seven claims. Seven  
22 claims are on tap for the Court. Their opposition to our  
23 briefing did not mention the fact that only one claim is  
24 asserted.

25 After we got the call, I called plaintiff's

1 counsel and said, hey, are you willing to give us a covenant  
2 not to sue on the other claims? He was willing to give us  
3 something less than, something that relies on *res judicata*  
4 which does not give us the certainty.

5 CHIEF JUDGE STARK: So you do think I have  
6 jurisdiction to resolve the eligibility of all seven claims?

7 MR. POPOVSKI: Yes, sir. They're briefed and  
8 ready for decision.

9 CHIEF JUDGE STARK: Do all the defendants take  
10 that position?

11 MR. POPOVSKI: They don't need to. I think --  
12 I'll let them speak for themselves, but their complaints and  
13 their assertions are different than ours. Only claim 6 is  
14 being asserted against them, but I will let --

15 CHIEF JUDGE STARK: Just briefly, because I know  
16 you don't have much time.

17 MR. POPOVSKI: Your Honor, Mike Bonella on  
18 behalf of Mapillary.

19 The complaint says just claim 6. Claim 6 is the  
20 claim we're asserting.

21 CHIEF JUDGE STARK: So that is the only one you  
22 moved on then?

23 MR. POPOVSKI: That is correct. That's the only  
24 one.

25 CHIEF JUDGE STARK: Thank you.

1 MR. SELINGER: Jerry Selinger from Patterson +  
2 Sheridan for Fantastic Fox.

3 During our conference with Judge Burke, this  
4 question specifically came up, Your Honor, and plaintiff  
5 conceded that it is asserting only claim 1 -- or claim 6.  
6 So while we briefed more than that, I believe the concession  
7 ought to be sufficient to limit what the Court needs to  
8 decide in our case to claim 6 unless the Court had a  
9 different impression.

10 CHIEF JUDGE STARK: Okay. Thank you. That is  
11 very helpful.

12 So you are the outlier on this one, but it's  
13 because of what they told you and what they haven't told  
14 you. That is, the plaintiffs.

15 Let me just ask you, because I do want to save  
16 time for you for rebuttal: So the Patent Office, of course,  
17 has now issued some guidance directed to Examiners how to  
18 work through the 101 analysis. As I noted, there is this  
19 concept of Step 2(a), and is there a practical application  
20 of the abstract idea?

21 I don't know if this argument is being made or  
22 not, but I could imagine it is being made in this case that  
23 the claims here are really a practical application of  
24 arguably abstract ideas and, therefore, they would survive  
25 an Examiner's analysis under Step 2(a). Do you have a

1 response to that?

2 MR. POPOVSKI: Yes, sir, I do. I think the  
3 claims, one of the guiding lights of this type of analysis  
4 is what courts have done previously. I think if you  
5 compare these claims to what courts have done previously,  
6 the guidance to the Examiners would be very, very clear.

7 If an abstract idea, even if it is new and  
8 novel,  $E=MC^2$  is the famous quote that the court in *Alice*  
9 identified is not patentable. And it may be even a good  
10 idea. The *Investa* case had, what the Court said, is a very  
11 bright idea, but the idea, while helpful, wasn't patentable  
12 because it was merely just abstract done on a computer, on a  
13 standard computer.

14 Judge Burke asked in the previous case what would  
15 you like to see in these claims if you would find a computer  
16 structure? Plaintiff relies heavily on *Enfish*. There is the  
17 claim in *Enfish*. This was found to be non-abstract because it  
18 identified a very specific improvement to a data structure.

19 Look what this claim does. It talks, it really  
20 sets out what this data structure is. Look at the detail  
21 in the claims. It has rows identified. It has columns  
22 identified. It has contents of rows and columns identified  
23 and the interrelationship which is key between those rows,  
24 columns, and the content.

25 That is completely lacking in this case here. We

1 have nothing but a table, a data store, a computer with a  
2 processor and a memory.

3 If you take these claims and you want to find  
4 claims that are very akin to ours, look no further than the  
5 *Niantic* case.

6 CHIEF JUDGE STARK: I'm familiar with the  
7 *Niantic* case. Let me save your last three minutes for  
8 rebuttal. We'll hear from the plaintiff.

9 Good morning.

10 MR. MASSAND: Good morning. Give me just one  
11 second.

12 Your Honor, Neal Massand on behalf of the  
13 plaintiff Location Based Services.

14 I want to jump into the limitations of claim 6  
15 and I guess focus on some different language than what the  
16 defendants have focused on, and that language being the  
17 language related to the "data store."

18 The claim itself states, or requires a data  
19 store configurable to store one or more images as a function  
20 of a timeline, a location or image history parameter, and  
21 that it be configurable to store a table, and that the table  
22 be configurable to associate metadata for the one or more  
23 images with one or more of the timeline, image history  
24 parameter, and the location.

25 We think that due to this limitation or these

1 limitations, claim 6 is directed to an improved data  
2 structure which allows for integrated storage of image  
3 data with metadata and the table. This is discussed in or  
4 described in Figure 3 which is depicted below.

5 We believe that this figure does show the improved  
6 data structure. I'll be coming back to this figure in a  
7 little bit more to explain how.

8 I want to talk a little bit about prior art data  
9 stores for images.

10 We have alleged in our complaint that the data  
11 structure that I have just described is unconventional. In  
12 the prior art, data stores were image catalogs which contain  
13 image data or files such as TIFF files. Images could have  
14 metadata included within the image file itself stored within  
15 the header such as the TIFF header.

16 What is depicted on the right is from the TIFF  
17 standard from 2002. Basically what this is intended to show  
18 is that it's a traditional image file, has image data along  
19 with various categories of metadata.

20 In a conventional data store, metadata was  
21 stored separately within each individual file within the  
22 catalog and within each respective file's header.

23 As kind of an aside, the Nikon Cool Pix 6000,  
24 which we have referred to in the complaint, which was  
25 released after the priority date of the '733 patent, was

1 one of the first commercially available cameras to capture  
2 GPS metadata.

3 CHIEF JUDGE STARK: I was curious about that  
4 aside, because that camera comes out three years after your  
5 patent's priority date?

6 MR. MASSAND: Right. This is intended to show  
7 how, what the patent is discussing, and the use of the data  
8 store that is claimed was unconventional because incorporating  
9 location data into the metadata was certainly unconventional  
10 as of the date of the patent. The camera, one of the first  
11 cameras that was able to use that information only came out  
12 three years later.

13 CHIEF JUDGE STARK: But you are not suggesting  
14 that one couldn't practice the invention in 2005; right?

15 MR. MASSAND: No, I'm just saying that this  
16 certainly wasn't conventional, wasn't commonplace. It was  
17 kind of what the point was.

18 CHIEF JUDGE STARK: You are not acknowledging  
19 your patent was not enabled; correct?

20 MR. MASSAND: No.

21 CHIEF JUDGE STARK: Okay.

22 MAGISTRATE JUDGE BURKE: On that point, though,  
23 I think one of the pages of your answering brief, page 9,  
24 you used the phrase "previously unavailable functionality"  
25 or the phrase "new functionality" three times.

1 The question is going to be, if you want  
2 Judge Stark to rely on that idea, the idea that there was  
3 something about the association of metadata vis-à-vis  
4 these images with the timeline, for example, and that was  
5 previously unavailable functionality or unconventional use  
6 computer technology, et cetera, the other side is going to  
7 ask where are the citations? Where does the patent tell you  
8 that? Where does anything else tell you that could be  
9 cited? What is the answer to that?

10 MR. MASSAND: First of all, we alleged it;  
11 right? In the complaint itself.

12 Then, second of all --

13 CHIEF JUDGE STARK: Well, did you allege it and  
14 identify what the support was in the patent?

15 MR. MASSAND: I think we alleged -- in paragraph  
16 10 of the complaint, we allege --

17 CHIEF JUDGE STARK: Which one is it best to look  
18 at? Which complaint?

19 MR. MASSAND: Probably Mapillary.

20 CHIEF JUDGE STARK: Okay.

21 MR. MASSAND: That's the one where I believe it  
22 is paragraph 10. I mean we allege tracking some of the  
23 claim language and state that that is unconventional, and  
24 then we refer the Cool Pix camera.

25 CHIEF JUDGE STARK: I guess to go to Judge

1 Burke's point, yes, I have to take as true well pleaded  
2 factual allegations, but if it is merely conclusory, if it  
3 is inconsistent with what is in the specification, then I  
4 don't think I take it as true, do I?

5 MR. MASSAND: I will get to in a moment where I  
6 think it is consistent with the specification.

7 CHIEF JUDGE STARK: Okay.

8 MAGISTRATE JUDGE BURKE: But it's fair this  
9 patent is not doing a lot of the work that you would hope  
10 it would do in terms of -- I mean kind of like in the way  
11 we were talking about in the last case, there aren't great  
12 parts of the specification that say the things that you want  
13 to say in your brief; right? About this unconventionality,  
14 about this step forward? Is that fair?

15 MR. MASSAND: I would not say that is necessarily  
16 true. What I'm focusing in on is the data store itself. I  
17 mean, granted, the data store does enable instantiation of a  
18 timeline, and that, arguably through my claim construction,  
19 might be through activation of metadata or something like  
20 that. That is stuff -- you know, there isn't a specific way  
21 of instantiating the timeline that is described in great  
22 detail in the patent, but the data store we think is described.

23 MAGISTRATE JUDGE BURKE: I mean like you look at  
24 a case like *Enfish*, famously I think in that case, the Fed  
25 Circuit is pointing to the patent as doing a lot of the work

1 that a patentee would hope could be done for 101 purposes,  
2 talking in detail about not only that there were these  
3 specifics in the claim but it's those specifics that really  
4 solve the problem and that function differently in conventional  
5 database structures. Where is the analog in your patent?

6 MR. MASSAND: Right. I will get to that as well.

7 CHIEF JUDGE STARK: Why don't we get there.  
8 Yes, let's go there now. If it's the data structure and  
9 it's in the specification, I want to see that.

10 MR. MASSAND: So what the specification talks  
11 about, it talks about a problem in the prior art, and that  
12 is a result of the conventional file structure that I was  
13 just describing earlier.

14 CHIEF JUDGE STARK: What is the problem you see  
15 it articulate?

16 MR. MASSAND: So here, it talks about a related  
17 art map that is describes a prior art, an iconographic map  
18 that, by clicking on a link, allows you to open up another  
19 web page that shows an image and has some information; right?

20 Then it describes the embodiment of the  
21 invention, saying using the invention rather than opening  
22 up a single image on another web page, as was in the prior  
23 art, a user can be connected to a catalog of images that is  
24 associated -- and an associated timeline that is integrated  
25 within a map. And that we think is a direct result of the

1 data store.

2 CHIEF JUDGE STARK: So the problem was you could  
3 only open one image on the other website. Now you can open  
4 an unlimited amount, presumably.

5 MR. MASSAND: Right. The prior art reference  
6 here isn't even talking about activation of metadata. It's  
7 just taking entirely different web pages. It is even  
8 further removed than opening up a single image from an image  
9 catalog that has its metadata itself contained.

10 CHIEF JUDGE STARK: Okay. What does it tell us  
11 how you solve that problem?

12 MR. MASSAND: So how it solves the problem is  
13 by, like the prior art, taking an image catalog, a data  
14 store, that would have images as long as their metadata and  
15 including, in claim 6, including within the data store which  
16 has the image catalog, a table, and the table would take  
17 metadata and hold metadata from the images. And, again, it  
18 is included within the data store.

19 This, I did a drawing last night that I think  
20 kind of accurately depicts what we're talking about; right?

21 On the left, you have a conventional data store.  
22 You have image files with image data, associated metadata  
23 all contained within the respective file, right?

24 In the inventive or the unconventional data  
25 store of claim 6, you have your image files, each again with

1 their image data and metadata but you also have a table and  
2 the table is able to associate the metadata with a timeline  
3 and image history and a location. And this is all laid out  
4 in the claim. This isn't relying on purely the specification.  
5 This is laid out in the claim. This is the data store of  
6 claim 6.

7 CHIEF JUDGE STARK: This is the claim, and this  
8 is also the figure, not your own figure but the figure that  
9 you just showed us.

10 MR. MASSAND: Yes, this is the figure with  
11 essentially describing in a different way.

12 CHIEF JUDGE STARK: Are there words, sentences  
13 in the specification that also describe that?

14 MR. MASSAND: Yes, there is a description of  
15 figure 3 in column 5 talks about this same thing: the data  
16 store having the table, associated metadata.

17 CHIEF JUDGE STARK: Column 5, you say.

18 MR. MASSAND: I believe it is column 5. Let me  
19 ...

20 CHIEF JUDGE STARK: Maybe 6. The discussion of  
21 Figure 3, is that where it is?

22 MR. MASSAND: It would be in the discussion of  
23 Figure 3.

24 Sorry, Your Honor. Just give me a moment.  
25 (Pause.)

1 MR. MASSAND: I think I misplaced my patent.

2 One second.

3 (Pause.)

4 MR. MASSAND: So I will turn to the brief. I  
5 think I quoted some of the discussion of Figure 3 in the  
6 brief.

7 MAGISTRATE JUDGE BURKE: It's on page 9.

8 MR. MASSAND: Yes. Like column 6, lines 3  
9 through 16.

10 This structure that I have drawn out is also  
11 discussed. And it refers to, for example, the table with --  
12 let me go back to Figure 3. The table at 314 and 324, and  
13 then the catalog being at 312 and 322.

14 The different functions are described in those  
15 lines. Line 3 through 16 of column 6. And I think it may  
16 actually go a bit farther down than 3 through 16.

17 MAGISTRATE JUDGE BURKE: Maybe to get to a  
18 potential criticism from the other side. If they were to  
19 say, look, there is nothing much different about what the  
20 claim says or even what column 6 says, then it would be a  
21 great idea if we could take metadata associated with an  
22 image, store it in a table that was connected to a timeline,  
23 that would be a great idea.

