

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA
3 CV 07-1687 (JNE/JJG)

4 Timebase PTY Ltd., . September 23, 2010
5 . Plaintiff, Minneapolis, MN
6 vs. . Courtroom 12W
7 The Thomson Corporation, .
8 West Publishing Corporation . 9:30 a.m.
and West Services, Inc., .
9 Defendant.

10 TRANSCRIPT OF MARKMAN HEARING
11 BEFORE THE HONORABLE JOAN N. ERICKSEN
12 UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

THE COURT: Good morning. We're in recess.

All right. Please be seated. So, we're here for the Markman hearing. Counsel, do you want to tell me how you would propose to proceed? I've got my own ideas. I had kind of a claim-by-claim idea in mind, but.

MR. GROSS: Your Honor, David Gross at Faegre and Benson. We have been talking about this. In this case, there's a lot of claim terms and a lot of complexity, and they relate to each other. So we talked about it, and my typical experience in Markman hearings is to go claim by claim. We think that's pretty helpful for the Court.

In this particular instance, given that I may want to spend a lot of time on one claim term, and Mr. Hosteny may want to spend a short time, and we kind of went over it, and the two of us said we would jointly propose the Court for this one, that Mr. Hosteny go ahead and give his presentation, then I give mine, and then we have a back and forth afterwards if there's any clarification.

It is a little unusual, Your Honor, but given the complexity and our different approaches, we thought that would be best for the Court. So we're recommending that, Your Honor, but, of course, we'll do whatever the Court would like to do.

MR. HOSTENY: The only thing I have to add, Your

1 Honor, is that I think the independent claims have the
2 principle terms that I would like to discuss running through
3 essentially all of them in both patents.

4 THE COURT: Okay.

5 MR. HOSTENY: So I'm probably a little more tuned to
6 discuss individual terms that appear in the independent claims
7 rather than on a claim-by-claim basis, but I agree with
8 Mr. Gross. I think we can go back and forth on the claims as
9 necessary too.

10 THE COURT: All right. Well, let's do that.

11 MR. GROSS: What we're proposing, Your Honor, is
12 that Mr. Hosteny go for probably somewhere around an hour or
13 so, and then I will go for around a similar time, and then
14 we'll use the remaining time to clarify any issues that come
15 up, kind of respond to each other's specific arguments, if
16 that's all right with the Court.

17 Obviously, we will take a break at some point, and
18 maybe we want to take a break after Mr. Hosteny's presentation
19 or somewhere in the middle of mine, and that will be whatever
20 the Court tells us to do.

21 THE COURT: Okay.

22 MR. GROSS: Is that a plan, Your Honor?

23 THE COURT: Yep. Mr. Gross, you can go ahead and
24 sit down then. Mr. Hosteny, I had to relook at your name
25 because I can't read my court reporter's handwriting sometimes

1 and I said, "Joseph Hootenanny!"

2 MR. HOSTENY: There are many mispronunciations, Your
3 Honor.

4 THE COURT: Well, I'm looking forward to hearing
5 what you have to say.

6 MR. HOSTENY: It's a Bohemian name actually. Before
7 we begin, I would like to introduce Mr. Cunningham as our
8 local counsel.

9 MR. CUNNINGHAM: Good morning, Your Honor.

10 THE COURT: How are you?

11 MR. HOSTENY: And also here is one of my partners,
12 Art Gasey.

13 MR. GASEY: Good morning, Your Honor.

14 MR. HOSTENY: And if I get in trouble, he'll pull me
15 out.

16 At any rate, we appreciate the Court giving us some
17 time to tell you about this. I hope that we can be of
18 assistance. I think we can.

19 I think our briefs are pretty good on the subject,
20 but I think the oral argument will, I hope, give you an idea
21 of what it is that the problem that the inventors faced, just
22 a couple of minutes of background on the inventors, and an
23 idea of how the technology is used because the claim
24 construction briefs can tend to be a little bit dry. They're
25 not the most exciting things to read in the world.

1 THE COURT: I read a lot of patents, and I was just
2 saying to somebody that this patent is written more like a
3 marketing piece than any other patent I've ever read. It's
4 gung-ho.

5 MR. HOSTENY: It is a bit different, because what
6 happened here was that -- let me just check my time and see
7 where I'm at -- the inventors are Australians. One of them is
8 German by birth, Christoph Schnelle, and he emigrated to
9 Australia in, oh, probably the mid 1980's. He's since been
10 deposed. We spent about a week in Australia in August doing
11 those depositions. Married a lady by the name of Abha
12 Lessing, and they are two of the named inventors. They
13 started a company that did a lot of scanning of documents
14 called Scan Text.

15 And then in the 1996 to 1997 time frame, they came
16 up with the idea that resulted in the patent that or the
17 patents that are here before the Court today. They filed in
18 Australia, and of course, that's why you'll see S instead of Z
19 in a lot of the words. And there's some different phraseology
20 and some different punctuation. They filed a provisional
21 patent application in Australia in January of 1977, pardon me,
22 1997, not 1977.

23 And then in order to meet the deadline, they filed
24 an international application in 1998. And then in June or
25 July, I'm sorry, it was July of 1999, '98, pardon me, they

1 filed the first patent application that resulted in the '592
2 patent. That's the older of the two patents that are before
3 the Court today.

4 THE COURT: Here's what I was looking at: When you
5 were talking about their funny spellings, and I can't believe
6 my eyes lit on this word in the patent. And I was reading it
7 at a time I didn't have a pencil in my hand, but anyway,
8 miraculously have found it. So tell me about this, "the first
9 aspect of the invention was to analysis the data," is that "to
10 analysis?" Is that some kind of an Australian --

11 MR. HOSTENY: Should be "analyze."

12 THE COURT: I thought maybe that's how they talked
13 in Australia.

14 MR. HOSTENY: No, should be "analyze." Sometimes
15 that gets caught in the certificate correction process, and it
16 probably was not here, should be "analyze" instead of
17 "analysis."

18 THE COURT: Just so you know I'm focusing on the
19 really important points.

20 MR. HOSTENY: Well, you're looking at the patent and
21 that's something that we're happy to hear, because it takes
22 some read-throughs to get an idea of what it's about. And I
23 think that's why the oral argument can help today. At any
24 rate, the '592 patent was filed July 1 of 1998. It issued in
25 2001. And there's the cover page, '592 patent, B1, system for

1 electronic publishing.

2 And then the inventors continued their activity.
3 They filed another patent application in October of 2000. And
4 that ultimately issued in 2007 as the '228 patent, which is
5 the other patent that's in the suit and is before the Court.

6 Now, one unusual thing about this is the '228 was
7 originally filed as a completely separate application. And
8 you'll see it has a different title on the slide that Art's
9 just pulled up, the Malt Web multi-axis viewing interface and
10 higher level scoping. MALT is the acronym that Timebase used
11 to refer multi-access layer technology. If we can, Your
12 Honor, we do have three extra copies. We've given copies,
13 paper copies of the PowerPoint. We have paper copies for the
14 Court as well --

15 THE COURT: Sure.

16 MR. HOSTENY: -- in case anything electronic goes
17 awry on us this morning. There are a few slides we prepared
18 that after we had bound this rest of this information.

19 At any rate, the '228 was originally --

20 THE COURT: All right.

21 MR. HOSTENY: The second patent the '228 was a
22 separate, an entirely separate '228 application. Ultimately,
23 what happened was it converted into a continuation in part.
24 You are probably familiar with that terminology from some of
25 your patent decisions. It just means a later application that

1 contains all of the text of an earlier patent and something
2 more.

3 So the '228 has in it all the text of the '592
4 patent, and then its own claims. So it is a continuation in
5 part of the '592. And the claims that were written in the
6 '228 patent, the original claims and the application process
7 were taken out, and another set of claims that were put in
8 that were based upon the specification that was brought in
9 from the '592 patent.

10 The bottom line is that what you have is two sets of
11 claims. One on the '228 patent, and one set of claims on the
12 '592 patent, a second set of claims on the '228 patent, all
13 based on the same specifications, the '592.

14 The subsequent history of the '592 is that right
15 after the lawsuit was filed here in about -- was it 2000?
16 Well, it was transferred here from Chicago. Shortly after
17 that transfer occurred, a re-examination was initiated by an
18 anonymous requester, and the case went into a stay while that
19 re-examination took place in the Patent Office. The
20 re-examination took about two years.

21 The next slide, the re-examination took about two
22 years, the result of the re-examination was that all of the
23 claims of the '592 patent were confirmed and several new
24 claims were added. So it came out completely intact with some
25 additional claims as shown on slide 4, patentability of claims

1 1 to 58 is confirmed, et cetera, et cetera. New claims 59,
2 61, are added.

3 At the time this was going on when this request for
4 re-examination was filed, the later of the two patents we're
5 talking about today, the '228 had been allowed but had not yet
6 issued. So Timebase's prosecution lawyers at Jones Day in
7 D.C. went to the Patent Office and said, "Patent Office, hold
8 that thing. Pull it from issue and wait. What we want to
9 do," Timebase said, "was give you the request for
10 re-examination so all of the new references that came up in
11 the request for re-examination of the '592 were considered in
12 the '228 as well. Ultimately, after the Patent Office
13 considered those, the '228 patent issued, and here we are
14 today. The stay was ultimately vacated, I think, in about May
15 of 2009 or so.

16 And the next slide just simply shows that both of
17 the patents have a priority date that stems back to that
18 original provisional application in January of 1997, filed by
19 Christoph Schnelle and Abha Lessing, and a third inventor,
20 Peter Mariani in Australia.

21 The next slide is just, this is probably old hat
22 stuff because we know you've got a number of Markman
23 decisions, but basically where we're at today is the first
24 step of the infringement to determination to determine the
25 scope of the claims.

1 We use sometimes an example on the next slide of a
2 simple claim. This comes from a Stanford law professor, so we
3 have it from a good source this example. It's, you know,
4 slices of bread. It describes, it claims what is described in
5 the next slide as a hamburger in the specification. And there
6 are some things that matter on this real simple example from
7 the standpoint of infringement. You can see that the claim
8 recites plurality, two or more slices of bread, a slice of
9 cheese. It doesn't say what kind. A piece of meat and a
10 vegetable. And the specification describes a bun, which is
11 two pieces of bread, a slice of cheese, lettuce, and tomato,
12 two vegetables, and a hamburger patty.

13 Now, if you have a claim or if you have an infringer
14 who comes out with what's described on the next slide, three
15 slices of bread instead of two, a particular kind of beef,
16 prime rib, a particular kind of cheese and a vegetable, you
17 have what's described there on slide 9.

18 And in slide 10, you can see that the accused
19 sandwich infringes. The extra bread doesn't matter. The fact
20 that the claim recites cheese and the infringer uses gouda
21 doesn't matter. The fact that the infringer uses prime rib
22 doesn't matter. The fact that the user may have more than --
23 may have only a single vegetable or arugula or multiple
24 vegetables doesn't matter, and the result is literal
25 infringement.

1 THE COURT: What if it was a means for satisfying
2 hunger?

3 MR. HOSTENY: Ha, that's when it gets interesting.
4 And we do have that issue in this case, which on the next
5 slide, one I've reproduced, each of the claims, each of the
6 patents has about four independent claims, and then all of
7 those independents have a series of dependent claims following
8 each of them, and there are both system and method claims in
9 the patents.

10 And one of the differences between the '592 and the
11 '228 is, as you'll see on this page right here, claim 1,
12 you'll see the preamble computer implemented system, and the
13 first element is a plurality of predefined portions. I'm not
14 going to read the whole thing.