24 In essence, that is all the claim says, or the  
25 patent says. This would be a great idea without explaining

1 CHIEF JUDGE STARK: What do you do with the  
2 cases that the defendant is relying on, for example, the  
3 *Move* decision? How are you any different than that?  
4 MR. MASSAND: So in *Move*, a similar data  
5 structure is not claimed at all. *Move* is generally about  
6 just use a map that has available real estate properties  
7 and zooming in and out.

8 There is no limitation in *Move* that is even  
9 close to the data store that has the image files along with  
10 the table that associates the metadata.

11 CHIEF JUDGE STARK: So it really comes down to  
12 the data store.

13 MR. MASSAND: It does come down to the data  
14 store.

15 So basically, I mean this is sort of repetition  
16 of some of the stuff we talked about I guess in sum.

17 The data store containing a table that  
18 associates a timeline, image history parameter and/or  
19 location with metadata for an image. That association  
20 enables the instantiation of time related images at a  
21 location to be shown.

22 This is simply not something that could be done  
23 with traditional storage of TIFF files or image files, and  
24 that is where we think we are. At the very least, this  
25 claim is related to unconventional activity. And I would

1 any of whatever words you want to use, specifics, concrete  
2 nature, the how, et cetera. What would be your response to  
3 that?

4 MR. MASSAND: I mean I think maybe that sounds  
5 like an enablement question, but this particular great  
6 idea I think is defined enough to show how it is different  
7 than the prior art, is different -- I mean it is a concrete  
8 description of what the patent is calling for. And we're  
9 arguing that it is unconventional. We pleaded that it is  
10 unconventional.

11 MAGISTRATE JUDGE BURKE: What is your response  
12 to the argument that column 6 referenced the metadata to the  
13 extent that it can be coupled to a timeline, for example,  
14 via any number of ways is kind of an acknowledgment or  
15 admission, there is nothing about the coupling of metadata to  
16 something like a timeline by this table that is new, a step  
17 forward, et cetera?

18 MR. MASSAND: I mean this claim specifically  
19 calls for a table, first of all. The fact that the spec  
20 may have different aspects to it, I don't think that is an  
21 indication that we're less concrete. This claim calls for a  
22 table, and then it does call for instantiation, and there  
23 may be a number of ways to accomplish the instantiation, but  
24 the claim simply says a data store and within the data store  
25 a table and image file as well.

1 say also it's not directed to an abstract idea because it  
2 calls for a specific format for the data store.

3 CHIEF JUDGE STARK: Which claim or claims do you  
4 think I need to resolve?

5 MR. MASSAND: I think you only need to resolve  
6 claim 6.

7 CHIEF JUDGE STARK: So you are agreeing not to  
8 ever sue Sony on, what, 1 through 5 and 7?

9 MR. MASSAND: We offered, or I sent them a  
10 letter saying we will not, or my client will not sue them  
11 on claims 1 through 5 or 7 for any product that exists as  
12 of today and operates substantially the same way.

13 I don't know that there is any lawsuit that  
14 could possibly be filed against another product. I just  
15 don't think we should be required to give them a covenant  
16 that goes to, says more than that.

17 We offered to amend the complaint to get rid of  
18 the end use language that they were referring to, and they  
19 wouldn't take us up on the offer. They wanted to go ahead  
20 and have this hearing.

21 CHIEF JUDGE STARK: But you are -- can I say you  
22 are effectively orally moving to amend your complaint to say  
23 we only assert claim 6?

24 MR. MASSAND: We certainly do want to do that.  
25 And to the extent that the Court thinks that our allegations

1 related to unconventional are not enough, we would also  
 2 request that we be granted leave to amend to essentially  
 3 beef up those allegations for the Court.  
 4 CHIEF JUDGE STARK: What, would the beefing up  
 5 be anything more than helping us understand what you argued  
 6 today? It's column 6. It's the data store.  
 7 MR. MASSAND: It's the data store potentially  
 8 talking about the prior art image stores with TIFF files and  
 9 stuff like that.  
 10 CHIEF JUDGE STARK: Anything else?  
 11 MAGISTRATE JUDGE BURKE: No.  
 12 CHIEF JUDGE STARK: Is there anything else?  
 13 MR. MASSAND: No. I can go -- essentially, I've  
 14 prepared some slides talking about various cases that they  
 15 relied on. For example, the *Niantic* case where I don't  
 16 think that there is any similarity between the claims here.  
 17 I think the similarities begin and end with the inventors.  
 18 They don't have anything to do, the *Niantic*  
 19 claims don't have anything to do with what we have here. An  
 20 abstract structure related to display of images on a  
 21 timeline.  
 22 *Move*, we have already kind of discussed.  
 23 We don't think that this case is like *BSG*, which  
 24 the defendants have relied on as well. There, the Court  
 25 found that a conventional database structure serving a

1 generic environment is not enough.  
 2 Here, we have a specific unconventional data  
 3 structure.  
 4 Again, also there, they found that incorporation  
 5 of summary comparisons, usage information or relative  
 6 historical usage information is not enough.  
 7 But, again, that is not similar to this case  
 8 where we have a specified data structure.  
 9 *Two-Way Media* also we believe is also not the  
 10 same. There, there was no architecture described in the  
 11 claims. Here, we do have an architecture described in the  
 12 claims.  
 13 We do think we are like *Enfish*. We may not  
 14 have the same type of tabular limitations, but what we have  
 15 is not simply any conventional data store that is claimed  
 16 but a specific unconventional data store that again has  
 17 additional conventional image files, table that associates  
 18 metadata so that they can be shown in a timeline or the  
 19 image can be shown in a time line. If we're not non-abstract,  
 20 as *Enfish* I think was held to be, then we certainly have an  
 21 unconventional setup here in the data store being combined  
 22 with a table, and that would put us similar to *Mapillary*.  
 23 That puts us similar to *BASCOM*.  
 24 Your Honor, I think that is it.  
 25 CHIEF JUDGE STARK: If I want to know whether

1 there is a fact dispute on the conventionality of the data  
 2 store, I look to column 6; is that right?  
 3 MR. MASSAND: Your Honor, I think basically you  
 4 would have to look at column 6 as well as generally what  
 5 was available or what was conventional at the time. I don't  
 6 think that the patent should be required to say what was  
 7 conventional and what was not.  
 8 I don't think that the patent not saying enough  
 9 to convince you that something is unconventional means that  
 10 it is unconventional. You don't have to take defendants'  
 11 word for it.  
 12 CHIEF JUDGE STARK: Is there any non-conclusory  
 13 factual allegation in the complaint about it, the data store  
 14 not being conventional?  
 15 MR. MASSAND: The only allegations we have in  
 16 the complaint are those in claim 10.  
 17 CHIEF JUDGE STARK: Paragraph 10.  
 18 MR. MASSAND: I am sorry. Paragraph 10, correct.  
 19 MAGISTRATE JUDGE BURKE: I thought you said it  
 20 was claim 6.  
 21 MR. MASSAND: Claim 6, unconventional  
 22 allegations. Paragraph 10.  
 23 CHIEF JUDGE STARK: All right. Is there  
 24 anything else?  
 25 MR. MASSAND: I think that is it.

1 CHIEF JUDGE STARK: Okay. Thank you very much.  
 2 We'll have rebuttal.  
 3 MR. POPOVSKI: Your Honor, let me, just one  
 4 comment on the claims that are at issue.  
 5 We briefed them the first time we heard that  
 6 nothing is at issue was in the three-page letter that was  
 7 sent to the Court.  
 8 We asked for a covenant not to sue. Counsel  
 9 here at the table did not give us the security that we need  
 10 to know that we would not be sued on these claims for this  
 11 product. These software products, they get modified all  
 12 the time. It could be a different product. I don't want to  
 13 find myself six months from now arguing whether or not some  
 14 modification is good enough to get out of the claims. We  
 15 were sued on them.  
 16 CHIEF JUDGE STARK: If I amend the complaint to  
 17 say just claim 6 and only 6 will ever be asserted in this  
 18 case, do I have jurisdiction over the other claims?  
 19 MR. POPOVSKI: You do, Your Honor. We believe  
 20 they put it in issue. We responded. If we had answered, we  
 21 would have put in a DJ on those claims as well.  
 22 CHIEF JUDGE STARK: You can go ahead.  
 23 MR. POPOVSKI: So that there was a question about  
 24 whether this data store is novel because it identifies,  
 25 because it allows a plurality of pictures, many pictures

1 instead of one.

2 I just want to note that, if I can find it here.

3 I'm sorry. Can we change this?

4 (Ms. Palapura adjusts Elmo settings.)

5 MR. POPOVSKI: Thank you.

6 Well, I want to point out that claim 6 is

7 identified, that it's to one or more images. So if that was

8 the crux of it, claim 6 shouldn't be directed towards one or

9 more images.

10 The other thing, just briefly. This is really

11 in answer to Judge Burke's question.

12 Go to the last page of this. I'll find this.

13 I'm sorry. This is theirs.

14 CHIEF JUDGE STARK: We have hard copies, if you  
15 know where you want.

16 MR. POPOVSKI: The *Glasswell* case came out in  
17 very late December 2018. This tells you really the problem  
18 that you have here.

19 This claim is just way too broad. It doesn't  
20 tell you how to do anything. It doesn't tell you how to  
21 associate. It doesn't tell you how to store, how to  
22 arrange, how to organize. They don't say anything on how  
23 you do any of these things. When you have this issue, you  
24 have an abstract concept that is being implemented by using  
25 conventional technology and outside of 101.

1 The concept of a storing one or more images if,  
2 you take a look at Figure 3. Figure 3 is not, this is not  
3 an embodiment of a data store. This is an illustration of  
4 the abstract concept. And this figure can be used to store  
5 any amount of images, one image or more.

6 There is nothing added to a stereotypical  
7 storage space in a computer that allows it to store more  
8 than one image.

9 I mean you have some storage perhaps issues of  
10 how much you can store, but certainly any computer in 2005  
11 can store multiple pictures.

12 CHIEF JUDGE STARK: Is the patent silent on the  
13 conventionality of the data store that is claimed?

14 MR. POPOVSKI: So it does not characterize the  
15 data store as unconventional. It does not characterize it  
16 as conventional. I think a lot --

17 CHIEF JUDGE STARK: So it is silent.

18 MR. POPOVSKI: It is silent on it.

19 But a lot of these cases kind of, when they  
20 talk about conventionality, they come through it in a  
21 different way. What they really talk about is, hey, this  
22 is a problem. This is a technological problem, and they do  
23 it in the claims, and they do it in the specification like  
24 they did in *English*, and here is our solution. This is how  
25 we improve technology. We identify the problem, and here

1 MAGISTRATE JUDGE BURKE: Is another way of what  
2 you are saying is in light of what Mr. Massand argued, look,  
3 I don't know, maybe the patent does enough to tell you  
4 that this idea was previously unavailable but the claim as  
5 drafted nevertheless fails because there just isn't enough  
6 specificity about exactly how this maybe arguably new way  
7 of associating metadata with images and table is actually  
8 done? And if that is the argument, why is that more of an  
9 enablement argument as Mr. Massand suggested as opposed to a  
10 101?

11 MR. POPOVSKI: It very well may be an enablement  
12 argument. I didn't say the specification tells you how to  
13 do it. All I said was the focus on this inquiry is on the  
14 claims, and the claims don't tell you how to do it. The  
15 claims are directed towards results, their results, and they  
16 just use conventional technology to get those results.

17 It is famous quote from the case that is so  
18 famous I can't remember it now. It says: Here is an  
19 abstract idea, apply it. That is what we have here.

20 CHIEF JUDGE STARK: What does the patent say  
21 about the data store and whether it is conventional and  
22 whether it is an improvement and whether it is a solution to  
23 a problem discussed in the patent?

24 MR. POPOVSKI: So there is no discussion of a  
25 problem, of a technical problem in this patent whatsoever.

1 is our fix for it. None of that is in the '733 patent.

2 CHIEF JUDGE STARK: So if it is silent on the  
3 conventionality of the data store, why isn't it at least a  
4 fact dispute at this point, you know, we'll see what the  
5 evidence is but how can I decide by clear and convincing  
6 evidence now that there is nothing non-conventional in this  
7 claim?

8 MR. POPOVSKI: So what it does say about a data  
9 store is that it says it can be used as an image catalog.  
10 That is not conventional. That is not a technological  
11 problem that it is fixing. It is just storing more pictures  
12 in the same place it would have stored the one picture.

13 CHIEF JUDGE STARK: Anything else?

14 MAGISTRATE JUDGE BURKE: No.

15 CHIEF JUDGE STARK: Okay. We're over your time.

16 MR. POPOVSKI: Thank you.

17 CHIEF JUDGE STARK: Thank you very much. We'll  
18 have the third case come up here.

19 (Counsel tables filled with different counsel.)

20 CHIEF JUDGE STARK: Good morning.

21 So with the third case, it is the plaintiffs  
22 that who are the moving party, so we'll hear from the  
23 plaintiffs first whenever you are ready.

24 MS. PFEIFFER: Thank you, Your Honor.

25 May I approach?

1 CHIEF JUDGE STARK: Yes, please. Thank you.  
 2 (PowerPoint Presentations passed forward.)  
 3 CHIEF JUDGE STARK: Good morning again.  
 4 MS. PFEIFFER: Good morning, Your Honor.  
 5 As the Court just mentioned, we're here on a  
 6 slightly different procedural posture than some of the other  
 7 cases, so I do want to briefly talk about that. We're here  
 8 on SSMP's motion for reconsideration of an order that  
 9 granted in part and denied in part a motion to dismiss under  
 10 101. We're talking about the '828 patent. The '176 patent  
 11 remains in the case. It is asserted against the same  
 12 accused technologies that the '828 patent was asserted  
 13 against when it was in the case.

14 On a motion for consideration, there are several  
 15 grounds that are available, and as set forth in our brief,  
 16 several of these apply in this situation. I'll talk more  
 17 specifically about the Federal Circuit cases that came out  
 18 after briefing completed and after the order actually issued  
 19 that prompted SSMP to file the motion. But there is also  
 20 some new evidence that exists, and there is also a need to  
 21 prevent manifest injustice.

22 CHIEF JUDGE STARK: Now, I think there is only  
 23 one case you are relying on that came out after the order;  
 24 is that right?

25 MS. PFEIFFER: Yes, only one case came out

1 after the order, but three cases came out after briefing  
 2 completed.

3 CHIEF JUDGE STARK: Okay. So what is the  
 4 relevance of after briefing completed? It's a very common  
 5 thing that we get a notice of supplemental authority. You  
 6 could have done that. Here, even in the order talked about  
 7 two or three of the cases that you are now saying are a  
 8 basis for reconsideration. You actually talked about them  
 9 in the order you are asking me to reconsider them. That  
 10 can't be what is intended by our rules about new evidence,  
 11 can it?

12 MS. PFEIFFER: Well, in this particular  
 13 instance, in the 101 context it is very important. Because  
 14 there is no bright line test for what qualifies as abstract  
 15 or not abstract and, in particular, for what qualifies as  
 16 well understood, conventional or routine. District Courts  
 17 are required to look at other Districts or other Federal  
 18 Circuit decisions or District Court decisions analyzing  
 19 similar claims.

20 When the Federal Circuit issues an opinion that  
 21 analyzes claims that are so analogous as they are in this  
 22 case, it should really be considered as a part of the record  
 23 for whether or not these claims are themselves abstract.

24 So that would go to the *Data Engine* and the  
 25 *Core Wireless* cases, then the other two cases, *Aatrix* and

1 *Berkheimer*, which Your Honor did mention in his order really  
 2 go to the fundamental issue of whether or not questions of  
 3 fact exist. And the *Data Engine* case also touched upon  
 4 this, which did --

5 CHIEF JUDGE STARK: *Data Engine* came out I  
 6 think a few weeks -- well, maybe a few months actually  
 7 after we issued the order in your case. But *Core Wireless*  
 8 was already out. Couldn't you have filed a notice of  
 9 supplemental authority and said, hey, we know you are  
 10 looking at our motion. Here is a new opinion that we think  
 11 is highly relevant to the decision.

12 MS. PFEIFFER: Your Honor, that is possible,  
 13 but defendants have cited to no authority that that is a  
 14 prerequisite to filing the motion for reconsideration, and I  
 15 think really just considering all four of the cases together  
 16 really is an important part of the underlying motion for  
 17 reconsideration.

18 CHIEF JUDGE STARK: All right. Then let's turn  
 19 to, if we assume for the moment that that is true, what do  
 20 you see in one or more of those four cases that I should  
 21 treat as new and cause me to come out a different way than  
 22 I already did?

23 MS. PFEIFFER: So I'm going to start first with  
 24 one of, some of the less substantive cases that I think will  
 25 go a little quicker and then focus on the 101 cases.

1 Quickly, *Data Engine* addressed the fact that  
 2 it is appropriate for a court to consider public record  
 3 evidence. And SSMP submitted with its opposition Exhibits  
 4 A through G which included statements by one of the  
 5 defendants, that's Facebook, touting the technological  
 6 innovations of the accused feature. It said that it had  
 7 never been seen in a social networking world and talked  
 8 about how great it was and how they faced severe criticism  
 9 in implementing it.

10 CHIEF JUDGE STARK: If that is inconsistent with  
 11 what the patentee told us themselves in the specification,  
 12 can I credit the defendants' extrinsic evidence over the  
 13 intrinsic statements of the patentee?

14 MS. PFEIFFER: If it contradicted it, that would  
 15 be true, but that is not the case here. The specification  
 16 does not contradict that and, in fact, the specification,  
 17 in peculiar, columns 1 through 5 talks about some of the  
 18 difficulties in navigating a lot of information and getting  
 19 the information you want quickly in particular in the  
 20 Internet world and in various different context. So it does  
 21 not conflict with what the patent said at all and therefore  
 22 it would be appropriate to consider it.

23 CHIEF JUDGE STARK: Does the specification even  
 24 talk about social networks?

25 MS. PFEIFFER: It does briefly, and it does discuss

1 the use of real-time news tickers in various embodiments. So  
2 it just kind of discusses the deluge of information we're all  
3 getting in the Internet world and how many people are taking  
4 advantage of things like social networks to, for example, stay  
5 in touch with their social friends. So it is addressed in  
6 the patents.

7 And so going back to this evidence, this  
8 evidence shows that there is at least a question of fact  
9 that precludes judgment at the Rule 12 stage.

10 MAGISTRATE JUDGE BURKE: Exhibits A through G  
11 were attached to your answering brief; right?

12 MS. PFEIFFER: Yes, the opposition briefing.

13 MAGISTRATE JUDGE BURKE: You cite *Love Terminal*  
14 *Partners* leads to a proposition that a court may also  
15 consider undisputed documents relied on by the plaintiff,  
16 but ultimately isn't what that case is citing to are cases  
17 that say relied upon by the plaintiff in the complaint?

18 How is it -- I mean it's kind of, no pun intended, 101.  
19 What the record can be as to a motion to dismiss, its  
20 matters that are attached to the complaint, integral to the  
21 complaint or relied on therein. How do you even get to  
22 these exhibits?

23 MS. PFEIFFER: Because courts have held that it  
24 is appropriate to rely on public record evidence. Not only  
25 do we have those public statements in press releases, but we

1 of things. For example, in that case, they do cite to, for  
2 example, articles from the time, yes, they were in the  
3 prosecution history.

4 CHIEF JUDGE STARK: They were in the prosecution  
5 history, right?

6 MS. PFEIFFER: It is similar, but that leads me  
7 to my next point, which is even if the Court doesn't think  
8 it was appropriate to consider it on a Rule 12, the  
9 appropriate remedy is either a motion for leave to amend or  
10 to simply deny this without prejudice and consider that  
11 evidence at the summary judgment phase.

12 The evidence there really shows a large question  
13 of fact as to whether this technology was well understood,  
14 routine, or conventional. And patents are entitled to a  
15 presumption of validity, and defendants are required to show  
16 by clear and convincing evidence that they're not.

17 Defendants here relied on no evidence. They  
18 didn't even really cite much to the specification to argue  
19 that the specification points, argues that any of the  
20 elements are well understood, routine, or conventional.

21 So I'll talk about this more as we talk about  
22 some of the cases in the 101 context, but at this point,  
23 the appropriate remedy would be to allow SSMP to at least  
24 amend the complaint and attach those materials to the  
25 complaint so the Court could consider them properly if the

1 have statements to the Patent Office that actually describe  
2 some of the very points that we are trying to make.

3 MAGISTRATE JUDGE BURKE: Wait a second. Wait a  
4 second. You have said courts have held it is appropriate to  
5 rely on public record statements. Now, I'm not talking  
6 about a part of the prosecution history, considered part of  
7 the patent, which would be attached to the complaint. I'm  
8 talking about a press release.

9 Are you asserting that any of these cases that  
10 you cited suggest that it's okay for a court to take into  
11 account a document like a press release that is not  
12 referenced in the complaint, not attached to the complaint,  
13 it is simply attached to an answering brief?

14 MS. PFEIFFER: The case law seems to say that,  
15 yes, if it's public record evidence. If the Court considers  
16 it to be of the public record, it would be appropriate to  
17 consider it.

18 MAGISTRATE JUDGE BURKE: And that's the case law  
19 cited in your brief?

20 MS. PFEIFFER: Yes.

21 CHIEF JUDGE STARK: Is that *Data Engine*  
22 principally that you are relying on now?

23 MS. PFEIFFER: *Data Engine* is something that  
24 enforced this principle and we think offers reconsideration  
25 for whether or not the Court should consider these types

1 Court doesn't believe it is appropriate to consider them  
2 on Rule 12, or, as I mentioned, deny the motion without  
3 prejudice and allow the defendants to bring this at a  
4 summary judgment phase.

5 CHIEF JUDGE STARK: Since you only have two  
6 minutes left, I want you to have time for your rebuttal.  
7 I'll give you extra five minutes. We'll do that for the  
8 defendants, too. So take your time.

9 MS. PFEIFFER: Great. Now, focusing on the *Data*  
10 *Engine* and *Core Wireless* cases, which, as I mentioned, the  
11 *Core Wireless* came out after the briefing was completed.  
12 *Data Engine* came out after the order issued, approximately  
13 just under two weeks. It was right before we were able to  
14 file our motion for reconsideration. And as I noted,  
15 earlier District Courts look to these previous decisions to  
16 find analogous claims to determine whether or not claims  
17 are abstract, and so the importance of these cases is very  
18 important on the reconsideration because both of them  
19 consistently held that improvement to the user interface are  
20 not abstract.

21 Now, I just want to call attention to some of  
22 the language in these two cases where they focus on what,  
23 about user interfaces could overcome the abstract barrier.  
24 And that was things like displaying selected data, or  
25 functions of interest, increasing the speed of the user's

1 navigation, preventing the need for paging through multiple  
2 screens, rapid access, ease of navigation. You can see a  
3 common theme here.

4 Now, if we look at claim 11 of the '828 patent,  
5 it is directed to improving the user interface in a social  
6 network context.

7 If we go back to 2003, when this was the patent  
8 priority date, and think about the social networks that  
9 existed at that time, it was MySpace and maybe the Harvard  
10 Facebook existed, but you had to go to your friend's page.

11 If you were curious whether or not Suzy did something new,  
12 you had to go to Suzy's page. She may not have updated  
13 anything, she may not have posted anything at all, and you  
14 would have is wasted your time. You would have to do this  
15 for all of your friends. But with the news feed, you get  
16 all of the information in one space. And with a real-time  
17 news ticker, you are saved a lot of time and navigation.

18 Similar to a data engine where users were forced  
19 to look across multiple spreadsheets to get their data but  
20 the claims enabled being able to do that much quicker. We  
21 have a similar situation here. Instead of having to  
22 navigate to the many different pages, that information is  
23 supplied right upfront.

24 This goes to some of the questions of fact that  
25 are at Step 2 as well which goes to the real-time news

1 ticker component. There are claim construction issues, as  
2 SSMP has laid out and the IPR defendants filed which is new  
3 evidence that was not available during briefing shows that  
4 they proposed a claim construction for real-time there.

5 So that comes into play a little bit later on,  
6 but I do want to point out that there are significant  
7 factual questions that remain on Step 2. But as to Step 1,  
8 the claim which includes the element of a real-time news  
9 ticker component that is configured to display new items  
10 pertaining to the first user account when second user  
11 account is in use, this is the type of element that takes it  
12 out of the preemption world and really puts it into context  
13 of the claim and the improvement to navigation.

14 So the *Core Wireless/ Data Engine* cases are just  
15 the most directly on point Federal Circuit cases that are  
16 similar to our claims. And it's important to consider them  
17 and really whether or not it's even appropriate to proceed  
18 to Step 2.

19 MAGISTRATE JUDGE BURKE: To push back on *Core*  
20 *Wireless*, I think what you are saying, *Core Wireless* came  
21 out and the decision there was so important to the decision  
22 in this case that it could arguably have changed the  
23 outcome, but for eight months it existed and you didn't  
24 apprise the Court of it. How could it be, on the one hand,  
25 so significant, so important that it could arguably change

1 the outcome of what ended up being the resolution here and  
2 yet not important enough for you to provide notice to the  
3 Court?

4 MS. PFEIFFER: Well, even if the Court  
5 disregarded *Core Wireless, Data Engine* is directly on point  
6 and refers to *Core Wireless* and really, just like I said,  
7 this comes together when the case law is going in this  
8 direction. And what District Courts are unfortunately  
9 forced to do is look at how the Federal Circuit has analyzed  
10 analogous claims, having two cases that are so similar, and  
11 really *Data Engine* is directly on point, and is, we have  
12 identified as the most important case makes clear, that at  
13 Step 1, these claims are just not abstract.

14 Then another reason the claims are not abstract  
15 is that they are particular to the Internet. But that is  
16 not quite the thrust of the motion for reconsideration, so  
17 I'll *move* on to some of the factual issues.

18 CHIEF JUDGE STARK: You have got about three  
19 minutes left, so it's up to you if you want to save time for  
20 rebuttal.

21 MS. PFEIFFER: I want to quickly point out  
22 that the case that defendants have identified which is  
23 *Intellectual Ventures v Capital One* is not at all analogous.

24 First of all, it occurred at summary judgment  
25 after claim construction which is the much more appropriate

1 time to deal with the claims at issue in this case,  
2 particularly since another patent will proceed to that stage.

3 But also those claims, although the word  
4 "interface" appears in them, they are not directed to the  
5 user interface but to putting pre-created content and  
6 selecting it based on very basic criteria, not the real-time  
7 news ticker when a second user is taken into account. You  
8 can either just look at the claims and see how sparse the  
9 one in *Intellectual Ventures* is compared to what the claim  
10 is in this case.

11 So I'll save the rest of my time for rebuttal.  
12 I just wanted to point that out.

13 CHIEF JUDGE STARK: Okay. Thank you very much.  
14 We'll hear from the defendant.

15 Good morning. I think it's just before noon. I  
16 can't quite tell from this angle.

17 MR. MORTON: Very good, Your Honor. Phillip  
18 Morton on behalf of the defendant Facebook.

19 So the plaintiff here has not met its heavy  
20 burden for motion for reconsideration. The fact that they  
21 just disagree with the Court's ruling is not sufficient.  
22 They haven't identified any intervening change in controlling  
23 law. As Your Honor has noted, three of those cases existed  
24 for the decision you entered. No attempt was made to bring  
25 those to the Court's attention.