15 A second is a plurality of linking means of a markup
16 language. So the claim construction issue that arises in this
17 case with respect to the '592 is whether linking means is
18 subject to 112, paragraph 6, or not. If it is subject to 112,
19 paragraph 6, then all the Court does at this point is
20 determine what the function is and determine the structure and
21 the specification that carries out that function. So the
22 later steps of the analysis, you know, what's equivalent to
23 that structure in the specification, whether the defendants
24 have that structure isn't for today. The interesting --

25 THE COURT: I'm going to look at the -- what has

1 stumbled me up a little bit on that is the initial
2 determination of whether it is subject to 112 or not, and you
3 do have to look at the specification for that. So that's a --

4 MR. HOSTENY: Yeah. Well, you have some decisions,
5 I think, on this point where I think you've come to
6 conclusions both ways. No question about it, there is --

7 THE COURT: In other cases. But see you can't judge
8 what I'm going to do in your case from reading other cases
9 because I'm going to judge each case on its own merit.

10 MR. HOSTENY: Absolutely. All I'm saying is you've
11 dealt with the issue before. And, typically, when you have a
12 means clause, the presumption arises that it means-plus-
13 function. That's the start point. Okay? The presumption is
14 rebuttable. And the situation we have here is that the '592
15 patent independent claims use linking means. The '228 patent
16 simply refers to links.

17 What we've done is provided a proposed construction
18 in the '592 based on our thinking that linking means does have
19 structure, but we've also provided an alternate. If you
20 decide it's 112-6, then we've said, okay, here's the function
21 and here's the structure because we don't know which way
22 you're going to go on that, frankly.

23 But in any event, what's interesting about this is,
24 typically, a means clause reads, "means for doing something,"
25 and then you fill in the something. Okay, and that's the

1 function. This one reads, "linking means of a markup
2 language." Okay? And we think that implies a great deal to
3 the person skilled in the art who reads the patent. And we'll
4 get to that when we go back into linking means.

5 And the remaining clause of this claim 1 is a
6 plurality of attributes, and then each of these attributes is
7 a point on axis of what the patent calls a multidimensional
8 space. So then I've reproduced just three dependent claims on
9 that slide. Simply to point out that there are dependent
10 claims that add things to claim 1.

11 For example, claim 2 refers to means for searching.
12 That is means plus function. That is just the word means
13 followed by the function. So it's a little different from
14 claim 1 which says "linking means of a mark-up language."

15 At any rate, the other point I would like to make
16 about the dependent claims is that claim 1, contrary to what I
17 understand to be the defendant's position, claim 1 does not
18 involve searching. It does not involve retrieving. It does
19 not involve movement. Those features, searching, for example,
20 are added by dependent claims as is the example in claims 2,
21 3, and 4 there.

22 If you go to the next slide, this is a series. And
23 I've looked at statutory invention registrations and saw that
24 that section, 35 U.S.C. 157, says, "the director of the Patent
25 Office can issue regulations to carry out the statutory

1 invention registration envisioned by section 157." The
2 statute was enacted -- actually it should say '84 not '85 --
3 it was amended once in 1999, so there are two versions of this
4 statute in existence over that period of time, which is 26
5 years.

6 If you go to the next page, the director did indeed
7 enact regulations. There's a whole series of them. 1.293,
8 which was put in place in '85, amended in '97. 1.294, an
9 examination, which was put in place in '85, amended like the
10 prior one in '97. Then one for review, section 1.295, put in
11 place in '85, but not amended until 2004.

12 And then on the next slide, which is 14, you have
13 two more. And one of those didn't exist for many, many years
14 after the statute was enacted. It wasn't put in place until
15 2004, and it's remained the same since.

16 And the last one is enacted in '85, and then almost
17 immediately amended. So we have different patterns and timing
18 of enactment and amendment on these regulations. The
19 difficult part comes about when the researchers confronted
20 with I want to look at the statute. I want to know what the
21 form of the statute was at a particular time. By the by,
22 you'll hear from --

23 THE COURT: No, I mean we all know from personal
24 experience.

25 MR. HOSTENY: Sure, right. You want to know what

1 were the facts at that time? What were the regulations at
2 that time? What did the Court say about them at that time?
3 And a point, but not the sole point, of the invention is
4 versions or point in time. It is one aspect of the invention.

5 The next slide says, well, you want to find the CFRs
6 that apply in each of these particular dates, June '99, '91,
7 June '99, June 2001, June 2005. If you look at slide 16,
8 you'll see that if you're looking at June 1991, you have the
9 earlier of two versions of the statute that you've got to dig
10 up because it's not in your ready handy copy of Title 35
11 anymore. It's gone, so you've got to go somewhere else to get
12 it.

13 And then you've got to go dig up these regulations.
14 Three are the earlier of two versions, one doesn't exist, and
15 the last one is the later of two versions. And then on slide
16 17, you have yet a different situation when you go to June 1
17 of 2000, now you have the later version of the statute because
18 it got amended in '99, and you have a different sequence of
19 versions of the underlying regulations.

20 And then on slide 18, one more date, if you go
21 June 1 of 2005, you are dealing with the later of two versions
22 of the statute. And you are dealing with yet a different
23 pattern of versions of the regulations including now you've
24 got to pay attention to 1.296 because it came into existence,
25 and you're dealing with the only version.

1 So if you look on 19, you get kind of an idea of the
2 problem that's confronting the researcher when you are looking
3 back in history to see what was in effect at a particular
4 time. You can see in the columns of the tables how the
5 version numbers vary and how if I'm reviewing in June 1 of
6 1991, I have to somehow get to version 1 of four regs and
7 version two of a fifth reg.

8 And if I'm referring on June 1 of 2001, now I've got
9 to get a different version of the statute. I've got to get to
10 version 2 of some regs, version 1 of one reg, and version 2 of
11 another, and so on with June 1 of 2005. This gets ugly. This
12 is a simple example. And the way you deal with this is what
13 this invention is about.

14 You have two versions of section 157, and you have
15 multiple versions of the CFRs. These are -- well, we'll get
16 to it, but these are basically can be treated as portions, and
17 they're going to be marked up with what are called attributes
18 to enable them to be located. And if you use attributes and
19 links, then you can get to the right CFR for a particular
20 date, for a particular version of section 157, not only the
21 right CFR, but the right collection of CFRs, and you can do it
22 a lot faster.

23 Slide 21 is an example out of the patent, table 1, I
24 forget what column it's in. It might be 3 or 6, I'm not sure.
25 In any event, it talks about how you have a piece of

1 legislation in Australia that had been amended 70 times, so
2 this is ugly to figure out what the form of the statute was at
3 a particular point and what the cases were about that.

4 Let me just get to the right part of my notes here.

5 THE COURT: I wonder if this technology could be
6 used to search patents, to go through the file wrapper in
7 there.

8 MR. HOSTENY: Yeah, it's an interesting question.
9 The patents do say -- they give as an example legislation in
10 the embodiments. They talk about it being applicable to other
11 complex, technical documents such as manuals for the operation
12 of aircraft and ships, and so forth and so on. The prior
13 methods of doing this had been to treat everything on a word-
14 by-word basis. And you would have an original copy of the
15 document, and you would keep a copy of each individual change.
16 You know, when the word "six" got changed to "seven," and then
17 if you wanted to create the new version, you take the
18 original, you apply the change, and you come up with a new
19 document. It got to be a nightmare when you were dealing with
20 seven amendments or when you're dealing with multiple statutes
21 and multiple regulations over a period of time.

22 The defendants at page 22 of the slide say that --
23 let me just check something here for the moment. Oh, let me
24 put this on the Elmo and switch over. There we go.

25 THE COURT: I have a picture of a family on mine.

1 Is that a mistake?

2 MR. HOSTENY: It's a group at the Ironman Triathlon
3 that I took a photograph of, and the point of this is simply
4 to give Your Honor an idea. You may have run across it if
5 you've dealt with discovery issues that concern metadata.
6 Attributes are metadata. Metadata is information about
7 information.

8 This is just a real simple example. The top is the
9 photograph from my IPhoto application. The bottom block is
10 the data or the metadata about that photograph. It contains
11 how many pixels in it when it was taken, what the file name
12 is, what the size of it is, and even when it was imported, and
13 even what kind of camera was used to import it. So that's
14 metadata. Information about information.

15 THE COURT: You don't need me to have that though.
16 That was just what metadata is.

17 MR. HOSTENY: You are welcome to have it. But I
18 will give you a copy afterwards.

19 THE COURT: I just wanted to make sure I wasn't
20 missing something.

21 MR. HOSTENY: No.

22 THE COURT: Okay.

23 MR. HOSTENY: Okay. Let me -- the defendants
24 suggested slide 22 that you can link documents by what they
25 call a static link. And the patents do not claim what's

1 called a static link. In fact, at the bottom of one column,
2 the patent says, oh, don't use haphazard links like hyperlinks
3 like you would see on a web page. Those are typically static
4 links. And by static, I mean that they do not change.

5 If you look at the example, this is page 4 of the
6 defendant's opening claim construction brief here, they say
7 that you can link document 1 to document 2 by using the code
8 or markup that's in blue. And they say the arrow is there.
9 The problem with that is is that document 1 is irrevocably
10 linked to document 2 and exclusively document 2. If document
11 2 should change for any reason or document 1 should change for
12 any reason, the link no longer operates. Document 2 may
13 disappear, if it's repealed, the link is broken. It leads you
14 to nowhere, if you're looking at a web page on your computer,
15 you see the 404 error.

16 So what you have to do is account for the fact that
17 there is change. Okay? What you have to do is something like
18 what we've shown on slide 123, and the invention does that.
19 It recognizes that there's a section in this case, and we'll
20 show you an example in a few minutes, a section of Title 49 of
21 U.S. Code 106 that's enforced between those two dates. There
22 are regulations that carry into effect -- this deals with
23 aircraft icing by the by and the pilots, so that's why I
24 zeroed in on this one.

25 There are two regulations, one which was in effect

1 up until January 31 of 2010, and another one which came into
2 effect on February 1 of 2010. So if I'm looking at document
3 1, and I want to know the right regulation, I need to know
4 which of documents 2 and 3 to go to, and that is what the
5 invention enables us to do.

6 And the way that's done, first, well, let me back up
7 here a little bit and cover one point that I've missed. If we
8 go back to slide -- I'm going to go a little bit out of order
9 here. We go back to slide 1. Let me talk for just a moment
10 about what apportion is.

11 And these are some loose slides, so I think I will
12 just put them on the Elmo. Do you have copies of these, Your
13 Honor? Everybody does. The patent talks about predefined
14 portions and modified predefined portions. And what the
15 patent means by a predefined portion is that one looks at how
16 the information is intended to be used.

17 In this case, their example was legislation, so they
18 concluded that a logical portion was a section of legislation.
19 That's what they mean by predefined. There's some forethought
20 to how some larger document, United States Code Annotated or
21 some title of United States Code Annotated is going to be
22 broken down and how pieces of it are going to be saved. And
23 that's the predefined portion.

24 And one aspect of the invention is to predefine that
25 portion. And then if that portion is modified, you know,

1 section 157 on statutory invention registrations is amended,
2 then you create a modified portion with the amendment. In
3 other words, I have all the words of that section with the
4 amendment in them as well as all the words of the section that
5 are not amended.

6 THE COURT: And the predefined portion then, that's
7 a subjective inquiry, no?

8 MR. HOSTENY: Well, it is, but it has the measure,
9 it has the guidance that the person determining the portion
10 has to understand what the intended use will be of the
11 documentation in question.

12 THE COURT: The person practicing the invention is
13 going to have to have some -- surely they must have some
14 standards. I mean to understand what's going to be a sensible
15 portion in the context of the product that's going to use
16 the --

17 MR. HOSTENY: Yeah. Well, companies in the legal
18 publishing business use legal editors. West uses them.
19 Timebase uses them. One of the West document, which I have
20 here somewhere, says that they will consider a section. They
21 work on a section basis of what they call a hierarchically
22 arranged statute. And then later in their document, they talk
23 about how if that section is modified, you will keep both the
24 unmodified and the modified portions of it.

25 But the predefined implies, and on this slide here

1 of -- one other thought about this first though is in the '228
2 patent, we use the word "dividing" into suitable portions in
3 the claims. It means the same thing. The '592 says, "the
4 embodiments advantageously divide information into suitably
5 small pieces or blocks of texts, each of which is a predefined
6 portion of data, and add to each piece of text either
7 expressly or implicitly a number of attributes,
8 (characteristics or descriptors.)

9 Then in the file history of the re-examination, this
10 came up and the examiner said, "As discussed above, the
11 predefined portion may be an optimum storage unit that is
12 chosen based on a particular application. For example, if the
13 application is legislation, the predefined portion may be a
14 section of that legislation." So in the '592, you are
15 selecting predefined portions. In the '228, you are dividing
16 into portions. The meaning is the same in both cases.

17 At any rate, I think -- let me go back to --

18 Now, claim 1 says there's a plurality, can be a
19 plurality of attributes. And claim -- let me look here.
20 Yeah, dependent claim 3, this is slide 11, says that the
21 system, according to claim 2, wherein said searching means
22 uses one or more attributes. So like the photograph there, I
23 take the portion that I'm working with, and I assign
24 attributes to it. And these attributes could be something
25 within the text, you know. I could highlight and mark in the

1 appropriate way some reference to regulations or they could be
2 external to that body of text.

3 For example, in the case of section 157, I could
4 have an attribute talking about 37 -- CFR1.293, 1.294, 1.295,
5 et cetera. The number of attributes are up to my imagination.
6 I can have section number, section title, section start date,
7 section effective date, section repeal date, section
8 identifier, if I wish to use a section identifier. And a
9 dependent claim in the '592 talks about having an
10 identification code. Each time I have one of those
11 attributes, I have another dimension in this multidimensional
12 space.

13 For example, if my attribute is time, then I'm
14 moving on a time line shown in figure 4 of the patent. If my
15 attribute is section number, I'm moving on a line that
16 represents section number. If I have --

17 THE COURT: That part I understand.

18 MR. HOSTENY: Yeah. If there's a related case to
19 the particular section, I move on yet another line that tells
20 me the title of that related case.

21 Let's go to slide 24, this is page 4, which I've
22 then marked up. They say that this link has to consist of a
23 single unique identifier. That's really contrary to the
24 language of the patent and the language of the claims that
25 talk about multiple attributes. Keep in mind figure 4, which

1 you'll see at some point today. Do you want to throw that up
2 on the Elmo there?

3 We'll show you that figure 4 right now. Figure 4
4 has three axes because it's hard to draw more than three axes
5 on a piece of paper. The patent says that you can use
6 multidimensional space that involves or is capable of more
7 than three dimensions. And it says, it gives an example of
8 where you can use as many as six dimensions.

9 Here we go. This is figure 4 out of the '592
10 patent. And you can see, I think in this particular case,
11 what's happened is down in the corner here, there's an L. And
12 we're starting off with legislation, and the under section
13 over legislation in section 1, and we're proceeding to another
14 point or sometimes people call them nodes that represents
15 January of '96.

16 Then we're going to see what section 4 looked like
17 of that legislation at January 1 of 1996. Then we're backing
18 up to see what it looked like at an earlier time, a year
19 earlier. Okay. So now we have section 4 at an earlier time
20 of this particular legislation. And one more thing that this
21 diagram shows is that you can jump off, and if you look at the
22 specification, you can see that the 412 and 414 are cases and
23 journals or articles concerning that particular section. So
24 now I've got the full story on section 4 at that particular
25 point in time.

1 But the patent isn't limited to these three axes.
2 And it is not limited, this is an example of how you can
3 travel around this multidimensional space. It is not limited
4 to what the defendants call point-to-point movement. It has a
5 number of alternatives.

6 At any rate, we're back on slide 24. And you'll see
7 I have marked up the defendant's example on page 4. They say
8 they have single attributes, and they say that a link has to
9 be markup language consisting of a single attribute. That's
10 the brief at page 36.

11 In fact, their two documents here show multiple
12 attributes. The section ID 35 U.S.C. 101 is one attribute.
13 The start date, which is surrounded in green and noted by the
14 green arrows, is another attribute. They have more than one
15 link, more than one potential link in document 1, which has
16 another two attributes, section identifier, and the start date
17 of document 2.

18 So, consistently with what the patent says, you've
19 got to use multiple attributes, a plurality of attributes to
20 deal with this, and you have to describe these documents with
21 those attributes, and those attributes then in turn give you
22 the point in space where you want to be. That's how you get
23 there.

24 There are instances in which you can use a single
25 attribute. I don't mean to say that there are not, and I

1 think there's a claim that refers to that. But that is not
2 what the patent should be limited to. It has more -- it has
3 the capability of doing a plurality of attributes as the
4 independent claims say.

5 The problem with their figure 4 that I don't think
6 they realize on slide 24 is that this description is
7 ambiguous. Neither of these documents has an end date. One
8 of them has to. Otherwise, the reader or user would not know
9 which one was in force. And the defendants own documents will
10 say if there's only one, you know, only one version, then you
11 may not need an end date. And I think there's a code that you
12 put in in that particular instance. But if you've got more
13 than one version, the earlier versions have to have end dates.

14 The user of the system described on this slide could
15 assume that document 2, the 2009 version of section 101 was in
16 effect because it has no end date. But in fact, document 1
17 has a later date, so you wind up with an error.

18 I'm going to skip over the next three slides
19 because, frankly, they're a little bit hard to read and go to
20 slide 27. This is an example of how the invention works using
21 Westlaw which we're all familiar with. If you go to slide 27,
22 you will see that what's been pulled up is a regulation in the
23 CFR dealing with aircraft icing. And the flag at the top
24 says, yeah, it's a regulation. And it says it's the current,
25 and it's effective February 1, 2010.

1 Over on the left side of the picture, you will see
2 links, and I emphasize the word links as plural, and then you
3 will also see circled prior versions. If I clicked on the
4 prior versions for the regulation, I go to the next screen,
5 slide 28. Now, I have a list. In other words, I have not
6 gone point to point. I have achieved a list. And this list
7 can be two versions, five versions, or as we'll shortly see
8 even more.

9 But in any event, my next screen now says I have a
10 list of versions of the same regulation. And there's an older
11 one that was in effect from January 31, 2010. And it has been
12 replaced by the current -- you see the little blue arrow by it
13 that is effective as of February 1, 2010.

14 Also, if I go to the next slide, I have selected the
15 earlier version. So now I've shifted in time, and I can see
16 the earlier version of this statute. But there are more links
17 at slide 29. There are more links than simply time or
18 versions on this. One of them I've circled at the left. You
19 see statutes authority. I click on that link, and I come up
20 with slide 30.

21 Slide 30 says, okay, here's the statute that
22 authorizes that particular regulation, and proceed one more
23 slide, slide 31, and now I have the text of that statute,
24 that's 49 U.S.C. 106. So there's the text for the particular
25 regulation in question.

1 I can do the same process either for the current
2 regulation or for the outdated expired regulation, I can get
3 to the statutory authority. Either one links.

4 If I go to the next page, here's the list of
5 versions of the authorizing statute. And you can't see them
6 all on the page, you have to scroll down. There's about ten
7 of them there. That's the list. That's not point-to-point
8 movement. And if I go to the next slide --

9 THE COURT: Look at the salary figure for 2004.

10 MR. HOSTENY: I didn't even notice that.

11 THE COURT: \$7 billion?

12 MR. HOSTENY: Yeah. \$7,591,000,000 for fiscal year
13 2004. And the next year is 7,732,000,000. And presumably it
14 escalates after that, I don't know. A goodly amount of money,
15 a billion here, a billion there, pretty soon you're talking
16 real money, as the saying goes. What's the budget of the
17 federal courts? Is it 2 billion?

18 THE COURT: It's nothing. Nothing.

19 MR. HOSTENY: Yeah, it's tiny.

20 THE COURT: Less than one percent.

21 MR. HOSTENY: It's like the Patent Office's budget.
22 It's very tiny. In any event, when you go to slide 32, you
23 get the list of versions. And you go to slide 33, and you see
24 I've picked the 7th on the list just for talking, and you can
25 see that that's the one that was effective for September 30,

1 2008, to March 29, 2009, on slide 33.

2 So what I've done is I'm able to move around the
3 space without going to a bunch of paper books in the library
4 and cutting and pasting, as the patent describes. And I have
5 located a regulation of interest, and the version of the
6 regulation of interest that I want to take a look at, the
7 related statute of interest, and a whole list of all the
8 statutes in effect so that I can pick the one that is of
9 interest to me. It's a very useful tool. And the reason the
10 defendants did this was because they were lagging in online
11 statutory research. They knew statutory research was a tough
12 job because it was mainly paper oriented, and they wanted to
13 boost the ability of people to do easy statutory and
14 regulatory research online, so they got statutes plus and regs
15 plus.

16 Skip to slide 34, that's a figure from the patent
17 that shows, again, varying ways of traveling in the
18 multidimensional space. I can click the button that says
19 "previous" or click the button that says "next," and you can
20 see that I've got a provision here in Timebase Commonwealth
21 Legislation Social Security Act in Australia, effective 9
22 August, 1996.

23 If I click the previous button, I go back to the
24 earlier version of that section. If I click the next button,
25 I would go to the later version. If I click all, I get all

1 the versions. So I don't have to move from point to point in
2 this space. If I know the right set of attributes that I'm
3 looking for, and the way this is implemented in the patent is
4 with relational databases. And there's a database mentioned
5 in some of the claims.

6 What you do is you create a record that has the text
7 of a particular portion in it and then that record, you know,
8 just like a student's record at a school, you know, what's the
9 birthdate? What's the student's course enrollment? Is he or
10 she in History 101? What was the grade, et cetera, et cetera?
11 For that portion, you have a whole bunch of fields: Start
12 date, end date, title, regulation, et cetera, et cetera, et
13 cetera, and then you can search that database for the desired
14 set of attributes, and there you are, figure 13, is an example
15 of that.

16 Slide 35, is one of the defendant's documents that
17 is a Power Point demonstrating their Statutes Plus, which is
18 one of the accused products. I mean, well, we accuse Westlaw,
19 but the features of Westlaw that are of particular interest
20 are Past That Locator, which is a time version of things.
21 Statutes Plus, which enables to you jump off to other places
22 from those versions. And then Regulations Plus, and then a
23 couple of things called Graphical Statutes and Graphical
24 Bills.

25 But, in any event, here's what they are saying here

1 that you can do, how you save time. Jump to any part of the
2 statute, get cases construing or applying the statute, get
3 secondary sources, get the statutes related to the viewed
4 statute, get the administrative code provisions related to the
5 statute. All of those represent attributes and dimensions in
6 this multidimensional space.

7 Just a couple of things out of my notes here that I
8 did not incorporate into the slides. You can see what I was
9 referring to earlier, the number in the parentheses by
10 defendants do this is the Bates number of their document. The
11 first bullet point is document, unless the context clearly
12 indicates otherwise. A document means a section of a
13 hierarchically arranged statutory code.

14 And then they go down and describe in other bullet
15 points the historical text, the current text, the future text.
16 Those are all things that can be the subject of attributes
17 that you can go retrieve and search if you like, either by,
18 you know, point-to-point movement. Something like next or
19 previous or by getting a list of them or by simply searching
20 and getting the attribute you like and going to the place in
21 the database that you like.