1 With respect to the *Data Engine* case, that is  
2 not a change in controlling law. That is just another case  
3 applying the same *Alice* two-step test to patent eligibility  
4 questions. They're not alleging that there is any  
5 availability of new evidence.

6 There is no clear error of law or fact that  
7 needs to be corrected to prevent manifest injustice. The  
8 fact that they didn't provide those cases to the Court  
9 suggests that there is no manifest injustice here.

10 One other point on the new law. The Court  
11 has -- this Court has actually stated in the *Kaavo* case that  
12 three of those four cases that are cited as new controlling  
13 law here by the plaintiff do not constitute a change in the  
14 law.

15 With respect to the *Data Engine* case, in that  
16 circumstance, the claims that were found to be patent  
17 eligible, in that circumstance the Federal Circuit believed  
18 could be patent eligible, those recited a specific structure  
19 with a particular spreadsheet display, the performance  
20 specific function. They were much more detailed about the  
21 type of structure that was claimed there.

22 Then you can see the contrast, that there were  
23 other claims, as Your Honor knows, in the *Data Engine* case,  
24 the Federal Circuit felt did not have a particular structure  
25 to them.

1 CHIEF JUDGE STARK: So you say these claims here  
2 are closer to the ones that were upheld as ineligible in  
3 *Data Engine*.

4 MR. MORTON: That's correct, Your Honor. Yes.

5 With respect to any factual disputes that may  
6 exist, SSMP is alleging that there are factual disputes.  
7 They don't really specify what those are. They basically  
8 just repeat what they said in their opening or in their  
9 papers on the primary motion.

10 Then the exhibits that were attached to the  
11 motion, they don't change the outcome here. Those are  
12 statements purportedly by Facebook. Some of them are news  
13 articles, some of them are press releases. What Facebook  
14 might have said in a patent prosecution in another case has  
15 no bearing on the patent eligibility of the claims here.

16 CHIEF JUDGE STARK: Well, why -- I mean let's just  
17 assume for the moment that those articles or statements say we  
18 have looked at the asserted patent here of the plaintiff for  
19 whatever reason, and it's novel, it's not conventional, it's  
20 not routine, it's fantastic, and we're really glad to have it  
21 and we can use it. If that is how one could fairly read those  
22 articles, is that irrelevant to the *Alice* test?

23 MR. MORTON: Well, so those articles don't say  
24 that. Those articles do not say anything about SSMP's  
25 patent here. They are about Facebook talking about their

1 own products or third-party sources talking about Facebook's  
2 products.

3 CHIEF JUDGE STARK: Okay. Well, still, if one  
4 might imagine a reasonable chain of inferences in which one  
5 might take those statements that Facebook made about social  
6 networks and say, all right, these claims maybe have to do  
7 with social networks and the value of a news ticker, can I  
8 really say as a matter of law that they are not -- there is  
9 no relevance, it can't possibly impact even the Step 2 *Alice*  
10 analysis, what you all were saying at the time about the  
11 problem, let's say, that the patent purports to solve?

12 MR. MORTON: Again, those are not part of the  
13 intrinsic record here, they're not part of the patent  
14 prosecution history, and they were not part of the complaint.  
15 So they're not something that the Court -- yeah.

16 CHIEF JUDGE STARK: Let's -- I've got to keep  
17 pushing, I guess. If I grant the motion to amend, which  
18 arguably is now in front of me, and tomorrow they re-file  
19 and they put all those exhibits in their complaint, I now  
20 can look at them -- right? -- on a Rule 12 motion.

21 MR. MORTON: They would be part of the record.  
22 They would be part.

23 CHIEF JUDGE STARK: They're not intrinsic to the  
24 patent prosecution. I understand that. But they're part  
25 of the record on Rule 12 at that point. Would you still be

1 able to argue that they are per se irrelevant to the *Alice*  
2 analysis?

3 MR. MORTON: If they do not -- if they're not  
4 associated with the invention itself, with what the patent  
5 team described as their invention, no, they're not relevant.

6 CHIEF JUDGE STARK: So the patentee is telling  
7 me that while the specification doesn't say very much about  
8 social networks and even about the news ticker, it says  
9 something about them. They're telling me that is at least  
10 in part what their patent is about. Don't I have to take  
11 that as part of what this patent is about?

12 MR. MORTON: Well, you take what is in the  
13 intrinsic record of the patent. That is what the inventor  
14 described and told the Patent Office what their invention  
15 was. What Facebook was saying after the fact about the  
16 invention is not relevant.

17 Your Honor, if you have any other questions, I'm  
18 happy to address them.

19 CHIEF JUDGE STARK: They also made this I guess  
20 practical argument. I did not find the other patent to be  
21 ineligible under Section 101, so you have a case that is  
22 presumably going forward.

23 Why shouldn't I, as a practical matter,  
24 particularly there has been new case law, there is now  
25 your IPR. You are here in front of me anyway. You are

1 litigating. There is a lot of 101 decisions. Wouldn't it  
2 just make more sense to fight this one out on the merits as  
3 well while you are here fighting about the other one anyway?

4 MR. MORTON: Well, Your Honor already ruled on  
5 this, and so we're here on a motion for reconsideration, so  
6 they need to meet the test of a motion for reconsideration  
7 in this District, and they have not done that.

8 Furthermore, that doesn't change the fact that  
9 these patents are directed to ineligible subject matter.

10 And they haven't identified any factual disputes  
11 that would be changed by claim construction or additional  
12 fact discovery.

13 Your Honor assumed the claim constructions that  
14 they had proposed in their motion and still found that this  
15 patent was not directed to eligible subject matter.

16 CHIEF JUDGE STARK: In the claim constructions  
17 they're telling me to assume now, they're the same ones we  
18 already assumed; right?

19 MR. MORTON: That's my understanding, yes.

20 CHIEF JUDGE STARK: Is there anything else?

21 MR. MORTON: No, Your Honor.

22 CHIEF JUDGE STARK: All right. We'll hear  
23 rebuttal.

24 Welcome back.

25 MS. PFEIFFER: Thank you, Your Honor.

1 All right. So first I want to focus on the  
2 defendant's statement that SSMP has not identified factual  
3 issues to be resolved.

4 First of all, the complaint itself alleged  
5 various problems that existed in the art and held the patent  
6 purported to solve those problems. That is a first factual  
7 question that exists.

8 Second, there are claim construction issues  
9 which made underlying relied upon factual questions but also  
10 may be important to determining the outcome here especially  
11 of Step 2.

12 CHIEF JUDGE STARK: Are the claim construction  
13 issues any different than the ones we already confronted?

14 MS. PFEIFFER: No. Well, especially because  
15 Facebook or defendants have not put forward before this  
16 Court any proposed claim constructions. However, in their  
17 IPR, which was filed after briefing was complete and pretty  
18 close to when we received the order, which could constitute  
19 new evidence, they did put forward a construction for the  
20 word, for the term "real-time." So there are at least two  
21 competing constructions out there.

22 CHIEF JUDGE STARK: Right. But is their  
23 construction that they proposed in the IPR better for you  
24 than the one you proposed and that we already assumed?

25 MS. PFEIFFER: It might -- they might argue

1 something different here.

2 CHIEF JUDGE STARK: They might, but I guess can  
3 it get any better for you on the real-time news ticker?

4 MS. PFEIFFER: If you take our construction as  
5 the Court did in the order, then, correct, it perhaps does  
6 not create a difference on that term, but they have not  
7 proposed any other constructions for us to discuss.

8 Then as noted, there was additional evidence  
9 that SSMP attached to the opposition to the motion to  
10 dismiss, Exhibits A through G, which in addition to the  
11 press releases, all of which touted the skepticism and the  
12 taking of that on news feed and discussed how creating a  
13 news feed was very controversial and innovative, Facebook  
14 has also taken out patents relating to the news feed and has  
15 touted again the innovation and inventive steps and fought  
16 101 on that.

17 While it does not have statements directly  
18 related to the patent at issue, logically the claims here  
19 are asserted against the news feed. Therefore, statements  
20 about the news feed and whether or not it represents an  
21 inventive step will certainly be relevant to whether or not  
22 the claims are well understood, routine, or conventional.

23 There is no way to avoid the fact that what if  
24 we got to the factual dispute of this, these statements will  
25 undeniably be considered as part of the state of the art

1 and what someone of skill in the art would understand at  
2 that time.

3 Some of the arguments that defendants put  
4 forward in their brief, all of which were attorney argument,  
5 no evidence that would overcome the burden that they need to  
6 meet, especially at the Rule 12 stage, to show that these  
7 elements are well understood, routine, or conventional. At  
8 this stage, the defendant's burden is to show you where in  
9 the specification all of these elements and the ordered  
10 combination was well understood, routine, and conventional.  
11 The defendants have simply failed to do that, especially in  
12 view of the recent decisions that came down that offered a  
13 lot of clarity on whether or not these claims are even  
14 subject to the Step 2 of the *Allice* test.

15 So I don't want to take up any more of the  
16 Courts's time unless you have questions. But in summary, if  
17 the Court is not inclined to find that the claims are patent  
18 eligible at Step 1, certainly questions of fact preclude  
19 judgment at the Rule 12 stage.

20 CHIEF JUDGE STARK: Okay. Thank you. Thank you  
21 everyone so far for the helpful argument.

22 So what we're going to do is take a 15 minute or  
23 so recess. When we come back, I'd like to have at least  
24 those counsel who have argued so far up here near the front  
25 and, depending upon what questions we have, if other people

1 want to answer them, there may be an opportunity for you  
2 to do that, but let's at least have all of you who have  
3 principally argued up here in the front in about 15 minutes.  
4 We will be in recess.

5 (Recess taken at 12:12 p.m.)

6 \* \* \*

7 (Proceedings reconvened at 12:25 p.m.)

8 CHIEF JUDGE STARK: Have a seat, please.

9 All right. So we are back, and we have arranged  
10 our thoughts. Thank you very much.

11 I think I have about three case specific  
12 questions to specific attorneys; and after that, I think we  
13 just have possibly some general questions. So when we get  
14 to the general questions, I'll first look to see if any of  
15 the folks here in the front want to answer them, and no one  
16 is obligated to. Then I'll look more generally to see if  
17 there is anyone else in the courtroom that wants to answer  
18 the questions. As long as you are willing to come in and  
19 tell us who you are on the record, you are free to do so.

20 The first questions are for Mr. Massand and LBS.

21 Yes, why don't you come to the podium for us.

22 (Mr. Massand comes to the podium.)

23 THE COURT: The first question is focused on  
24 claim 6. Where does claim 6 require that the "data store"  
25 limitation has to be practiced as you depicted in your late

1 other question for you.

2 So the claim also talks about one or more  
3 images. I think this argument came up on rebuttal. That I  
4 think means there are embodiments where there is just one  
5 image.

6 In such embodiments, what implication, if at  
7 all, does that have for the 101 question if that is what is  
8 all, this is all about, but yet I can have an embodiment  
9 with just one image? Where are we?

10 MR. MASSAND: So in an embodiment, if there  
11 were, say, for example, a data store that just had a single  
12 image file in it and some kind of program that could cause  
13 that picture to be viewed, that is possible. That may be  
14 the case.

15 That is not the invention. The invention  
16 requires a data store with one or more images and a table.  
17 If there is only a single image as well as a table with the  
18 associated metadata, then that would read on the claim. But  
19 the idea that the one or more -- I don't think the claim is  
20 limited to multiple images, but I think it is limited to a  
21 data store having one or more images as well as a table.

22 CHIEF JUDGE STARK: So the fact that we could  
23 have an embodiment with just one image, does that have any  
24 implications for either Step 1 or Step 2 of *Alice* or is it  
25 just an interesting fact but really doesn't have an impact?

1 night drawing last night which I take to mean has a separate  
2 table? So where is it that claim 6 requires that?

3 MR. MASSAND: So, Your Honor, claims 6 requires  
4 a data store that contains image files, right? And then it  
5 also requires a data store that is configurable to store a  
6 table; right? And that the table be able to associate  
7 metadata in those categories.

8 So that "configurable to store a table" we  
9 believe is a requirement for this.

10 CHIEF JUDGE STARK: Okay. So I see the  
11 limitation in claim 6, "data store configurable to store a  
12 table." But does that require that the store, the table  
13 look analogous to what you depicted for us or is that just  
14 simply one embodiment, one way of doing it?

15 MR. MASSAND: Well, I would say, Your Honor,  
16 that may go to what the construction of what a table is, but  
17 what I drew I would say certainly is a table. I think there  
18 may be something analogous that would also be considered a  
19 table, but I think it would be required to be a table.

20 Whether in software there is a different data  
21 element that could be considered a table, that I think may  
22 be the case. But what it does require is a table. It may  
23 not have to be specifically like in a drawing.

24 CHIEF JUDGE STARK: All right. And certainly  
25 we'll give defendants a chance to respond, but I have one

1 MR. MASSAND: I don't think it has an impact  
2 because our argument is about the combination of the image  
3 file with a table, the one or more image files with a table  
4 in the data store.

5 CHIEF JUDGE STARK: All right. That was our  
6 questions for you.

7 We're happy to hear a response.

8 MR. POPOVSKI: I'm going to try to do the  
9 technology thing again, Your Honor, if I could, and bring  
10 up.

11 CHIEF JUDGE STARK: Are you going to try to  
12 bring up your slides?

13 MR. POPOVSKI: I'll try.

14 CHIEF JUDGE STARK: Just for the record,  
15 Mr. Popovski.

16 MR. POPOVSKI: Lewis Popovski on behalf of Sony.  
17 CHIEF JUDGE STARK: Thank you.

18 MR. POPOVSKI: Just actually, if the Court has  
19 the handout.

20 CHIEF JUDGE STARK: I do, yes.

21 MR. POPOVSKI: Then right on page 8, slide 8.

22 CHIEF JUDGE STARK: Okay. Right, this is Figure 3.

23 MR. POPOVSKI: Figure 3, and it's the text above  
24 Figure 3. This tells you, really, we're talking about the  
25 claim table and data store. Two things on that:

1 One. If it was so important to the invention,  
2 the specification would highlight the necessity of this  
3 table but it doesn't. It tells you that it could use  
4 anything, truly that is what it says, or other methods  
5 illustrated by lines 3, 16. It boils it down to a concept.  
6 Take the line, make the association, you are done. It  
7 doesn't care what it did. So whether it's a table or  
8 whether it is some other means to do it is beside the point.  
9 The focus of this claim is really the implementation of the  
10 idea, not how you do it.

11 And, again, on page 10, on slide 10, it tells  
12 you that, again, it emphasizes the point. We don't care  
13 about technology. It says you can do this by a wide range  
14 of hardware, software, firmware or any combination. Again,  
15 emphasizing, underscoring the focus of these claims is  
16 really the implementation of an idea by use of a general  
17 purpose computer system.

18 And one more thing, Your Honor. If you could go  
19 to slide 13.

20 This is *Niantic*. I want to be ... *Niantic* has  
21 a data store. *Niantic*, it has very much the same claim  
22 elements as we have here. It has a computer, a processor, a  
23 memory coupled to the processor, a map display that itself  
24 is again as defined by constituents, which includes a data  
25 store for storing and organizing data. And that was

1 found wanting.

2 CHIEF JUDGE STARK: A data store configurable to  
3 hold data is *Niantic*, and here in our case we have data  
4 store configurable to store a table. Those are not different?

5 MR. POPOVSKI: They are not different because  
6 the table stores image metadata, which is data.

7 CHIEF JUDGE STARK: What is your view of the  
8 late night drawing that we saw of Mr. Massand's? Is that  
9 one embodiment? Is it the only embodiment?

10 MR. POPOVSKI: I'll be honest with the Court.  
11 You are a wonderful artist. I didn't understand what that  
12 meant to the case and I didn't see it before. It's the  
13 first time I have seen it. I do know that these claims  
14 are so broad as to encompass many, many embodiments that  
15 would implement this idea. It really is agnostic to what  
16 technology we use.

17 CHIEF JUDGE STARK: All right. And your point  
18 about the embodiment or just one image, anything more to say  
19 about that in light of what you've heard?

20 MR. POPOVSKI: Yes. A data store is a data  
21 store. It is a physical memory location. That is how it  
22 is defined in the specification and a physical memory  
23 location. There is no limitation on it other than its size  
24 about whether or not it can store one or more images. That  
25 data store is not added to any unconventionality to these

1 claims. It is just a memory location. And the spec even  
2 calls it that. It calls it a repository for an image catalog.

3 CHIEF JUDGE STARK: All right.

4 MR. POPOVSKI: Thank you.

5 CHIEF JUDGE STARK: Thank you. Anything you  
6 want to add?

7 MR. MASSAND: Your Honor, I would add that just  
8 that I can't remember which slide it was but the quote that  
9 includes table amongst a list of various items, I don't  
10 think that the argument that defendants are making related  
11 with respect to that is really pertinent to claim 6 where a  
12 table is specified. It specifically says table.

13 But, again, as I indicated earlier, I think a  
14 table may not have to look exactly like I drew in my late  
15 night drawing, but the claim calls for a table.

16 CHIEF JUDGE STARK: All right. Thank you.

17 MR. MASSAND: A table as well as the other  
18 aspects of the data store holding the image files.

19 CHIEF JUDGE STARK: Okay. Thank you.

20 Then the next question was for Ms. Pfeiffer, do  
21 you want to come back, and SSMP.

22 (Ms. Pfeiffer comes to the podium.)

23 CHIEF JUDGE STARK: So you told me that the  
24 patent which was quite long has some discussion in it of  
25 social network. Could you point out to me where I can find

1 that?

2 MS. PFEIFFER: Unfortunately, I did not bring  
3 the patent up, Your Honor. But I believe Figures 53 to 54.  
4 And I believe column, the end of column 30 to the beginning  
5 of column 31.

6 CHIEF JUDGE STARK: Wherever they're discussing  
7 53 and 54, is that where we find it?

8 MS. PFEIFFER: Yes.

9 CHIEF JUDGE STARK: All right. That was really  
10 the only question.

11 MS. PFEIFFER: All right. Thank you.

12 CHIEF JUDGE STARK: Thank you.

13 Is there anything Facebook wants to say about  
14 that?

15 MR. MORTON: I think the part that she was  
16 referring to -- Phillip Norton.

17 CHIEF JUDGE STARK: Remind us for the record who  
18 you are.

19 MR. MORTON: Yes. Phillip Morton on behalf of  
20 Facebook, Your Honor.

21 CHIEF JUDGE STARK: Thank you.

22 MR. MORTON: 53 and 54, I think that was  
23 referring to the ticker. That was not specific to the  
24 social network discussion, I don't believe. Then I think  
25 where they've referenced the social network has been in

1 the title and the abstract.  
 2 CHIEF JUDGE STARK: So you don't see it anywhere  
 3 besides the title and abstract?

4 MR. MORTON: Not that I have been able to look  
 5 at, Your Honor.

6 CHIEF JUDGE STARK: Okay. Thank you.  
 7 Do you want to come back?

8 MS. PFEIFFER: Your Honor, Sarah Pfeiffer.  
 9 So as a general matter, I would refer the Court  
 10 to the claim construction table that we provided with our  
 11 letter. And I believe in the underlying opposition, there  
 12 is support identified for the claim construction, and that  
 13 should help guide the Court as well.

14 In a more general way, the general UID as a  
 15 whole is basically what describes the social network system.  
 16 It really is kind of a combination of different events and  
 17 different circumstances, and it is kind of described  
 18 throughout, but I think probably the best reference would  
 19 be the claim construction table and the references there.

20 CHIEF JUDGE STARK: All right. So do you want to  
 21 come back and address that? Because in the underlying decision,  
 22 and presumably with respect to motion for reconsideration, I  
 23 have assumed that I will adopt the plaintiff's proposed  
 24 construction. If I do that, does that mean that this patent  
 25 is, for purposes of the motion, about a social network?

1 MR. MORTON: I think for the purposes of the  
 2 motion, you can assume that because the construction that  
 3 they proffered has that in it, and the claims have that in it.

4 But as I said before, the patent doesn't really  
 5 have any disclosure of that.

6 CHIEF JUDGE STARK: How, if at all, could I say  
 7 that that is still relevant to the 101 analysis at either  
 8 Step 1 or Step 2 if I'm saying, look, for purposes of the  
 9 motion I'm adopting the plaintiff's claim construction,  
 10 they're not implausible constructions. That now means the  
 11 claims are about a social network, but the patent doesn't  
 12 really talk about that.

13 Do those two data points have some relevance to  
 14 the *Alice* analysis at that point?

15 MR. MORTON: Under the *Alice* analysis, the Court  
 16 has already found that the patent or this patent is directed  
 17 to ineligible subject matter. The construction had no  
 18 impact on that. I don't know if that answers your question,  
 19 but I don't think that it has any impact.

20 CHIEF JUDGE STARK: Okay. Is there anything  
 21 else?

22 MR. MORTON: No, Your Honor.

23 CHIEF JUDGE STARK: All right. Ms. Pfeiffer, is  
 24 there anything you want to add?

25 MS. PFEIFFER: Just briefly, Your Honor.

1 Going to the question of the relevance of  
 2 this patent, the specific support in the specification is  
 3 starting to sound a lot like a 112 argument which, again, is  
 4 like something more appropriate at the Rule 12 stage.

5 That is really all I have to add. Thank you.

6 CHIEF JUDGE STARK: All right. That was it for  
 7 the specific questions. Let's throw out some general  
 8 questions.

9 I think the first general question is, I know  
 10 I struggled with the relationship between 101 on the one  
 11 hand and 102 and 103 on the other hand, and there has been  
 12 allusion to that in some specific context today. But if  
 13 first anyone here upfront wants to provide any guidance as  
 14 to how I think of that, I'm happy to hear it.

15 Yes. Come on up and remind us who you are,  
 16 please.

17 MR. MAY: Christopher May for the plaintiff,  
 18 MOAEC Technologies.

19 I would say that with respect to 102 and 103, it  
 20 is possible for a patent or a patent claim to pass 102, 103,  
 21 fail 101.

22 The only point I would make is, to the extent  
 23 that a limitation is found to be completely absent in the  
 24 prior art, that by definition it cannot, the defendants  
 25 cannot meet Step 2 of the *Alice* test because that requires

1 every element to be found to be well understood, routine,  
 2 and conventional as well as the combination of the elements  
 3 to be well understood, routine, and conventional. And if  
 4 the element is not present in the prior art, by definition,  
 5 it cannot be conventional.

6 CHIEF JUDGE STARK: If we knew that someone had  
 7 looked at all the prior art and couldn't find anywhere this  
 8 particular limitation in the patent in front of us, then  
 9 you would say you have to say that the patent in front of us  
 10 survives *Alice*.

11 MR. MAY: Yes, I would say that. Now, to the  
 12 extent that later on the defendants want to bring in  
 13 additional factual information that says the Patent Office  
 14 did not have in front of it, that certainly is their right  
 15 to do, but at that point we're not talking about a Rule 12  
 16 motion any more, we're talking about a Rule 56 motion.

17 MAGISTRATE JUDGE BURKE: It sounds like what you  
 18 are saying is -- and tell me if this is your view -- that to  
 19 the extent that the case law about *Alice* Step 2 talks about  
 20 conventionality and whether or not saying in the context of  
 21 a computer-related invention, we're talking about a claim  
 22 that involves anything other than the utilization of  
 23 conventional computer technology, it sounds like you think  
 24 that is almost a synonym for novelty.

25 In other words, because, before the Examiner,

1 you can point to or the prior art doesn't include this  
 2 element, the prior art doesn't include it, it's a new  
 3 element, it's an element that hasn't been associated with  
 4 it. But is treating conventionality for purposes of Step 2  
 5 as to what that means, is it new? Is it not otherwise in  
 6 the art, is that right? Or is conventionality supposed to  
 7 get to more about a particularity that matters? Not just  
 8 do it on a computer but a kind of specificity that makes a  
 9 difference as opposed novelty. Do you know what I mean?

10 MR. MAY: I think I understand. If your  
 11 question is different, let me know. But with respect to  
 12 102, remember that all these elements must be found in a  
 13 particular piece of art. Similarly with 103, all of the  
 14 elements must be found either in a copy or a combination of  
 15 art.

16 So you could easily say in 102, well, all the  
 17 elements are present in this particular piece of art but  
 18 it's not well understood, routine, and conventional. But if  
 19 you have a situation where it's not merely that not all of  
 20 the elements are in one piece or all of the elements, there  
 21 is no motivation to combine, for example, between two elements.  
 22 If you have a situation where the element has been found  
 23 by the Patent Office to be completely absent, they found  
 24 nothing in the prior art that is like this element, then,  
 25 yes, I would say that that's a situation where at minimum

1 you have a factual dispute on Step 2 of the *Alice* test.

2 With respect to the other question you are asking  
 3 as to whether or not you are looking at something more from  
 4 a what was conventional at the time, I would say that is a  
 5 question of whether or not a person of ordinary skill in the  
 6 art would have understood this particular limitation to be  
 7 a conventional thing. And, again, I think that is more a  
 8 question of fact that has to be developed on the record during  
 9 the case.

10 MAGISTRATE JUDGE BURKE: Why does *Alice* Step 2  
 11 care about conventionality? Why does it care about it? Why  
 12 does it ask about it? Why is that word even in the Supreme  
 13 Court case law? What is it getting to? Is it getting to  
 14 something, is it meant to get to something other than novelty,  
 15 Not novelty but something else, something that sounds more  
 16 like non-ideaedness, specificity, particularity, concreteness,  
 17 the other kinds of words you often hear creep up in these  
 18 briefs from a patentee. Is it one or the other or partly  
 19 both or what?

20 MR. MAY: Its sounds a little bit as though there  
 21 is a combination of a question of enablement in your question,  
 22 and also a combination of is what is in the limitations  
 23 something that is only minorly different from what is in the  
 24 art where maybe it was found to be sufficiently different at  
 25 the Patent Office but really if you look at it, it's not doing

1 much different from what was already known.

2 But, again, I think in that instance, that you  
 3 got a question of what did a person of ordinary skill in the  
 4 art actually know? For that, all you can really rely on at  
 5 this point on a Rule 12 motion is what is in the spec? And  
 6 what is in the file history?

7 In our particular case, there is nothing in the  
 8 file history that says this is operating in a routine  
 9 conventional manner. In fact, there is nothing in this file  
 10 history that says this particular structure even existed.

11 CHIEF JUDGE STARK: Thank you. Anybody else?  
 12 Ms. Shanberg?

13 MS. SHANBERG: Your Honors, I'd like to read to  
 14 you two passages that constitute what I believe the Federal  
 15 Circuit's most recent guidance on the relationship between  
 16 Section 101 and Sections 102 and 103. They are short and  
 17 they come from the *SAP* decision from May of 2018.

18 The first one says: We may assume that the  
 19 techniques claimed are ground breaking, innovative, even  
 20 brilliant, but that is not enough for eligibility.

21 The second one says: Nor is it enough for  
 22 subject matter eligibility that claim techniques be novel or  
 23 nonobvious in light of the prior art passing muster under  
 24 Section 102 or 103.

25 The Federal Circuit's current guidance says

1 these are two completely different tests. Can we dream up  
 2 a hypothetical scenario in which something that happens in  
 3 a reexam proceeding could be relevant to the question of  
 4 conventionality or there could be a statement in a proceeding  
 5 that is relevant to the question of conventionality?  
 6 Probably. But that is not what we have seen today. And  
 7 that is not what you are going to have in a typical case  
 8 because they are two entirely two different tests.