22 And then -- yeah, here we go. The other one I
23 wanted -- I referred to earlier that I wanted to quote is -- I
24 apologize, I think this is from the same document. But in any
25 event, my focus is the bullet point under section 3.1.2.

1 Multiple amendments and deferred text of subsection level
2 which create multiple text will need to be set out in multiple
3 documents to support versions.

4 So the document the defendants are doing multiple of
5 what we call portions. They happen to use documents. There's
6 two senses of document in this case. There's document in the
7 sense of the prior art, which means the whole entirety of the
8 document. And then there's the way the defendants use it, and
9 it appears to me from what I've seen in the discovery so far
10 that they do a predefined portion, a section of legislation, a
11 section of regulation. But practically speaking, they refer
12 to that often as a document. They also refer to attributes as
13 meta data.

14 I'm just looking through my notes, and I think I
15 have covered, yes, on identification code. It was claim 10,
16 just to refer back to that, where the defendants claimed that
17 the markup must use a link with a single attribute, and that
18 must be what they call a single unique identifier, if I recall
19 their words correctly.

20 Single unique identifier doesn't appear anywhere in
21 the patent. We do have a claim 10, but it's a dependent claim
22 that refers to an identification code. So an attribute under
23 a dependent claim can be an identification code. I can call
24 it 123 XYZ, if I want.

25 THE COURT: Say that again. Give me that last

1 concept again.

2 MR. HOSTENY: Okay. The defendants say that a link
3 is a single unique identifier and a single attribute. Well, I
4 say no because in claim 10 --

5 THE COURT: I'm sorry. Just give me that sentence
6 one more time.

7 MR. HOSTENY: Okay. The defendants say that the
8 link is what they call a single unique identifier, and it
9 consists of -- Art, can you go back to slide -- before I do
10 this, I think --

11 THE COURT: Is that again referring to their little
12 model on page 24?

13 MR. HOSTENY: Yes. Yeah. Slides 22 and -- yeah,
14 slide 22 is the best one. So they say, yeah, they agree that
15 links connect, and they agree that links are of a markup
16 language. I think the parties are of the same view on those
17 points. But, as I understand them, they say the link is a
18 single attribute, and it's what they call a unique identifier.
19 And that doesn't fit with the claim language because the claim
20 language of the '592 and the '228, the independent claims,
21 both talk about a plurality of attributes. The specification
22 talks about a number of attributes. In fact --

23 THE COURT: I just kept thinking that you were
24 saying that they were saying that the link is the attribute.

25 MR. HOSTENY: They're related, but --

1 THE COURT: Yeah, but you're not saying that their's
2 --

3 MR. HOSTENY: They're not saying that they are
4 necessarily the same thing.

5 THE COURT: Okay. Sorry. That's where I was.

6 MR. HOSTENY: Okay. They're not saying that they're
7 the same thing. It's just my point was that we have claim 10
8 that refers to an identification code, which you might say is
9 a unique identifier, but it's a dependent claim. It's one of
10 a number of attributes that you can use to apply to a
11 particular portion. And claim 1, there you are, recites
12 plurality of attributes.

13 I'm just checking my notes here, and I think I have
14 covered most of what I wanted to cover. I just want to go
15 back to this tail-end slide here, and see if I've missed
16 anything otherwise.

17 Some of the terms I think we're leaving to our
18 briefs, displaying and graphical representation. And then on
19 slide 40, all we did here was summarize the disputed terms and
20 what we believed the constructions should be.

21 On the next slide, that continues. And then on the
22 next slide --

23 THE COURT: I am sorry. Just give me a second. I
24 only go to 35 for some reason.

25 MR. GASEY: It's the loose --

1 THE COURT: Those are 3, 1, 2. I don't have
2 anything that has -- it's listed as page 40.

3 MR. HOSTENY: Oh, here.

4 THE COURT: She needs both hands. She needs three
5 hands. They just have different page numbers.

6 MR. HOSTENY: Yeah, what happened was we -- when we
7 were putting our PowerPoint together, we inadvertently left
8 them out, so we had them e-mailed here and their loose pages.

9 THE COURT: I have those. They just have different
10 page numbers than I thought.

11 MR. HOSTENY: In any event, Your Honor, the first
12 two represent what we believe the disputed terms to be, and
13 what we think the correct constructions are. In the case of
14 link and linking means, we have provided alternative
15 constructions in case you rule it is 1.126 or it's not 112.6.
16 I think not because it refers to "of a markup language" which
17 is unquestionably a structure.

18 THE COURT: Well, is it enough structure?

19 MR. HOSTENY: Well, I would say then, you know, the
20 specification describes in fair detail two markup languages,
21 one is called XML for extensible markup. And the other is
22 SGML for standard generalized markup languages. And it
23 includes attachments on what are called DTD's, datatype
24 definitions that are basically the rule books for using the
25 language for a particular application.

1 THE COURT: So I guess isn't that so encompassing as
2 to be similar to just saying "a computer?"

3 MR. HOSTENY: No, absolutely not. A markup language
4 is something that's well-understood, was well-understood in
5 1996 on what it was and how it was used. SGML had been -- was
6 the subject of published standards by that time. XML advented
7 later. And there are -- and we may have made some of them
8 exhibits, I think, in our claim construction briefs. There
9 are publications by organizations on the Internet going back
10 to very early years that describe in detail how to use them.

11 THE COURT: No doubt about that, how it fits into
12 whether --

13 MR. HOSTENY: Yeah, what you can and can't do. Not
14 like a computer. I understand where you are going on that
15 one, but I don't think that's the case here.

16 The next slide is agreed terms. Terms no longer in
17 dispute. We think we understand that those are all resolved.
18 Let me back up though on one, on attributes. The defendants
19 want to call it a characteristic or descriptor. And ours is a
20 piece of code or markup that describes a point on an axis of a
21 multidimensional space. For example, the secretary or ID or
22 the effective date. We can probably live with an attribute is
23 a characteristic or descriptor which is a piece of code or
24 markup, et cetera. In other words, merge the two
25 descriptions, the two proposed terms.

1 And I think at that point I've probably gone on too
2 long as it is, and I'll turn it over to Mr. Gross, unless you
3 have questions.

4 THE COURT: No. Thanks, Mr. Hosteny. Mr. Gross, do
5 you agree on these agreed terms that that's all satisfactory
6 to you?

7 MR. GROSS: I believe so, Your Honor. But can I ask
8 my colleagues to check on that only because I haven't
9 confirmed that with what we thought that was agreed. So
10 Ms. Sooter, who is with me today, will confirm that in a few
11 minutes. If that's all right, Your Honor?

12 THE COURT: Sure.

13 MR. GROSS: Your Honor, I have with me, Mindy Sooter
14 from our Boulder office, who has been admitted pro hac vice.
15 And she's going to answer questions I can't answer today, and
16 then we also have Mr. Wagner.

17 MR. WAGNER: Good morning, Your Honor.

18 MR. GROSS: From the Minneapolis Office and
19 Mr. Litsey from the Minneapolis office.

20 THE COURT: I know him.

21 MR. GROSS: That's true, Your Honor.

22 THE COURT: Now, you, I don't know, did I meet you
23 in Boulder? I did an ABA site evaluation of the university,
24 of the law school out there, and there were some lawyers out
25 there. Did I meet you?

1 MS. SOOTER: No, Your Honor.

2 THE COURT: I don't remember you.

3 MS. SOOTER: I do believe I met you casually in
4 Minneapolis on occasion.

5 THE COURT: I deny it.

6 MR. GROSS: And Ms. Sooter is the one who has the
7 degree in electrical engineering and experience in this area,
8 and I'm the one who is coming up here to talk, Your Honor.

9 THE COURT: Well, that's good.

10 MR. GROSS: Your Honor, may I submit these? Two or
11 three copies of our material?

12 THE COURT: Let's take three.

13 MR. GROSS: If I may approach, Your Honor.

14 THE COURT: Yes.

15 MR. GROSS: I have here printouts of our slides, and
16 then I also have a hand-up for the oral argument that simply
17 is going to help guide the Court a little bit with some
18 highlighting on a few documents.

19 THE COURT: Okay. That's good.

20 MR. GROSS: So if I may.

21 THE COURT: And Mr. Hosteny or Mister -- is it
22 Gasey?

23 MR. GASEY: It is, Your Honor.

24 THE COURT: If you want to move so that you can see
25 these big boards. I don't really care. I'm not afraid of

1 you. You can come on up and sit in some uncomfortable place
2 if you want. What's up there right now is figure 4.

3 MR. GROSS: Your Honor, I had prepared a
4 presentation based on the arguments that I had seen in
5 Timebase's briefs. This morning I didn't hear a lot of those
6 arguments. So I have two choices: I can ignore them or
7 address them. I think it's better if I address them because
8 the Court has read the briefs, and the Court will be reading
9 the briefs again.

10 So I think it's actually going to take me longer
11 because I'm going to be going through the claim terms claim by
12 claim and doing the Markman analysis that you do at a Markman
13 hearing, so I'm going to be going into the details. So I'm
14 not going to be giving as high level a presentation as
15 Mr. Hosteny. We typically don't do that. So I'll keep going,
16 Your Honor, and I think I'll take my full allotted half time
17 would be my sense.

18 THE COURT: Okay.

19 MR. GROSS: Let me talk about what I've given the
20 Court. I've given the Court a printout of the PowerPoint
21 presentation that we will be showing. And, of course,
22 Mr. Hosteny and Mr. Gasey have the printouts as well. I've
23 also handed up to the Court --

24 THE COURT: In fact, that flashed up during their
25 presentation, so you all must have exchanged these ahead of

1 time.

2 MR. GROSS: Yes, Your Honor. I won't say we
3 exchanged them way ahead of time, but yes.

4 THE COURT: Okay.

5 MR. GROSS: And, Your Honor, I have our packet here
6 which has the first three tabs 1, 2 and 3 are merely, are
7 blow-ups or enlargements. That way we don't have to leave an
8 enlargement with the Court.

9 So at tab 1, we've got figure 4. Tab 2, we have an
10 illustrated version of figure 4, and at tab 3 we simply have
11 the chart that comes out of our brief on point-to-point
12 movement.

13 Your Honor, when you go to tab 4, just so you know
14 what we've given the Court, tab 4 is where we've taken the
15 '592 patent, and we've highlighted all the language that talks
16 about point-to-point movement for the multidimensional space.
17 So we basically collected it, so in conjunction with that
18 table, the Court could review this patent and see all the
19 times where it discusses point-to-point movement. That's the
20 only point of that.

21 And because there's a lot of extraneous tables to
22 this issue in the middle of the patent, we've deleted those,
23 but obviously we're not suggesting they're not part of the
24 patent. It's just for the ease of saving paper.

25 If you go to tab 5, Your Honor, we've done the same

1 thing with the '228 patent, which simply highlight all the
2 times where it shows point-to-point movement. And once again,
3 we took out some of the appendices.

4 When you go to tab 6, this goes to what Mr. Hosteny
5 was talking about. Mr. Hosteny told the Court there's a '592
6 patent, and there's a '228 patent. The '228 patent is a
7 continuation in part which means it has some new subject
8 matter where they put some new stuff in the specification.
9 And Mr. Hosteny is making clear, and we're making clear, that
10 both sides are relying on the information that's in the '592
11 patent and then copied on to the '228 patent.

12 So whenever the Court hears us talk about the '592
13 patent, that's identical in the '228 patent. They literally
14 took the same text from the '592 patent and put it in the '228
15 patent. And because Timebase wants to get the priority date
16 of that first patent, they're not going near any new subject
17 matter. They're not talking about by the way, you know, many
18 years later we added some stuff that's very helpful here. So
19 that's why both sides keep focusing on the '592 because
20 Timebase is saying every single claim in this case is based on
21 the old subject matter.