9 Something else one of my colleagues pointed out  
 10 to me during the break. I thought what was an interesting  
 11 point is that even if an Examiner's decision as to 102 and  
 12 103 are later revisited when we're in court, the Examiner  
 13 didn't make any decisions as to 101, there is no reason to  
 14 give the Examiner in our PTAB or reexamination proceeding  
 15 that was initiated by MOAEC or any other reexamination  
 16 proceeding any deference relating to Section 101  
 17 conventionality. It is not even something they look at.

18 CHIEF JUDGE STARK: Go ahead.

19 MAGISTRATE JUDGE BURKE: I was going to say  
 20 probably what you are saying I think is, look, you can have  
 21 a new abstract idea. It's certainly newness, novelty isn't  
 22 enough. And so to the extent the Examiner is saying this is  
 23 new at least in the sense this element, I can't find it in  
 24 the prior art, the newness of it or the nonexistence of it  
 25 in the prior art isn't enough to necessarily get you out of

1 the woods in Section 101. There is something else that when  
2 we look at, we're talking about conventionality for Step 2,  
3 there is something else more than just newness of an idea  
4 that we are focused on.

5 MS. SHANBERG: Yes.

6 CHIEF JUDGE STARK: What do you think it is?

7 MS. SHANBERG: Whether it is more or less, it is  
8 just different.

9 MAGISTRATE JUDGE BURKE: Different.

10 MS. SHANBERG: What Your Honor just said is  
11 exactly what the Federal Circuit said in the *Synopsys* case.  
12 The claims bring new abstract ideas to a claim for an  
13 abstract idea.

14 So what do I think conventionality is?

15 We know conventional isn't the presence or  
16 absence of something in the prior art. *Berkheimer* tells me  
17 that I can't say something conventional because it existed  
18 in the prior art.

19 Similarly, you can't prove something was  
20 non-conventional because it wasn't in a particular group of  
21 prior art.

22 So what does conventionality mean if it doesn't  
23 mean those things?

24 As Your Honor suggested in the prior  
25 questioning, it means a -- it is very hard to say what it

1 means without reference to all of these different cases that  
2 seek to, themselves, interpret conventionality. But I think  
3 the goal is probably the best way to look at it, which is  
4 that the goal of identifying what is and what is not  
5 conventional is to make sure that you don't have a patent on  
6 an abstract idea itself.

7 MAGISTRATE JUDGE BURKE: Right. When the  
8 Supreme Court says you have an abstract idea, it's not  
9 enough just to say abstract idea on a computer. Like the  
10 computer part, even though a computer is a non-idea type  
11 thing, it is a real world thing, that is not enough.

12 There is a reason why the Supreme Court was  
13 saying it is not enough. It is not enough just to lump a  
14 computer on to abstract idea, because it really is still  
15 just the abstract idea that is at issue. How come, and  
16 to the extent you go beyond just a computer, is it about  
17 specificity, narrowness, concreteness, or what?

18 MS. SHANBERG: I think there are a number of  
19 different ways to have an obviously ineligible patent claim.  
20 They're going to have specificity as to how things are done.  
21 They're not going to be purely functional claims. They are  
22 going to have something concrete about them. And if you are  
23 really being true to what we're seeing out of the Federal  
24 Circuit these days, they are going to actually improve the  
25 functionality of a computer or a computer component. That

1 is the common thread that you see throughout all of the  
2 eligible claims. You see that level of specificity, and  
3 you see that improvement in the way that computers operate.

4 CHIEF JUDGE STARK: Assume for the sake of  
5 argument, if we knew that a particular claim limitation did  
6 not exist in any prior art, not just the prior art in front  
7 of an Examiner, but we just know it is not out there, was  
8 not out there at the time, doesn't it follow that that  
9 limitation can't be found under *Alice* Step 2 to be  
10 conventional, routine, well understood?

11 MS. SHANBERG: I think it depends on what it is.  
12 I have a really hard time coming up with that claim element.  
13 That concept that would be never before heard of. I mean  
14 something we all acknowledge when we're talking about  
15 Section 101 is that those things existed in some way, shape,  
16 or form before. So just the absence of something in prior  
17 art references, I can see that being a compelling point as  
18 to conventionality, but I think it is hard to imagine a  
19 situation in which it would actually exist.

20 CHIEF JUDGE STARK: All right. Is there anybody  
21 else on this relationship?

22 MR. BONELLA: Your Honor, Michael Bonella from  
23 Condo Roccia for Mapillary.

24 I want to answer your question, if I could, the  
25 best I can, the best I understand the case law that we have

1 in front of us.

2 You can have a situation where you have  
3 something that is new that is not in the prior art, yet it  
4 is conventional. I think that you pointed out that you have  
5 computers. Computers operate. We know computers operate.  
6 They have memory, they have processors. There are a lot  
7 things the computers can do, and they can adapt to new  
8 things.

9 So we see in the case law that if you collect  
10 and save data, that is not patentable under Section 101.  
11 However, you can think about a lot of scenarios where you  
12 might have some data that didn't exist before. What are you  
13 going to do? You can put it into a computer, collect it,  
14 and save it.

15 That is not a patentable idea. It's maybe novel  
16 because the data didn't exist before, so you can write a  
17 claim limitation that says save new data. It's novel, can't  
18 find it in the prior art, but there is nothing you did to  
19 the computer to improve the functionality. There is nothing  
20 that wasn't routine about what they did. They just took the  
21 data and inputted it into the computer and saved it.

22 Just like with the whole Internet world; right?  
23 If we go back like 15 years, we didn't have the Internet  
24 patents, and you had all these patents that took concepts  
25 that were kind of known, if you would, but they weren't

1 necessarily in the prior art. And when people took known  
 2 concepts and put them on the Internet, like contracting,  
 3 right? And you put that on the Internet. When the Patent  
 4 Examiner does his search, he can't find it because people  
 5 weren't patenting those things. So it was new in the sense  
 6 of patent law, but was it anything that wasn't conventional,  
 7 was it anything that wasn't routine? It wasn't because you  
 8 were taking known concepts, sticking them on a computer.  
 9 There wasn't anything that wasn't nonroutine about that.  
 10 That is something a programmer could do.

11 So the whole 101 case law in the context of the  
 12 computer, I think as it was pointed out, looking at, I was  
 13 reading the cases, trying to make sense of them before I  
 14 came here today, and if you read through all the Federal  
 15 Circuit cases, you can really group them into, on the  
 16 computer areas, two big buckets.

17 Now, in the one bucket, the computer is just  
 18 operating like a generic computer, and you are putting, it's  
 19 either collecting, it's saving, it is not really doing  
 20 anything different.

21 And the other bucket, if you really get into  
 22 the facts of each case, you really dive into it, there is  
 23 something different about the way the computer is operating.  
 24 It's changing the functionality of the computer, whether it  
 25 was like the *Finjan* case where they're changing the way the

1 security of the computer operated, or if you are looking at  
 2 the *Visual Memory* case that came out, it changed the way the  
 3 processor interacted with memory to make it more efficient.

4 I think you also have the standpoint that you  
 5 have to look at the evidence. There is like a little bit of  
 6 a procedural aspect of it because the Supreme Court, the  
 7 Federal Circuit directed us to kind of, we need to look at  
 8 the patent. I think you've asked several times today where  
 9 in the patent is the story about what the problem was and  
 10 what you invented? Where is that?

11 That is incumbent upon the patentee to put that  
 12 there so we know what that is. So we can tell what did you  
 13 do? What was different? And it is not there. So it is a  
 14 little bit of a procedural aspect of it, too.

15 So I hope that helps, Your Honor.

16 CHIEF JUDGE STARK: Yes.

17 MAGISTRATE JUDGE BURKE: I guess, can I ask you,  
 18 before you sit down, you are talking about how you see the  
 19 cases, the Fed Circuit cases where you have it articulated  
 20 how the technology, so the computer technology is doing  
 21 something different. Well, those are the ones that tend to  
 22 get over the bar.

23 MR. BONELLA: Correct.

24 MAGISTRATE JUDGE BURKE: The different part of  
 25 that, it's not about novelty; right? Because you just said

1 you can have a new idea, maybe no one happened to be doing  
 2 hedging on a computer because no one would try, it was new  
 3 in that sense, but not still seen as an abstract idea.

4 But the different part is not getting the  
 5 novelty in your mind, it's getting to what is the different  
 6 matters in the computer world, not because it's new but  
 7 because it is sufficiently, what --

8 MR. BONELLA: Sufficiently --

9 MAGISTRATE JUDGE BURKE: -- specifically an idea?

10 MR. BONELLA: Well, there is a specific  
 11 component to that. Certainly, the Federal Circuit cases  
 12 are focusing on the how. So specific, so that is a very  
 13 important part: Is the "how" there? Do you specifically  
 14 claim? Is it just under a generalization level? Then on  
 15 the "how," are you improving the functionality of the  
 16 computer? Is the computer doing something different? Is it  
 17 operating in a different way? And how is that manifesting  
 18 itself?

19 Like what was the *MCR* case, I think it was with  
 20 the lip syncing, and they had that. There were specific  
 21 rules in the claim, and that is what the Federal Circuit  
 22 relied on because it said here is the rules, here is the  
 23 how. And that is the why.

24 MAGISTRATE JUDGE BURKE: When I know we're  
 25 looking for improving the functionality, but why are we

1 looking for it, vis-à-vis 101, right? Why are we looking  
 2 for the improvement? We're not looking for the improvement  
 3 solely for novelty purposes. In 101, which is are we  
 4 patenting an idea alone, it seems like we're looking for  
 5 the improvement for another reason.

6 MR. BONELLA: Right.

7 MAGISTRATE JUDGE BURKE: The reason is?

8 MR. BONELLA: The second prong of the test  
 9 requires us to look for technical improvement beyond the  
 10 abstract idea; right? So it's saying to us, okay, there is  
 11 an abstract idea in this claim. Is there anything more in  
 12 the claim, the claim itself? Does it have a limitation that  
 13 takes it out of this abstract idea and makes it is more  
 14 concrete? Is the "how" there? Is the specificity there?  
 15 Is there something that shows this isn't just routine  
 16 operation of a computer that we inputted new data into a  
 17 computer? Is there something more specific there?

18 So does that answer your question?

19 MAGISTRATE JUDGE BURKE: Well ... (Laughter.)

20 CHIEF JUDGE STARK: It's a good try. All right.

21 Thank you.

22 Mr. May, do you want to respond?

23 MR. MAY: Yes. I will be extremely brief, Your  
 24 Honor.

25 I think the question that we're all trying to

1 kind of wrap our arms around here is, is the limitation that  
2 is completely absent from the prior art a new concept, or a  
3 new structure?

4 If it's a new structure, then I think you cannot  
5 get past *Allice* Step 2 at that point because the question  
6 is whether or not that new structure is well understood,  
7 routine, and conventional. But if we're just talking about  
8 a concept, that is something where potentially the Court  
9 could say, well, this concept is perfectly conventional and  
10 routine, so I think that may be the question that we're all  
11 trying to grapple with.

12 CHIEF JUDGE STARK: Okay. Thank you.

13 Before we let everyone go for lunch, one more  
14 general question.

15 This new PTO guidance that came up at least once  
16 in one of the arguments, does anybody have anything they  
17 want to say about whether that is something I should be  
18 considering or not? Is it helpful, is it not helpful, or  
19 does no one want to address it, which is fine, too.

20 All right. At least we have at least one taker.

21 MR. MASSAND: I mean I'll just say, Your Honor.

22 CHIEF JUDGE STARK: Just for the record.

23 MR. MASSAND: This is Mr. Massand for Location  
24 Based Services.

25 This is really kind of specific to our case. I

1 mean I think that with respect to practical applications,  
2 and something that sort of came up a little bit earlier  
3 about whether or not the patent had, at least in the case  
4 I'm arguing, identifies a problem at Figure 2, or not  
5 Figure 2, the discussion of Figure 2 at column 5 shows some  
6 practical applications. And I would agree not in very, very  
7 specific detail, it does have at least a couple of sentences  
8 that relate to the prong of prior art.

9 CHIEF JUDGE STARK: I guess implicitly, you  
10 think it's fair for me to consider that at least on your  
11 analysis, if an Examiner was applying the PTO's new  
12 guidance, you think you would prevail at Step 2(a), I guess.

13 MR. MASSAND: I think if he is searching for a  
14 practical application, that is there.

15 CHIEF JUDGE STARK: Okay. Do you want to  
16 respond at all?

17 MR. POPOVSKI: Your Honor, Lew Popovski on  
18 behalf of Sony.

19 So I think I answered a little bit of this  
20 question earlier, and someone else chimed in and said the  
21 Court is the final arbiter of whether a patent is valid or  
22 not, so what the Examiner does may influence and may inform  
23 the decision but I don't think the answer stops at the  
24 Patent Office.

25 CHIEF JUDGE STARK: Thank you. Anybody else?

1 You are back.

2 MR. BONELLA: Thank you, Your Honor. Michael  
3 Bonella on behalf of Mapillary.

4 The one point of the guidelines is they're a  
5 little bit interpretation of the law but they can't change  
6 the law that guides us here today.

7 The Federal Circuit has made, at least as it  
8 applies to the *LBS* case, that collecting and saving data is  
9 not anything new, and that is all that is in the claim is  
10 collecting and saving data. So the guidelines I think  
11 really have no affect on the outcome of our case.

12 CHIEF JUDGE STARK: Okay. Do you feel you want  
13 to respond to that?

14 MR. MASSAND: May I?

15 THE COURT: Sure.

16 MR. MASSAND: Mr. Bonella raised a few other  
17 points that I don't know that I would agree with entirely  
18 in his earlier argument, but I think he was indicating  
19 about the improvement to a functionality of the computer  
20 requiring. You know, the way that he describes it seems to  
21 me wouldn't include, for example, the invention in *DDR* which  
22 was held to be patent eligible. There, it was simply a  
23 software invention, right?