22 And just to help the Court, at tab 6 what we've done
23 is we have a note here that says, "Subject matter not
24 appearing in the '592 patent is highlighted." So if you want
25 to see the new stuff, then you can look at tab 6. But just so

1 the Court knows, neither side is focusing to a great extent on
2 the new stuff because they want that priority date so they
3 need to rely on the old information from the '592 patent.

4 So that's really just an administrative convenience
5 for -- to the extent the Court is trying to figure out what's
6 new, what's not new, we have that. And then we just have a
7 couple of pages from their brief.

8 Your Honor, I want to talk for just a moment about
9 the slides that Mr. Hosteny presented. Because I think it
10 illustrates the challenge that we're facing as a defendant in
11 this case. With respect to Mr. Hosteny's slides, after you
12 get past the introductory slides, which gets past slide 11 or
13 so, I've written down, and I think this is probably close to
14 being right, slides 21, 25, and 34 seem to quote from the
15 patent or talk about something in the patent. Every other
16 slide is not based on the patent.

17 So, for example, Your Honor, Mr. Hosteny talked
18 about that table, and I'm going to now try to use the Elmo or
19 the document camera. All right. Your Honor, Mr. Hosteny
20 talked about table 1 in the specification. But if the Court
21 will recall, there were slide after slide after slide about
22 CFR regulations and a statute, and all the things that can
23 happen, and the mess that can be created. I just want to be
24 crystal clear, every single one of those slides has nothing to
25 do with the patent. They're not based on the patent. They're

1 not from the patent. They're not an embodiment of the patent.

2 THE COURT: No, I think he's just trying to show me
3 how it works.

4 MR. GROSS: Yes. But my point, Your Honor, is he's
5 showing you how it works not by taking an example from the
6 patent, but by just talking about how out there in the world
7 there's problems that people face, and he would like the Court
8 to see what that is.

9 So if you go to what actually goes on in the patent,
10 if you look at the patent, it says it has this table 1. It
11 talks about complexity, but look at what it goes right into.
12 It goes right into the summary of the invention, and then
13 there you go with figures 1, 2, 3 and 4 which is what we'll be
14 talking about.

15 In other words, in a patent, they briefly mentioned
16 there's all kinds of things going on, but then they go right
17 to teaching these figures. In no way do they get into the
18 kind of teaching and discussion that Mr. Hosteny just did.
19 It's all I'm trying to say.

20 THE COURT: Yeah, fair enough.

21 MR. GROSS: For purposes of the Markman hearing,
22 it's important, we think, to try to base our example right
23 from the patent.

24 The other thing that really jumped out is
25 Mr. Hosteny suggesting and acknowledging that with respect to

1 the Westlaw product, he said, and I think I'm quoting him
2 close enough, that's not point-to-point movement, as if that
3 was a problem. That's a solution.

4 In other words, we don't infringe because the patent
5 teaches point-to-point movement or movement along axes. We
6 don't do that. And you heard Mr. Hosteny saying if you look
7 at what Westlaw does, they're not doing this. They're not
8 doing what's taught in the patent. And our point is that's
9 right, that we don't have multidimensional space as claimed in
10 the patent and as properly constructed. Therefore, we win.

11 So for us, when I hear Mr. Hosteny showing something
12 about Westlaw and saying that's not point-to-point movement, I
13 say that's helpful because what he wasn't doing is showing how
14 the patent itself teaches something that's not point-to-point
15 movement, other than something about an All button which I'll
16 get to.

17 So that kind of frames, that helps the Court frame
18 the issue. We are not going to get into any extensive detail
19 on the West products. We think that the Court has a general
20 idea of how Westlaw works. But as we move forward in summary
21 judgment, and if we unfortunately need to go to trial, we'll
22 be talking a lot about the accused products. But I think it's
23 helpful for the Court to have a big picture understanding that
24 West is saying our product doesn't have multidimensional space
25 as claimed, and Timebase is suggesting we do. And that's one

1 of the big fights. I'd say that's probably the big fight.

2 The Court is familiar with, I'm sure, generally that
3 West has a long history. It has been in this business a long
4 time. And let me go to our slides here. Back, as far back as
5 obviously '94 and even earlier. But in '94, you could look up
6 a statute of a section or a portion of a statute. There were
7 index, databases. We had databases that had statutes. You
8 could search statutes as I did back in the late 80's, I had
9 Westlaw, but by '94, obviously, I searched statutes.

10 There were things called jump markers. There were
11 updates to statutes. And the accused products, we believe,
12 are extensions of what we've been doing for decades. And the
13 biggest point I want to make to the Court is with respect to
14 how Westlaw works today, the last thing West would want to do
15 is adopt multidimensional space.

16 In other words, it's not just Westlaw doesn't have
17 multidimensional space as claimed in the patent. It's Westlaw
18 doesn't want multidimensional space. It's not as if it's a
19 good feature, but we say no, it's not a helpful feature. It
20 actually would be more cumbersome. Our product would be a
21 worst product and more expensive and more difficult and really
22 would not work if we tried to use this multidimensional space.

23 And what we'll be showing in the future, absolutely
24 not today, is that Timebase itself has had a Dickens of a time
25 creating its own product with multidimensional space. In

1 fact, problem after problem after problem. And we'll talk
2 about that in later dates, but Mr. Hosteny was giving you a
3 highlight of Westlaw. He never mentioned his product. His
4 company has had a product for years that they've been
5 struggling with, and it's had all kinds of problems. And
6 we'll talk about that in the future. But the point is is that
7 no one wants the claimed multidimensional space.

8 Now, here's the three patents, Your Honor. We have
9 the '592. We have the re-exam from the '592 which added a
10 handful of claims. And we have the '228, which is the new
11 patent, but it relies on the same subject matter of the '592
12 patent. We focused on that.

13 Here are the total number of claims, and what we
14 asked Timebase in this case is say, well, all right, tell us
15 what claims you are really focusing on, so we can focus our
16 defenses and narrow the issues. And where we are right now is
17 of the 58, they're asserting 58. Of the 3, they're asserting
18 3. And of the 48, they're asserting 48. So that's where we
19 are. And that's why there's some complexity to this process,
20 and that's why I may need a fair amount of time today.

21 We're here today, as Mr. Hosteny said, to determine
22 the meaning and scope of patent claims. And that's what I'm
23 going to be focusing on. I have a list here of claims, Your
24 Honor, but I just want to say here are the claim terms.
25 There's multidimensional space and then there's everything

1 else. So we have some noninfringement arguments based on
2 other terms, and we certainly have an invalidity argument
3 based on what occurs from the Markman hearing. But really
4 multidimensional space is the big enchilada, and so I'll be
5 spending a lot of my time on multidimensional space.

6 So let's talk about multidimensional space. And if
7 you recall Mr. Hosteny's argument, it had almost nothing to do
8 with what's in the specification in terms of teaching on
9 multidimensional space. He talked a lot about how our
10 products work and that they don't have point-to-point
11 movement, but not a lot about let's look at what's taught in
12 the patent.

13 So what I'm going to do with the Court's permission
14 is I'm going to work through what is actually taught in the
15 specification. I think the Court will have a lot of these
16 concepts in mind, but because there's so much complexity, I'm
17 going to go ahead and reinforce a few fundamental points. So,
18 Your Honor, if at any point you want me to speed up, I will,
19 but I think it's just helpful if we take some of these
20 fundamental points and nail them down.

21 All right. Now, Your Honor, the first point is that
22 every single asserted claim requires multidimensional space.
23 There is not one claim of all of the 109 patents that lacks
24 the requirement of multidimensional space. And that's
25 undisputed. So that's where we are. That's why it's so

1 important is that if the accused products lack
2 multidimensional space, we are finished with the entire
3 lawsuit.

4 Now, I'm highlighting a future motion that's going
5 to be probably a ways out, but I just wanted the Court to know
6 that's why this is so important. It wouldn't narrow the
7 issue. It would kill the case.

8 What did Timebase say to the Patent Office?
9 Timebase didn't say to the Patent Office let me show you a lot
10 of administrative regulations, and let me show you all of the
11 things that are going on out there in the world. What
12 Timebase said was, "the multidimensional space may be
13 visualized much like the exemplary space shown in figures 1 to
14 4. Okay.

15 So the Court knows, we all know, where to go. We're
16 going to go to figures 1 to 4, culminates in figure 4, and
17 we'll understand what they meant by multidimensional space.
18 If you tell the Patent Office that, and the Court sees that,
19 obviously a person of ordinary skill in the art would know I
20 guess I want to focus on figures 1 to 4, that will be helpful
21 in understanding multidimensional space.

22 And in their opening brief, they said,
23 "multidimensional space means a number of axes or lines as
24 shown in figures 1 to 4 of the '592 patent." So even to this
25 day, Timebase acknowledges that figures 1 to 4 are a main

1 focus when you are trying to understand how a person of
2 ordinary skill in the art would understand multidimensional
3 space.

4 And here are the figures, Your Honor. There's some
5 figures that lead up to figure 3 and then you see figure 4 is
6 a good example. Multidimensional space is in the abstracts of
7 the patents. And most important, Your Honor, Timebase
8 convinced the PTO to allow its claims only by including
9 multidimensional space in all of its claims. And what do I
10 mean by that?

11 Well, Your Honor, when they were doing that second
12 patent, they either inadvertently or intentionally submitted
13 23 draft claims that just happened to lack this
14 multidimensional space requirement. So they went to the
15 Patent Office and said we would like claims, and there were 22
16 total, that don't have multidimensional space. And here's
17 what the PTO did. The PTO itself reinserted multidimensional
18 space.

19 Here we go. You can see that I have on my slide 26,
20 you've got the proposed claim and then inserting
21 multidimensional space. And here's what the PTO said, "The
22 examiner notes that while electronically publishing multiple
23 versions of text base data is not a novel feature," that gets
24 to this issue of are these claims valid or not and what's
25 really going on here?

1 But the examiner says, look it, this is not a novel
2 feature, "but in combination with the other limitations," goes
3 on to say, "i.e., the multidimensional space for navigating
4 the data that has been encoded and amended, the claims are
5 considered novel." So the examiner went out of his way to say
6 to Timebase you can't get away with a claim that doesn't have
7 it. I'm putting it in, and it's important.

8 So what this means, Your Honor, is Timebase is stuck
9 with multidimensional space. And, unfortunately, the Court is
10 stuck with multidimensional space. The Court is going to be
11 asked today to construe that term, and that's what I'll be
12 spending a lot of time on.

13 Now, here are the two constructions, Your Honor. We
14 have Timebase's current construction, "an area not having
15 boundaries and that is capable of or involves more than three
16 dimensions." By the way, Your Honor, we have a
17 non-infringement argument based on that alone, which I'm not
18 going to get into.

19 THE COURT: But you are really eager to get to it.

20 MR. GROSS: Yes, I am excited about it. But for
21 today, Your Honor, I will say that what we've said in our
22 construction is simply, "where the dimensions are axes along
23 which point-to-point movement is allowed." That's what we're
24 saying.

25 And if the Court looks at the specification, the

1 specification says, "multidimensional space refers to an area
2 not having boundaries, and that is capable of or involves more
3 than three dimensions." So that's our starting point. And
4 each side agrees that's the starting point.

5 So the question today is why should the Court
6 clarify dimensions as allowing point-to-point movement or
7 words to that effect? Why should the Court do that? And I'll
8 show you, Your Honor. Here's what we think is going to
9 happen: If the Court simply adopts what's that sentence from
10 the specification that says, "the Court is finished for
11 today," we'll go forward, and I'm just predicting here, but I
12 think what's going to happen is Timebase will have an expert
13 who reads that and says, okay, I think there's infringement
14 here. And we'll have an expert who reads the exact same
15 sentence, and says, no, that doesn't have the dimensions as
16 discussed in this sentence. And then what we'll have is a big
17 disagreement on infringement. So the reason we're seeking
18 some clarity is that we want to have the experts understand
19 that the dimensions require this point-to-point movement
20 before we get into expert reports. That's why, Your Honor.
21 Because we think that they're going to disagree on how that
22 sentence applies to our product.

23 If they said, Your Honor, that they read the
24 sentence the same way we do, it wouldn't matter. We wouldn't
25 need clarification. We wouldn't need -- okay, good. It looks

1 like we both understand that sentence. But I don't think
2 they're going to agree with how we understand the sentence.
3 So we're seeking clarity now that's comprehensible to a jury,
4 helps the experts. They want some flexibility. They are
5 allowing some confusion, and then the experts will argue about
6 the construction. And I do want to make the point, Your
7 Honor, that you did not hear today Mr. Hosteny say, "let me be
8 clear about what the construction or clarification of
9 dimension should be." And you didn't see that in their brief.
10 They're just silent because they want to keep things flexible
11 which I understand. We've all been there. But my point is
12 when you reach a point where it's pretty clear, likely the
13 parties are going to be disagreeing, that's when we seek some
14 clarification. If we don't get that clarification, we'll just
15 move on, and the Court will revisit the issue in the future.
16 And that itself is not the end of the world, but it would just
17 be better, I think, if we could get some guidance for the
18 experts before their reports. And so that's what's going on,
19 Your Honor.

20 What is a dimension? Well, Timebase, and this is in
21 our packet, Your Honor. I believe it's the last tab in the
22 packet. And I'll switch to the document camera. Timebase
23 originally proposed, "space that is capable of, or involves,
24 more than three dimensions, used to organize a plurality of
25 predefined portions and related materials, and allows movement

1 along different axes or pathways."

2 We originally proposed that sentence that I just
3 showed the Court. We saw this and said this is helpful
4 because this suggests there's really no disagreement about how
5 that sentence is going to be applied because that's how we
6 read that same sentence with respect to dimensions. We
7 believe dimensions allow movement along different axes or
8 pathways. We believe dimension allows what we call
9 point-to-point movement. We see that as the same thing.

10 And so we said to Timebase sounds like we have an
11 understanding. Let's go ahead and clarify it. And then
12 Timebase's position evolved and said, no, now, we just want
13 the sentence. Your Honor, there's no waiver estoppel issue at
14 all. I'm just saying it's not crazy for us to say that a
15 natural reading of that sentence is to allow point-to-point
16 movement. That's not sort of from outer space. It's very
17 similar to what Timebase originally said. They are entitled
18 to change their mind. And just as we're entitled to say, "it
19 looks like we need clarification of dimensions," but we do
20 think it says a lot for today.

21 All right. So they've now removed that phrase. So
22 where are we? Here's where I'm a little worried, Your Honor.
23 I believe we could get to trial, and Timebase has an expert on
24 the stand and says to the expert, "Why don't you tell the jury
25 what you mean by dimension? Go ahead. Give your

1 understanding of dimension." And then the expert says, "Sure.
2 Dimension," and then we just have some answer. And so now the
3 expert is essentially interpreting the claim.

4 And we have case law. 02 Micro is a pretty
5 well-known case that if there's a dispute regarding the scope
6 of claims, it's better for the Court to resolve it than for
7 each of us to be turning to this jury and talking about claim
8 construction and what a dimension is and going through figure
9 4 and the like. It's better for the Court to resolve it. In
10 fact, the Federal Circuit would say that's required. So
11 that's why we're asking this. Had they agreed with our
12 clarification, we'd be fine. But since they haven't, we think
13 it's pretty clear there's a disagreement.

14 I am a little bit optimistic that if we were to get
15 the point-to-point movement construction, Timebase might go
16 ahead and say case is over. Let's go up to the Federal
17 Circuit because sometimes you have that in a claim
18 construction where they see the construction and they say,
19 okay, got it. If you don't do point-to-point movement, we're
20 done. But my guess is Mr. Hosteny may want to at least
21 reserve his options for purposes of today.

22 And what might happen? Well, I'll tell you what
23 might happen. If their expert says, well, this sentence where
24 it says "dimension", it doesn't mean a thing. It's attribute
25 and a database, just kind of conferring. We're working with a

1 database. Any kind of database, we're set. No big deal.

2 So that would mean that when the PTO said, wait a
3 second, you have to have multidimensional space. That what
4 the PTO is saying, wait a second, you have to confirm that
5 we're talking about a database and more than three dimensions.
6 And we don't think in any way that's what the PTO meant. And
7 so what our concern is, and I'm just making this up, by the
8 way. I'm sure their expert would have a different
9 understanding of dimension of some kind.

10 But our concern is what they'll do is water down
11 that sentence so much that we'll have this big fight of what
12 the term means and then the Court will be stuck, and we'll
13 have spent a lot of time and effort fighting about something
14 we could have avoided. So I think I've made my point, that
15 that's where we're going from a sort of clarifying dimension,
16 should we or should we not? We think we should. And that's
17 why.

18 And the prior art certainly talks about databases,
19 and the prior art talks about attributes. It's not as if we
20 know Timebase didn't invent database and attributes. And
21 here's what the PTO is saying, "the attribute of a database is
22 a sequential set of attributes with no organization and no
23 relationship. In contrast, a multidimensional space in the
24 invention disclosed in the '592 patent is a set of organized
25 dimension," and that's SIC, not S-I-C-K, but S-I-C, "an

1 organized dimension that represent a point in the
2 multidimensional space by fixing one dimension or two, say
3 time and locations. See for example good old figure 4, one
4 can trace through the other coordinates or dimensions."

5 And, Your Honor, the Court has probably already seen
6 this enough. But the idea is you can trace through, go from
7 point-to-point. Well, all right, I could show that to the
8 jury and say that's why their expert was wrong when the expert
9 tried to apply dimensions and talked about what dimensions
10 meant, but the Federal Circuit would prefer the Court to
11 straighten these out rather than give them to the jury. When
12 they feel like claim construction, when it feels like the
13 parties are fighting about what a term means, that's where the
14 Court tends to step in.

15 THE COURT: Well, okay. I do think that any time, I
16 just had a jury trial. And I'm just imagining telling the
17 jury that we're going to talk about something that is more
18 than three-dimensional.

19 MR. GROSS: Right.

20 THE COURT: They're probably right off the bat going
21 to want to leave.

22 MR. GROSS: Yes, absolutely. Your Honor, there's
23 going to be all kinds of educating about what things mean, but
24 a lot of the educating, the parties will agree on.

25 THE COURT: Not the Court, of course. The Court

1 loves this.

2 MR. GROSS: No, no, the Court is all over this.
3 That's clear. I'm already -- I understand that. But, yeah,
4 the jury is going to have to be educated like nothing we've
5 ever seen. But most of the education both sides will agree
6 on. In other words, how computers work, that kind of thing.
7 Then there will be some key fights where it looks like you're
8 fighting about the meaning of a term, and that's where the
9 Court has to step in. But the Court is exactly right, there's
10 going to be all kinds of educating.

11 The '592 and the '228 patent are all about
12 point-to-point movement. And, Your Honor, I'm going to work
13 through -- bear with me, and I'll try to go fast. And we'll
14 work through a similar example three times just to make it
15 very clear how to read figure 4 in the specification. So I'm
16 starting out pretty basic and then getting a little more
17 advanced and then getting more advanced. But I just think
18 this is so important because they keep talking about figures 1
19 to 4, because the Patent Office talked about tracing and the
20 like, I think we need to get there.

21 THE COURT: I feel like I understand it, so I'm not
22 saying don't do it. I'm saying, good, I'll be -- and I've got
23 nothing but time so don't worry about it.

24 MR. GROSS: It's very clear that Your Honor does get
25 this idea of point-to-point movement, but I'll just show you

1 what we have --

2 THE COURT: I didn't say that to make you hurry up.
3 I only said it, I guess thinking out loud, because it's
4 helpful for me when I have in my mind, okay, I think I
5 understand the way it works now. I think I understand those
6 figures, so now I'll be very interested to see whether you go
7 through -- anyway, it's apropos of nothing. Just go ahead.

8 MR. GROSS: Whether there's a meeting of the minds
9 here or whether one of us doesn't understand it, and I have to
10 turn to Ms. Sooter or something. But for now, I think we're
11 close, Your Honor, so let's work through it.

12 Let's say you have a statutory set of statutes, a
13 statute that has a set of sections 1 through 4, right? We get
14 the idea.

15 THE COURT: I thought Mr. Hosteny went through it
16 really well too.

17 MR. GROSS: Exactly. You get the idea of moving
18 through the sections, and you certainly get the idea of moving
19 from one section to a past date. And you also get the idea of
20 now we're getting to the third dimension. It gets a little
21 complicated, but you certainly understand that --

22 THE COURT: Could you just back up? I thought you
23 were going to switch to the big chart, so go back. I was
24 looking at the big chart. I wasn't looking at the screen.

25 MR. GROSS: Oh, I'm sorry. Yeah, here's what I'm

1 doing, Your Honor --

2 THE COURT: Yeah, I've got it, I've got it now.

3 MR. GROSS: This is our sort of base that we'll be
4 coming back to. And what I'm going to do now in this
5 animation is just show you how you build something that looks
6 a lot like figure 4.

7 THE COURT: Just have to go back to the beginning of
8 the animation. I'm sorry.

9 MR. GROSS: Sure. Absolutely, Your Honor. So we
10 have section 1,2, 3, and 4. And you can see how you can trace
11 through like the PTO talked about, this point-to-point
12 movement. And then once you get to section 4, if you wanted
13 to move back, staying on section 4. So, you know, if this
14 were a quiz, I would ask, all right, so when you're looking at
15 this last point, how many dimensions are there? There's two.
16 What are the dimensions? Well, one is the statutory
17 dimension. The other one or what they call is the location,
18 one is the location. That's section 1, 2, 3, and 4, where are
19 you? And the other one is -- we'll call it the date or time
20 dimension and the intersection. Okay. Got it.

21 THE COURT: I'm going to stop you one more time,
22 just because I just realized that the gallery, we have all of
23 these people sitting out there who are probably bored to
24 tears, and I guess we don't technically care about that except
25 that I have this gallery monitor. Did I just turn it on? Is

1 it on now?

2 MR. GROSS: But we have our monitor, Your Honor,
3 that's right here so they can --

4 MR. GASEY: It's on now.

5 THE COURT: Okay. And the counsel table monitors
6 are on, right?

7 MR. GASEY: Yes, Your Honor.

8 THE COURT: All right.

9 MR. GROSS: Okay. So, the first question is all
10 right, this is the world of one dimension where you are simply
11 moving along what we would call the location access from one
12 point in the statute, one section to the next. So I've moved
13 from section 1 to 2 to 3 to 4. Got that. That's one
14 dimension moving on that one dimension.

15 Now, what if you say, all right, but I want to go
16 back in time to section 4 and go back to what was happening
17 before. I just move back to the most recent version. And
18 there it is. So now I'm in two dimensions. The two
19 dimensions are location, which is section 1, 2, 3, 4. And
20 then time, which is, you know, just the continuing of time.
21 So that's where you go with two dimensions.

22 Here's where it starts to get a little tricky, Your
23 Honor, because you have to picture now a third dimension which
24 is when you're talking about section 4 on January 1, 1995, are
25 you talking about legislation? Are you talking about a case

1 that's interpreting that very section or are you talking about
2 a journal article that's discussing that very section? And so
3 now we have a third dimension. I believe they call that type,
4 and so you sort of assume always we're talking about
5 legislation.