24 Similarly with the *Enfish*, certain things, new  
25 type of data structure, new type of table or something along

1 those lines can provide you with that inventive -- something  
2 that is patentable.

3 As far as where your original questions about  
4 the interplay between 101 and 102 goes, I think that that  
5 is really more about kind of whether or not there is an  
6 inventive step that gives you that something more, that  
7 whether or not that "something more" is something well known  
8 or not. That can be a new data structure, a new format of  
9 data or something along those lines; and that is what I  
10 think we have claimed in claim 6.

11 CHIEF JUDGE STARK: Thank you. All right. So  
12 we are going to take a break now. Everyone is free until  
13 4:00 o'clock. But please do make sure that every party at  
14 least is represented at 4:00 o'clock. There may be more  
15 questions. There may be more that we have to say. Whatever  
16 it is, we plan to be done no later than 5:00. But please be  
17 here at 4:00 o'clock, and get some lunch.

18 We will be in recess. Thank you.

19 (Recess taken at 1:15 p.m.)

20 \* \* \*

21 (Proceedings reconvened at 4:05 p.m.)

22 CHIEF JUDGE STARK: Have a seat, please.

23 So you will probably be happy I have no further  
24 questions, so you're all off the hook, but you will be less  
25 happy when I tell you I have a lot to say.

1 I'm going to rule on all of the motions that  
 2 were argued today. I will not be issuing written opinions  
 3 in any of the cases on the motions that were argued today,  
 4 but I want to emphasize before I get into the rulings that  
 5 I hope nobody will make any mistake about this. We have  
 6 followed, I assure you, a full and thorough process before  
 7 I made my decisions.

8 Obviously, there was full briefing on all the  
 9 motions, then there was the checklist letters which we  
 10 carefully considered. There was extensive oral argument  
 11 today. There were two judges that looked at everything.  
 12 And there were a lot of law clerks over the course of the  
 13 day. You may have counted, there have been five law clerks  
 14 that have helped Judge Burke and myself on these motions.  
 15 And we spent a lot of time together, not just today but  
 16 leading up to today.

17 So really the only thing that I haven't done is  
 18 take the time to write an opinion, but I have taken the time  
 19 with the assistance of all of these folks to try to organize  
 20 my thoughts and articulate the basis for my decisions.

21 So even though I am ruling from the bench and  
 22 not writing an opinion, I hope it won't be mistakenly  
 23 thought that we haven't put the time and the effort and the  
 24 thought into reaching these decisions.

25 One of the reasons that I am going ahead and

1 just ruling on these motions is related to one of the points  
 2 I have tried to make this morning. This is an effort to  
 3 deal with the fact that because there are so many 101  
 4 motions out there, it follows understandably that we're  
 5 getting so many 101 opinions from the Federal Circuit. My  
 6 team here did some research and by our rough calculations  
 7 over the last two years, the Federal Circuit has issued  
 8 roughly two opinions each month dealing with 101 issues, and  
 9 that doesn't count Rule 36 affirmances, so that actually  
 10 understates the amount of authority and guidance we get from  
 11 the Federal Circuit on 101 issues.

12 So they're issuing opinions on 101 at a rate of  
 13 around twice a month. And between Judge Burke and myself,  
 14 it turns out we're issuing opinions at the rate of about  
 15 one a month, but it is taking us on average two months after  
 16 argument to get our opinion out, and we usually do have  
 17 argument.

18 So if I did the math correctly, I think that  
 19 means on average about four new Federal Circuit opinions are  
 20 coming out in that lag time between argument and written  
 21 decision, and that is challenging in terms of subsequent  
 22 authority, et cetera.

23 So I don't want that to happen on the motions  
 24 that were argued today. I have decided what to do, and I'm  
 25 going to just tell you.

1 I am not going to read into the record my  
 2 understanding of Section 101 law. I have a legal standard  
 3 section that I include sometimes with a small amount of  
 4 modification in essentially all of my Section 101 decisions.  
 5 I hereby adopt the entirety of that legal standard section  
 6 I reference specifically. I'm documenting by reference  
 7 the discussion section of 101 law that can be found in my  
 8 September 28th 2018 opinion in the *SSMP* case, 2018 WL 4674572,  
 9 at pages \*2 to 5.

10 All right. Let's get to the cases.

11 So first is the MOAEC cases. That is what was  
 12 argued first this morning.

13 Defendants Deezer, SoundCloud, and Spotify moved  
 14 under Rule 12(b)(6) to dismiss complaints filed by plaintiff  
 15 MOAEC.

16 My ruling today relates only to defendants'  
 17 contention that the claims of the patent, of the  
 18 patent-in-suit, it's the '539 patent that they claim patent  
 19 ineligible subject matter under Section 101.

20 The defendants had originally challenged the  
 21 sufficiency of the pleadings under *Iqbal* and *Twombly*, but  
 22 they have withdrawn that portion of their challenge.

23 Applying the law as I understand it, and having  
 24 carefully reviewed the entire record and heard oral  
 25 argument, I agree with the defendants. The asserted claims

1 are directed to patent ineligible subject matter, so I will  
 2 be granting the motions in the MOAEC cases.

3 I start with claim 1 of the '539 patent. *Alice*  
 4 Step 1, I find that claim 1 is directed to the abstract idea  
 5 of accessing music by category. The crux of claim 1 is the  
 6 ability to use a graphical user interface or GUI or gooey  
 7 (phonetic) to display a list of music that matches a certain  
 8 category. The use of a flag to find music in a certain  
 9 category, whether by genre, artist, or ownership is an  
 10 abstract idea.

11 In this respect, the Court agrees with the  
 12 defendants' comparison of the present case to the *Affinity*  
 13 *Labs v Amazon* case of the Federal Circuit in 2016.

14 MOAEC's argument that claim 1 satisfies Step 1  
 15 because it recites specific hardware lacks merit. The claim  
 16 that recites hardware may nevertheless be directed to an  
 17 abstract idea. For example, the claims in *Alice* recited  
 18 hardware, such as a data processing system, including a data  
 19 storage unit and a computer.

20 MOAEC also argues that the claims satisfy Step 1  
 21 because it solves a problem that is unique to digitized  
 22 music, namely, copyright infringement and unauthorized use  
 23 of music.

24 MOAEC's argument, though, lacks support in the  
 25 intrinsic record. The ownership category flag, which seems

1 to be where the plaintiff finds this concept in the patent,  
 2 didn't appear in the claims until after the reexamination.  
 3 The specification says very little about the ownership  
 4 category flag. The specification states that an ownership  
 5 category flag allows users to tell which songs are on the  
 6 user's computer. That is what the term is doing in the  
 7 claims.

8 The claim limitation added in the reexam says,  
 9 "wherein one of the category flags comprises an ownership  
 10 category flag that indicates which music selections from the  
 11 list of all music selections are currently resident in the  
 12 storage device."

13 The specification does not, however, describe  
 14 an ownership category flag as providing the sort of access  
 15 control mechanism MOAEC suggests.

16 The specification does describe a method for  
 17 locking songs to prevent unauthorized playback, but this is  
 18 achieved using a serial number and an encryption key, not an  
 19 ownership category flag.

20 It may be that plaintiff thinks that preventing  
 21 copyright infringement is a benefit of preventing copyright  
 22 infringement, but that purported benefit of the invention is  
 23 captured in the claims through the proper construction of  
 24 some disputed claim term, but plaintiff has not said so  
 25 neither in the briefs nor in the checklist in which I

1 specifically asked for the parties to identify any claim  
 2 terms they thought were in dispute and how those disputes  
 3 might affect the outcome on the 101 motion. Nor has  
 4 plaintiff proposed a construction of any claim term that  
 5 would accomplish what the plaintiff says this claim is about.

6 I sensed today, maybe the plaintiff is  
 7 suggesting there is a dispute about what ownership means in  
 8 the context of the claim, but if so, this is too little/too  
 9 late. The plaintiff has not even offered a construction of  
 10 "ownership."

11 Instead, plaintiff expressly took the view in  
 12 the checklist response that claim construction is not  
 13 necessary before resolving the Rule 12 motion and said that  
 14 to the extent I'm even considering claim construction, I  
 15 should document the claim construction of "category flag"  
 16 that was adopted in the earlier *MOAEC Inc.* case, and I  
 17 hereby do so for purposes of the motion. I have adopted  
 18 the construction of that other court of "category flag,"  
 19 but that adoption doesn't help the plaintiff.

20 The term construed there again was "category  
 21 flag" and that construction doesn't reference ownership or  
 22 copyright infringement.

23 I find that the plaintiff has waived the  
 24 opportunities I have provided to make the claim construction  
 25 argument it seems belatedly to suggest that it may want to

1 make.

2 Moreover, even if they were making that  
 3 argument, there appears to be a lack of intrinsic support  
 4 for a construction of the "ownership category flag" term, or  
 5 even of the "ownership" term that would get the concepts of  
 6 protection against copyright infringement into the claims.

7 There is no specification support, and I don't  
 8 even think there is any prosecution history support even in  
 9 the reexamination history where this limitation was added to  
 10 the claims. I don't see any support in any of that for a  
 11 construction of "ownership" or "ownership category flag"  
 12 that would bring these concepts, the purported invention  
 13 into the claims.

14 I would not, even for purposes of a Rule 12  
 15 motion, assume an implausible claim construction. And so  
 16 we don't even have a proposed construction. If we did, my  
 17 sense is it would be implausible and would lack intrinsic  
 18 support.

19 Moving to Step 2, I find that claim 1 lacks an  
 20 inventive concept. The patent makes clear that the technical  
 21 components recited are conventional, well known, and generic.  
 22 It repeatedly makes that clear. As in *Affinity Labs* that  
 23 claims functional limitations here, the use of category flags  
 24 to look up music cannot supply the inventive concept. MOAEC's  
 25 analogy to the *BASCOM* decision fails because here, unlike

1 in *BASCOM*, the specification establishes that the recited  
 2 technical components and their combination are conventional.

3 Even assuming that the ownership category flag  
 4 itself is novel, which seems suggested arguably at least by  
 5 the prosecution history of the reexam, the claim still fails  
 6 Step 2 because the ownership category flag is directed to  
 7 the abstract idea, so it can't supply the inventive concept.

8 The Court further concludes that there is  
 9 nothing in the combination of the overwhelmingly conventional  
 10 components that is itself non-conventional or novel and,  
 11 importantly, nothing in the patent says that the combination  
 12 is novel.

13 MOAEC's pleadings do not create a factual  
 14 issue that would preclude dismissal. Under *Twombly*, *Iqbal*,  
 15 *Berkheimer* pleadings, as to indefiniteness, the claims are  
 16 not entitled to the assumption of truth where there are  
 17 conclusory or contradictory intrinsic evidence.

18 Once I subtract such elements from the -- I'm  
 19 sorry. Once I subtract such allegations from the complaint,  
 20 MOAEC's factual contentions taken as true do not provide  
 21 an inventive concept for the reasons discussed. Therefore,  
 22 claim 1 of the '539 patent is invalid because it claims  
 23 subject matter ineligible under Section 101.

24 Let me briefly talk about the other claims that  
 25 are at issue in the motion. MOAEC admits that claims 1, 6,

1 and 15 of the '539 patent are representative. MOAEC also  
2 says I can just address claims 1 and 15. And then MOAEC  
3 says, as I'd understand it, that claim 15 can't survive  
4 if claim 1 doesn't. And claim 1 has not survived, so it  
5 follows that claim 15 and all the rest of the asserted  
6 claims do not survive.

7 Plaintiff never made any articulable argument as  
8 to why any claim should survive if claim 1 does not.

9 For what it is worth, claim 15 is directed to  
10 the computer readable medium, but it contains essentially  
11 the same limitations as claim 1.

12 Claim 15 also contains category markers, but I  
13 fail to see how this makes a difference, and the plaintiff  
14 doesn't argue that it does.

15 Just briefly, there has been mention of claim 6.  
16 It depends from claim 1. It relates to the use of a play  
17 list that can be used to play music in a predetermined  
18 order. I find that the use of a play list to organize  
19 music in the context of this patent is an abstract idea,  
20 and nothing in claim 6 remedies the deficiencies I have  
21 identified in claim 1.

22 Having reviewed the rest of the '539 patent  
23 claims that are at issue in the motion, including all of the  
24 asserted claims, which are 1, 2, 6, 7, 9, 15, 16, 19 to 21,  
25 24, and also having reviewed the non-asserted claims, I find

1 that none of them are patentable under Section 101.

2 I further find that plaintiff has waived the  
3 opportunity to identify and argue specific additional  
4 grounds for finding the eligibility of any claims other than  
5 claim 1 by not articulating any such grounds in its briefing  
6 or today.

7 Coming to the motion for leave to amend, I will  
8 grant the motion for leave to amend as MOAEC requests  
9 because defendants do not oppose it. Both sides agree that  
10 for purposes of appeal, which may be coming, it would  
11 helpful to have a more complete record by filing the amended  
12 complaint. So simply for that purpose alone, I'm granting  
13 the motion for leave to file an amended complaint.

14 Nothing in the amended complaint cures the  
15 deficiencies that I identified with respect to Section 101  
16 reasoning that I have just addressed somewhat at length.  
17 And plaintiff concedes that the amended complaint does  
18 nothing to address those deficiencies.

19 In fact, in my view, the proposed amendment is  
20 futile, and I would deny it but for the fact that the  
21 parties have agreed that I should grant it solely for the  
22 purposes of completing the record.

23 I direct that the parties in the MOAEC cases  
24 meet and confer and a week from today, file a status report  
25 advising me as to what, if anything, there is to do in any

1 of these cases and of any order that you wish for me to  
2 consider entering.