6 But in this example, they say, well, what if instead
7 of legislation you want a case that's discussing legislation,
8 but you want to stay with the same time and the same section,
9 and so now what we do is we move along that axis. And every
10 time you move, what doesn't change is the location, meaning
11 you're still on section 4. That hasn't changed. And what
12 also doesn't change is the time because you're still on
13 January 1 of 1995. And the only thing you're moving to or
14 tracing along is the type axis, this third axis, and that's
15 moving from a section to a case discussing the section to a
16 journal article. And that's the third dimension. So you kind
17 of -- it's hard to visualize, but you get sort of a, you could
18 see we could build a cube that would kind of help show it.

19 But the Court can understand that multidimensional
20 space involves more than three dimensions so we now have to
21 talk about a fourth dimension. So good luck with that.
22 That's --

23 THE COURT: Well, I just think of it as variables.
24 This is the different variables that you can put in an
25 equation.

1 MR. GROSS: You can, but if you only think about it
2 as such as, you know, eight fields you can search. That's
3 just a database. So it actually constructs something where
4 you can move --

5 THE COURT: You have to have an organization.

6 MR. GROSS: Exactly. And to actually move within
7 it, it's very cumbersome. That may be why they stopped at
8 three, but the point is that it is very complex when you try
9 to add more dimensions. That's why we don't use this claimed
10 invention, and that's why Timebase has had so much trouble is
11 that to construct something along these lines is very
12 difficult. And then when you think about the thousands of new
13 additions that happen every day and how to figure that out and
14 work this out, it's a real mess. So that's why this invention
15 with this claimed multidimensional space is not commercially
16 liable or of interest.

17 Now, when we talk about point-to-point movement, can
18 I get the next board -- when you are talking about
19 point-to-point movement, you are using a previous and a next
20 button. And in fact, I think this is Timebase's brief. They
21 say there's this separate feature that relates to
22 point-to-point movement, the previous and next button. So
23 that's what's nice here, Your Honor, is that we're in some
24 agreement on how things are working. I actually think there's
25 not a huge raging disagreement on the discussion of section 1

1 through 4 of the figures, but I want to work through it.

2 So what I'm going to do now, Your Honor, is simply
3 just showing some previous next buttons is do the exact same
4 thing, but show how it would work. With the previous next
5 button, what you would do, Your Honor, is if you began section
6 1, you would push "next" in that section axis and get down to
7 section 4, and then you get on the axis of time and push
8 "previous" and that gets you there. And then you get on this
9 other axis of type and push "next" and that would get you
10 there.

11 So in other words, you're actually moving from point
12 to point. The patent has a previous and a next button and
13 talks about point-to-point movement. Again, if you're in
14 Australia and you have a limited set of data that doesn't
15 change all the time, and you're a very small company trying to
16 do something in Australia, you can try to make it work.
17 They've had a lot of trouble, but you can try to make it work.

18 When you get to the bigger world of thousands and
19 thousands of things going on, this is not useful, helpful.
20 It's cumbersome. So that's why we don't infringe. That's why
21 we don't use it.

22 So now what I do, Your Honor, and this would be sort
23 of the final exam for people watching in the audience would be
24 I'm going to take the discussion that's in the patent of
25 figure 4 and show the Court how in the specification itself

1 the patentee teaches someone how to follow this point-to-point
2 movement. So this is actually, I think, helpful to bring it
3 all together.

4 This is a question from the specification. This
5 isn't a specification that we made up or a question we made
6 up, so this is literally from the specification. Here's the
7 question: Does NSW, which, Your Honor, is New South Wales in
8 Australia. I'm sure the Court knows that.

9 THE COURT: The other one is Queenslander.

10 MR. GROSS: Very good, yes. I think we were in New
11 South Wales taking depositions in August which is a beautiful,
12 beautiful part of the world. But does New South Wales'
13 legislation on fences presently cover hedge rows between the
14 boundary of a private property and a public road? All right.

15 So the question is you have hedges. Is there a
16 fence? And here's what the specification talks about. In
17 figure 4, the X, Y and Z axes indicate time. We've already
18 talked about that with the Court. "The legislation provision,
19 location," we've talked about that. That's section 1, 2, 3,
20 4. And "type, legislation L, cases C, journal articles J."
21 What's nice there, Your Honor, is the specification is just
22 described exactly what I talked about it, so that helps
23 reinforce it so it's not me talking. It's the specification
24 talking.

25 Then it says, "The end user begins at legislation L

1 along the Z axis where the fences and boundaries act as
2 located." And so we're at L. That means it's legislation.
3 It's not a case about legislation. Not a journal. We're at
4 legislation. And we're just kind of making it clear where
5 that works. That's where you would be.

6 And then "select section 1 of legislation indicated
7 by L allowing the Z axis at node 402 as of January 1, 1996."
8 So we know where we are. We're at the intersection of those
9 three. And then look at what they say: "The end user then
10 follows a path in the legislation through nodes 404, 406, and
11 408 for sections 2, 3, and 4. So you can see what they're
12 doing. They're going to go to this point, then this point.
13 This is the point-to-point movement. This is the tracing the
14 PTO talked about. This is the multidimensional space.

15 THE COURT: As opposed to jumping right from 404.

16 MR. GROSS: Exactly. So instead of doing a database
17 search, just saying I'm going to do a search, you know, fences
18 within the same sentence. This is about not doing that kind
19 of work. What we call sort of database that's been around
20 forever. This is a very cumbersome way of setting something
21 up. But when it's set up, you can just go boom, boom, boom,
22 and pushing a button and moving from point to point.

23 THE COURT: All right. I had in mind, I guess when
24 I was working through this in my mind, I didn't -- I mean I
25 guess you're right. You would have to move point to point to

1 point. I had in my mind that the user would be searching for
2 the date, and that the computer would do -- would go from --
3 that you wouldn't see in this example 404 and 406. That
4 actually this would be done behind your -- without your
5 knowing. But now you're telling that you would actually have
6 to you, yourself, the user would go 402, 404, 406, 408?

7 MR. GROSS: Yes. The way I'll say it, I think we're
8 in complete agreement, but let me say what I think you're
9 saying. It's that we're not talking about doing a search
10 we've been doing for the last 20 or 30 years. You know, we're
11 just searching and finding stuff. Searching again, messing
12 around. That's not what we're talking about.

13 We're saying you start somewhere and then you go to
14 the next point, and you actually see the next section. You
15 see section 2, and then you see section 3, and you see section
16 4. So you're going boom, boom, boom, boom.

17 THE COURT: Okay. So it has to be each step then
18 has to be intentional, along each -- through each dimension.

19 MR. GROSS: Yes. Which is a wonderful idea to a
20 certain extent if you're talking about almost nothing, you
21 know, very limited, almost like a science experiment. You can
22 see that it might be useful because you could say look how
23 fast and efficient you can move from point to point. But once
24 you get into anything with any complexity, it's completely
25 cumbersome and of no value. In fact, we would actually turn

1 it down, like you would not want to do this with a complex
2 statutory database. It's just too much.

3 THE COURT: We just have to pause for a moment
4 because this is different from how I had it in my mind. In my
5 mind, I thought these things all happen basically automatic.
6 And the figures were explaining how it gets there, but, no,
7 I'm wrong about that.

8 MR. GROSS: Yes. And, Your Honor, what's
9 interesting is, what's great, I think, very helpful from a
10 Markman perspective, is that the specification is walking us
11 through this. The specification is saying, look at this. It
12 says, "the user then follows a path in the legislation through
13 nodes 404, 406, and 408 for sections 2, 3, and 4,
14 respectively."

15 THE COURT: It's "by follows." I guess "by follows"
16 that means does something -- it takes action to follow rather
17 than -- follows in the sense of being lead without knowing.

18 MR. GROSS: And then when you look in the patent and
19 they have a "previous" and a "next" button, they talk about --

20 THE COURT: Yes, they have to go through step by
21 step by step by step -- yes, I mean I --

22 MR. GROSS: -- next, next. Then we go to node 408
23 contains section 4 at January 1, 1996, which contains the
24 current definition offenses. And then the next question:
25 Well, all right, you've gotten to where you wanted to get for

1 starters. You're at the right section. Section 4 talks about
2 fences, so that's good. You're at the date 1996. Okay.
3 You're in legislation, so you've got the three points coming
4 together. The three dimensions coming together. If not, have
5 such hedge rows ever come under NSW legislation? And let's
6 look at what the specification teaches.

7 "The user then selects section 4 of the legislation
8 as of January 1, 1995, which in this case is an earlier
9 version of the section prior to amendment by moving to node
10 410 along the X axis." So, you just move, there you go, now
11 you move one over.

12 Then it says, "this provides information about the
13 prior law for the query." And it says what about cases?
14 Well, look at what they say. "The user can then move to other
15 information on section 4 as of January 1, 1995, by going to
16 nodes 402 and 412, for case and journal article information
17 respectively, along that node axis. For example, a case on
18 the earlier section 4 might be identified at node 412, and
19 articles on interpretation of section 4 at node 414."

20 Now, the patents describe as point-to-point movement
21 over and over again. The Court's aware that under the case
22 law, when you talk about embodiments of an invention that's
23 meaningful, if you say the words, "all embodiments of the
24 present invention," that's broad and unequivocal. That's very
25 powerful if you want to understand something.

1 Here's what Timebase said, "the ability to map each
2 node or key intersection point of various axes or pathways,"
3 that's what we're talking about, "is a significant functional
4 aspect of the embodiments of the invention. With such
5 coordinates known, it is possible to move easily between
6 points in the multidimensional space." If you want to move,
7 Your Honor, from point to point, you can do that through
8 multidimensional space.

9 And what's important is the specification teaches
10 that this ability that creates this feature is a significant
11 functional aspect of the embodiments of the invention. So it
12 doesn't say, you know, there's this stray embodiment that has
13 this one feature. You might be interested in. It says, "the
14 embodiments," which anyone reading that would say, okay,
15 that's the embodiments. You're talking about the embodiments.
16 And then it doesn't say, you know, the embodiments, that's
17 sort of something you might be looking at doesn't matter, of
18 the invention.

19 So this is the heart of the invention, the
20 embodiments of the heart of the invention. And so we think
21 that helps inform the Court, when the Court is trying to
22 figure out, all right, so, there's this discussion of
23 dimensions. Timebase originally thought it would have this
24 movement. West said that's right. Let's go ahead and clarify
25 that, so we don't have any problem. The PTO talked about

1 tracing through and the importance of multidimensional space.
2 Okay. When you say this, when you talk about this so clearly,
3 then it should be part of what you're talking about when
4 you're talking about multidimensional space, and we think it's
5 a reasonable instruction. Comes right out of the
6 specification and has a very clear teaching.

7 But there's more, Your Honor. If I could have the
8 next board which is really out of our brief, Your Honor, so
9 this is --

10 THE COURT: Can I --

11 MR. GROSS: Go ahead, Your Honor.

12 THE COURT: Can you just indulge me, and don't
13 laugh, okay?

14 MR. GROSS: No, no please.

15 THE COURT: If you could put up on here so I can --
16 well, maybe I do have Telustrating or I'll just explain it.

17 MR. GROSS: Go ahead, Your Honor.

18 THE COURT: Suppose the user doesn't want to go
19 through this in this methodical way. They just want to know
20 were there any -- you know, what did law professors think
21 about this hedge row business back in 1964? Could you just go
22 directly to that or in your understanding, do you have to go
23 doo, doo, doo?

24 MR. GROSS: Well, you have to start somewhere --

25 THE COURT: You have to pass it through --

1 MR. GROSS: Your Honor, you do a search to get you
2 started somewhere, but then you move along these points, and
3 that's what's so efficient and fast. It doesn't allow extra
4 work. It's just boom, boom, boom because of how they're
5 connected.