3 Turning now to the second set of cases that  
4 were argued, the Location Based cases or the LBS cases. The  
5 defendants here, Sony Electronics, Fantastic Fox, and  
6 Mapillary have each moved to dismiss the complaints filed by  
7 Location Based Services, LBS, for failure to state a claim  
8 under Rule 12(b)(6) on the basis of Section 101.

9 Having conducted the same thorough and careful  
10 analysis that I have already described, I find that I agree  
11 with the defendants and hereby find that claim 6 of the  
12 '733 patent claims ineligible subject matter. I will grant  
13 defendants' motions to dismiss.

14 My decision concerns only claim 6. Only claim 6  
15 is asserted against defendants Fantastic Fox and Mapillary;  
16 and plaintiff made clear today that it is asserting only  
17 claim 6 against Sony as well.

18 I recognize that Sony's motion is directed to  
19 all of the claims of the '733 patent and that Sony is asking  
20 for essentially a declaratory judgment of non-patentability  
21 of the unasserted claims.

22 It may be that I should or even have to address  
23 those additional claims, but I do not have to do so today,  
24 and I am not doing so today. I am hopeful that I won't have  
25 to do so at all, but with you all as well, I'm ordering that

1 you meet and confer and submit a joint status report a week  
2 from today, and in it address among anything else you wish,  
3 whether I do have to go on and resolve the patentability of  
4 claims other than claim 6.

5 With respect to claim 6, turning to Step 1 of  
6 *Alice*, I find that the asserted claim is directed to the  
7 abstract idea of collection, organization, manipulation, and  
8 display of data.

9 The Court had considered the arguments plaintiff  
10 has made against this conclusion both in its briefing and in  
11 argument today and none of these arguments has merit.

12 Claim 6 may be likened to pinning pictures on a  
13 map or keeping them in a chronological photo album. Even  
14 the claimed metadata is a computerized version of writing  
15 the location and/or time on the back of a photograph.

16 At bottom, the claim is just a collection,  
17 organization, manipulation, and display of data, and does  
18 not rise above the realm of abstraction.

19 The claim in this way is comparable to the ones  
20 considered in the *Move Inc. v Real Estate Alliance* case by the  
21 Federal Circuit. There, the claim was directed to a method  
22 of searching real estate property by identifying a region,  
23 selecting an inner region, zooming in on the selected region,  
24 and cross referencing a real estate database to pictorially  
25 display available properties in the region.

1 The Federal Circuit found there, as I find here,  
2 that the focus of the claim is not on any technological  
3 advancement but rather on the performance of an abstract  
4 idea for which computers are invoked merely as a tool.

5 Plaintiffs attempts to liken this case to  
6 *Enfish* are unpersuasive. In *Enfish*, the invention of a  
7 self-referencing data table improved the functioning of  
8 the computer itself by enabling faster searching, more  
9 efficient storage of data, and better flexibility in  
10 configuring the database.

11 Here, claim 6 merely uses a known table with  
12 known table entries to display pictures.

13 Further, in *Enfish*, the specification contained  
14 an explanation about how the claimed table was an  
15 improvement on computer technology. There is no similar  
16 explanation here, nor is the purported improvement captured  
17 in the claims.

18 At Step 2 of *Alice*, the asserted claim lacks  
19 an inventive concept. Plaintiff does not allege that the  
20 patent is the first to claim metadata tables or to associate  
21 location, time or image history data to digital photographs.

22 Although plaintiff argued in its briefing that  
23 the inventive concept resides in the patents organizing  
24 pictures by both location and time, claim 6 is not so  
25 limited. It recites organization by location, time, and/or

1 image history.

2 The patent repeatedly observes that the  
3 purported invention can be implemented with generic computer  
4 components. It does not teach any other way. Nor does it  
5 teach any non-conventional or novel ordered combination.

6 Today, at argument, plaintiff emphasized above  
7 all that the patent is about the data store configurable to  
8 store a table. The specification fails to discuss those  
9 specifics that were discussed today in argument. Today's  
10 argument neither rises above abstraction, nor amounts to an  
11 inventive step.

12 Essentially I hear, and I think I understand  
13 plaintiff's argument, but I find that it is untethered to  
14 the patent that is in front of me. The patent itself does  
15 not identify the problem that plaintiff's counsel describes,  
16 nor does the patent itself describe how that problem is  
17 solved. Even at this early stage in this case, I can only  
18 find that plaintiff has failed to persuade me that these  
19 claims are directed to the improvement of computer  
20 functionality.

21 Based on my conclusions, any amendment would be  
22 futile. So I'm denying today's request for leave to amend  
23 the complaint. Therefore, I grant the defendants, Sony,  
24 Fantastic Fox, and Mapillary's motion to dismiss.

25 That leaves the third case, Search and Social or

1 SSMP. Here, the motion is the plaintiff's SSMP's motion for  
2 reconsideration.

3 This motion is denied. The motion is brought  
4 pursuant to Local Rule 7.1.5 which indicates that a motion  
5 for reconsideration should be granted only sparingly. As is  
6 well settled, these types of motions are granted only if the  
7 Court has patently misunderstood a party, made a decision  
8 outside the adversarial issues presented by the parties or  
9 made an error not of reasoning but of apprehension.  
10 Generally, a motion for reconsideration is granted only if  
11 the movant can show at least one of the following:

12 That there has been an intervening change  
13 in controlling law, the availability of new evidence not  
14 available when the Court made its decision, or a need to  
15 correct a clear error of law or fact to prevent manifest  
16 injustice.

17 Plaintiff has failed to persuade me that any of  
18 these circumstances are present.

19 The motion is directed to the portion of my  
20 September 28th opinion that granted defendants' motion to  
21 dismiss the asserted claims of the '828 patent for lack of  
22 patentable subject matter. My memorandum opinion concluded  
23 that the asserted claims of the '828 patent are directed to  
24 the abstract idea of providing news items to a subscriber  
25 who is part of a group. At Step 2 of *Alice*, I concluded

1 that providing news via a news ticker on a computer, in the  
2 context of a social network environment without more, does  
3 not amount to patent eligible application of an abstract idea.

4 The specification, as I've pointed out,  
5 acknowledges that the relevant hardware components and  
6 software were known at the time of the invention.

7 In its motion for reconsideration, SSMP first  
8 asserts that a recent change in controlling law confirms  
9 that the claims covering user interfaces are not directed  
10 to abstract ideas. For this contention, SSMP points  
11 principally to *Core Wireless* and *Data Engine*, the two  
12 decisions from the Federal Circuit.

13 Initially, I'll note *Core Wireless* was issued  
14 many months, I believe eight months before the Court issued  
15 a September 28th opinion. Although that opinion, from the  
16 Federal Circuit, came out after briefing on the motion in  
17 front of me was closed, it was permissible and available  
18 for either party to direct the Court's attention to *Core  
19 Wireless*, for instance, through a notice of supplemental  
20 authority, but the plaintiff notably did not do so.

21 The availability of *Core Wireless* before the  
22 Court ruled on the earlier motion means that *Core Wireless*  
23 cannot be a change in the controlling law of the type  
24 contemplated by our local rule.

25 The same goes for *Aatrix* and *Berkheimer* which

1 are also bases for the motion for reconsideration. Those  
 2 two decisions were also issued by the Federal Circuit many  
 3 months before this Court issued its opinion on the earlier  
 4 motion. Indeed, both *Aatrix* and *Berkheimer* are cited in the  
 5 decision for which plaintiffs are seeking reconsideration  
 6 today. So *Aatrix* and *Berkheimer*, too, cannot be a change  
 7 in the controlling law simply due to their timing.

8 Moreover, putting aside the timing question,  
 9 none of the four cases on which the plaintiff relies are  
 10 actually a change in the law. They do not constitute a  
 11 change in controlling Section 101 law. *Core Wireless* and  
 12 *Data Engine* are simply applications of *Alice*. *Aatrix* and  
 13 *Berkheimer* perhaps place new emphasis on the reality that  
 14 *Alice* Step 2 can involve factual disputes, but that too is  
 15 not a change in the law.

16 I do want to talk just briefly a little more  
 17 about *Data Engine*. That one does I understand at least have  
 18 the virtue of coming after this Court's decision was issued  
 19 on the underlying motion, so it's not untimely in that sense  
 20 but it's not a change in the controlling law.

21 Instead, *Data Engine*, like *Core Wireless*, is an  
 22 application of *Alice*, and both of those cases involved  
 23 specifications that taught that the claimed inventions were  
 24 specific solutions to then existing technological problems.  
 25 And the claims found in those cases to be found patent

1 eligible recited these specific improvements.

2 Here, by contrast, the written description does  
 3 not itself refer to a social network and only briefly  
 4 discusses a ticker as an optional feature that can be added  
 5 on to a tool bar. And the claims recite generic components  
 6 described at a very high level of generality.

7 I have considered SSMP's remaining argument and  
 8 find that they, too, lack merit. I don't see a factual  
 9 dispute that could be resolved in a manner supporting a  
 10 conclusion that these claims survive *Alice* Step 2.

11 I say this having looked again at paragraph 13  
 12 to 23 of the complaint where plaintiffs say there is a basis  
 13 for a factual dispute that could be resolved in their favor  
 14 if we had further proceedings on *Alice* Step 2.

15 SSMP also contends that I erred in not  
 16 considering the materials attached to the answering brief on  
 17 the underlying motion. Those materials, of course, are not  
 18 incorporated in the complaint, nor cited in it.

19 Beyond that, I just, I don't think it was error  
 20 and certainly not clear error leading to manifest injustice  
 21 for me not to give further consideration to those attachments  
 22 to the answering brief.

23 In any case, I have looked again at those  
 24 materials. Of course, it is undisputed they're all extrinsic.  
 25 None of those materials directly relate to the patent-in-suit.

1 And given my analysis of the patent-in-suit, none of this  
 2 extrinsic evidence I find can cure the deficiencies that are  
 3 intrinsic to the patent.

4 SSMP also makes an argument about the recent  
 5 IPR petition. The IPR petition I'm told does not present  
 6 an anticipation argument but instead points to multiple  
 7 references in seeking to invalidate the patent-in-suit. I  
 8 don't see how this in any way detracts from Court's analysis  
 9 or creates a meritorious basis for reconsideration of my  
 10 earlier decision.

11 Even if it were true that defendants were  
 12 conceding that the patent-in-suit is not invalid due to  
 13 anticipation, and I don't understand them to actually be  
 14 conceding that, but even if they did concede no anticipation,  
 15 it would not follow that the patent necessarily survives  
 16 Section 101 scrutiny, nor would it even necessarily follow  
 17 that the patent survives Step 2 of *Alice*.

18 Finally, I am denying SSMP's request to file  
 19 an amended complaint addressing the purported deficiencies  
 20 relating to the '828 patents. SSMP does not attach any such  
 21 proposed amended complaint to its motion, and it is not  
 22 clear to me that allowing SSMP to amend its complaint at  
 23 this point, and then a motion for reconsideration would be  
 24 fair or would be timely or not unduly prejudicial, but  
 25 putting that all aside, it would be futile in light of the

1 conclusions I reached here. An amendment can not overcome  
 2 what is lacking in the intrinsic record.

3 Since SSMP has failed to show that  
 4 reconsideration is warranted, this motion is denied. There  
 5 is the other patent in that case, and I know that case is  
 6 ongoing, but it will be helpful to me for the parties to  
 7 submit a week from today a joint status report, tell me  
 8 where that case is and what it is you think should happen  
 9 next.

10 So I have spoken for an awful long time. You  
 11 might now wonder whether I would have been better off  
 12 writing opinions, but I'll say just a few more things and  
 13 then see if Judge Burke has anything to add.

14 As you will have noticed, I did find that all  
 15 three of the patents that were at issue today turned out to  
 16 be not patent eligible. And I have done that in all three  
 17 cases at the Rule 12 stage.

18 I would caution against reading anything into  
 19 that. To me, that is the luck of the draw. That is what  
 20 happened. These were, as I mentioned, and I think you know,  
 21 originally this hearing had five separate sets of cases and  
 22 more patents. Two of those cases went away. It turns out  
 23 that the three cases that got scheduled today happen to  
 24 involve patents that, when I looked carefully at them, I  
 25 thought could not survive Rule 101 analysis under current

1 law.

2 It absolutely does not follow that you should  
3 expect that I am going to invalidate every 101 or every  
4 patent I see on a 101 motion. I'm sure the same goes for  
5 Judge Burke. We look at each case on its own, applying the  
6 law to the facts and circumstances, considering of course  
7 all the arguments made and do our very best. That is what I  
8 have done. That is what I will continue to do.

9 It may be that I try to do another 101 day like  
10 this. If I do, and if any of you are involved in it, you  
11 should not assume that I have made some decision that these  
12 patents that I am scheduling for these days are going to be  
13 invalidated. That is just the luck of the draw and what was  
14 up on my docket for argument at this time. So I would again  
15 caution reading against any larger message in any of that.

16 Judge Burke, is there anything you would like to  
17 say?

18 MAGISTRATE JUDGE BURKE: No, thank you.

19 CHIEF JUDGE STARK: I do want to turn to counsel  
20 here in the front. Any -- not any comments or suggestions,  
21 but any questions? Anything particular about the ruling or  
22 what I'm looking for in the status report?

23 MR. MAY: No, Your Honor.

24 MS. SHANBERG: No, Your Honor. Thank you.

25 MR. POPOVSKI: No, Your Honor.

1 CHIEF JUDGE STARK: The record will note that  
2 all counsel said no, and that it is almost 5:00 o'clock, and  
3 hopefully that makes the weekend for some of you. It does  
4 for me.

5 Thank you all. It's been a very interesting day  
6 and helpful for me and Judge Burke. We will be in recess.

7 (Hearing ends at 4:46 p.m.)

8

9 I hereby certify the foregoing is a true and accurate  
10 transcript from my stenographic notes in the proceeding.

10

11 /s/ Brian P. Gaffigan  
12 Official Court Reporter  
13 U.S. District Court  
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