6 THE COURT: But you have to go one dimension at a
7 time, right?

8 MR. GROSS: Yes, absolutely. You are moving along a
9 dimension, and that's exactly what their example is. Their
10 example is very clear you move one dimension at a time.

11 THE COURT: Okay. If I had used the Telustrator, I
12 would have drawn a diagonal line along which there are no
13 dotted lines right now and asked you if you can do that or
14 would that in your mind be creating a disorganized three
15 dimensional space?

16 MR. GROSS: The way I would put it, Your Honor, is
17 in the world of databases, you can do searches that are very
18 specific, and then you can do another search and then another
19 search and kind of move around. But all you're doing is doing
20 searches. You're just giving terms and then finding what's in
21 a database. That's been around for decades. Everyone agrees
22 that's not anything new.

23 And what they didn't say here is they didn't say
24 that, yes, this is a key functional aspect of the invention.
25 But as you know, you can also just do a bunch of searches and

1 that's also multidimensional space. Because when you get
2 right down to it, multidimensional space is just a database,
3 and we're just searching within a database, so it's really no
4 big deal.

5 In fact, the PTO made it very clear multidimensional
6 space is a significant feature. It's in contrast to
7 attributes in a database. If the Court remembers, I had a
8 slide about that. And then in the patent, the teaching which
9 --

10 THE COURT: That's the slide where they added in the
11 language.

12 MR. GROSS: Yes, Your Honor. Yes, Your Honor. And
13 where the patent is teaching that point-to-point movement, and
14 our point is simple that a person of ordinary skill in the art
15 who is reviewing this specification and all these other
16 materials, would see this very clear teaching, and say all
17 right, so that's what you mean when you talk about the
18 dimensions and the multidimensional space. So that's it.

19 THE COURT: All right. Thanks.

20 MR. GROSS: So what I've now done, Your Honor, is we
21 can take these two boards down, and the Court has this at a
22 tab. It's really more just to get the gist. I'm not going to
23 go through every one.

24 THE COURT: That's tab 3.

25 MR. GROSS: Thank you, Your Honor. I believe that's

1 right. And this is just our chart from the brief. And our
2 point is, Your Honor, it's not as if there was a stray
3 discussion of this point-to-point movement. It's a
4 significant functional aspect of the invention. It's at the
5 heart of the invention, and it's repeated over and over again.
6 And when you have that, and you're asking that question,
7 "Would a person of ordinary skill in the art understand that
8 dimensions are similar to how Timebase first proposed and how
9 we are now asking the Court to construe?" The answer, we
10 think, is a yes.

11 We think that someone looking at this would say, of
12 course, this invention is point-to-point movement, and the
13 multidimensional space requires point-to-point movement. And
14 that's what you teach both specifically, and then you have
15 that strong language, and that's also what you're talking
16 about with the PTO.

17 Now, Your Honor asked a question which I didn't
18 realize it, but I think we might have even anticipated, which
19 is what if you didn't have point-to-point movement? And if we
20 look at figure 4, we have a modified figure 4 where you take
21 out the point-to-point movement. This is just a database,
22 literally. You can do searches, and you can certainly do all
23 kinds of searches to find things, but that's just database
24 searching which this Court does and is capable of doing and
25 understands. Everybody understands a database that has a

1 bunch of fields, and you enter fields and search.

2 So you would actually have to rewrite the patent if
3 you wanted to delete point-to-point movement at the heart of
4 the invention. It would be a different patent. And figure 3,
5 also the same thing. If you remove the point-to-point
6 movement, now it's just a database.

7 And you also would have to remove the previous and
8 next buttons. You would have to remove the previous and next
9 buttons in the other figure. It would be a different patent.

10 What I will give Timebase a lot of credit for is if
11 the Court looks at the briefs and tries to figure out where
12 are people agreeing and disagreeing? You're not hearing
13 Timebase say things like, "There's no such thing as
14 point-to-point movement in the specification. The
15 specification doesn't teach point-to-point movement. They're
16 out of their minds when they're talking about point-to-point
17 movement."

18 What they're saying is there's point-to-point
19 movement taught in the specification. We don't think it's
20 enough today to require the Court to construe it in
21 dimensions. Let's worry about it later. And they're not
22 getting their own construction of dimensions. They're not
23 getting their own clarification. But what I think is helpful
24 for the Court is they're not saying things like you're all
25 wrong. These are not references to point-to-point movement.

1 And that helps the Court in a very complex case when there's
2 that much agreement.

3 Now, Timebase has an analogy I won't spend a lot of
4 time on, and we have this as one of our tabs. They talk
5 about, "Once created, the attributes are used in conjunction
6 with links in order to travel in the multidimensional space to
7 a desired location." And they say a simple analogy is the use
8 of an address, state, city, street name, and street number to
9 find a house. And they say the house is analogous to the
10 text, and the state, city, street name, and street number are
11 analogous to the attributes.

12 But, Your Honor, this is a bit silly but I'm going
13 to go ahead and show the Court because you'll get an idea of
14 where the fight is and probably will be. We've got portions
15 of text base data, it could be the house. We'll give them
16 that. And let's go ahead and say, "These identification
17 characteristics are the attributes." But if you don't have
18 point-to-point movement, then you're really talking about
19 homes out in the field. You know, out in grass. And there
20 would not be a way to get to each home.

21 And what they teach in that specification is
22 point-to-point movement. They don't say simply, "you can do a
23 bunch of searches and find stuff." That's not what this
24 invention is. If that was the invention, we don't believe
25 they would have ever gotten this patent. We think they

1 shouldn't have gotten it anyway, but we know if they would
2 have said to the Patent Office, "Just to be clear,
3 multidimensional space really is just talking about database.
4 If you want, you can go ahead and do your searching." They
5 wouldn't have any trouble. Importantly, the PTO has spoken,
6 and Timebase has spoken, and the specification has spoken.

7 All right. So what I'm going to do, Your Honor, I'm
8 going to try to do this pretty quickly because I know we're
9 taking a fair amount of time today. But what I'm going to do
10 is I'm going to address arguments we saw in their brief which
11 Mr. Hosteny did not make, and I'm doing that because there
12 will be a time when the Court is pulling it all together,
13 where the Court will be reviewing briefs again and trying to
14 remember what happened.

15 And so I was expecting Mr. Hosteny to make these
16 arguments, but he spent almost no time talking about the
17 specification and what it taught. And so what I'm going to do
18 is address very quickly their arguments. And if the Court
19 wants me, I'll continue.

20 THE COURT: Okay. Go ahead.

21 MR. GROSS: I thought the Court was giving me the
22 Court-would-like-to-take-a-break look, so I was going to --

23 THE COURT: No, no, I was just looking because I
24 thought Mr. Hosteny was going to take some sort of umbridge
25 with what you just said about him.

1 MR. GROSS: He probably is disagreeing with some of
2 what I'm saying. That would be my guess. He probably will
3 have some issues with what I'm saying, but I think these are
4 arguments that come out of his brief, and that he didn't
5 address, so I'm going to address them.

6 One thing they talk about is the defendants are
7 seeking a definition of a definition. And they say the Court
8 must adopt as its construction this sentence that's in the
9 specification, and that you can't do more. Basically, the
10 Court is stuck with that sentence that the parties agree
11 referred to multidimensional space.

12 And this is their brief at 22. And we want to be
13 clear, Your Honor, that the cases they cite simply talk about
14 the Markman process. And the case law is very clear, very
15 clear, Your Honor. We have a case here, "Where a patent
16 applicant has elected to be lexicographer by providing an
17 explicit definition in the specification for a claim term, the
18 definition selected by the patent applicant controls. The
19 patentee's lexicography must, of course, appear with
20 reasonable clarity, deliberateness, and precision before it
21 can effect the claim."

22 In other words, Your Honor, if there is some issue
23 about that definition and the parties are going to disagree
24 about it, the Court absolutely has discretion to straighten
25 that out.

1 There's another case that says, "where a patentee's
2 lexicography is amenable to more than one reasonable
3 interpretation, the patentee has failed to act as its own
4 lexicographer." So the big picture question, Your Honor, is
5 does this Court have discretion to decide this issue and give
6 clarification. The answer is obviously it does.

7 In fact, if this Court had done one construction,
8 which I'm sure has happened to this Court, where the Court has
9 done a construction and then later on clarified it for some
10 reason, that's not an error. That happens.

11 And so Mr. Hosteny didn't make this argument. It's
12 either because he waived it or he's just relying on his
13 papers, and I'm not going to chance which of that it is. So I
14 just want to say the Court clearly has discretion to clarify
15 dimensions, so it's consistent with the teaching of the
16 patents. Especially, Your Honor, when you think about it,
17 it's not as if Timebase is saying don't interpret
18 multidimensional space. Timebase is saying, here's a
19 construction, and we're simply discussing what the proper
20 construction is. So this is well within the Court's - we
21 think that's an easy one.

22 The second one is this idea that it's just an
23 embodiment, and they say in their brief at 24, words to the
24 effect, we're paraphrasing here, the defendants cite
25 extensively from the disclosure of the first embodiment

1 regarding point-to-point movement. And they make the point
2 that the point-to-point movement do not appear in the claims,
3 and that we're trying to read something from an embodiment
4 into the claim. So I want to be very clear about this.

5 The patent only has two embodiments. It's not like
6 there's 14 embodiments. There are two. And we know that
7 because there is discussion of the first embodiment and then
8 there's a little heading that says, "second embodiment."
9 That's the heading. So the Court doesn't have to do a lot of
10 hunting to find the discussion.

11 The first embodiment has an extensive discussion
12 from columns 8 through column 14 which is several pages.
13 That's where we see most of this point to point,
14 point-to-point movement discussion that we have in our brief.

15 The second embodiment is only a few lines of text.
16 That's something to do with storing text. It does not in any
17 way cancel what's come up until then. In fact, Your Honor,
18 I'm going to show this. This is a line from the second
19 embodiment. "It will be apparent to one skilled in the art
20 that the second embodiment may be readily implemented in view
21 of the foregoing description of the first embodiment, which is
22 not repeated here for the purpose of brevity." In other
23 words, we're not going to repeat everything we just did about
24 multidimensional space and everything else. We're just saying
25 in view of the foregoing, we don't have to repeat that here.

1 So that means, Your Honor, that both embodiments
2 incorporate multidimensional space and the importance of
3 point-to-point movement. And if you were at all concerned and
4 said, well, wait a second, I want to make sure I've got that.
5 Remember what they said in the specification. They said, "the
6 ability to map is a significant functional aspect of the
7 embodiments." And what they really meant was the two
8 embodiments, and that's how you can move easily between points
9 in a multidimensional space.

10 So we're not in a situation, Your Honor, where
11 you've got 50 embodiments, and we're some litigant who is
12 saying we found something in this one discussion and so read
13 it. We're saying all the embodiments have it, and that's
14 clear from a reading of the specification. And so that's why
15 that one goes away.

16 So let's skip to the third one which is claim
17 differentiation, and we really think this is incomprehensible.
18 That's argumentative, Your Honor. I don't think anyone on the
19 other side will agree with that. But we really do think this
20 claim differentiation just doesn't work. It really doesn't
21 work. I want to show very briefly.

22 I didn't hear Mr. Hosteny make this argument, but I
23 got it from the brief. There's an Amgen case, Your Honor,
24 that says basically if you've got a limitation from a
25 dependent claim, you generally shouldn't read it into an

1 independent claim. The Court is very familiar with that.

2 THE COURT: I'm always tempted to do that because
3 the dependent claims are more specific and understandable, so
4 it's always tempting to --

5 MR. GROSS: It is, it is. It can be, Your Honor.
6 But in this world of claim differentiation, it has to be
7 pretty clear. If there's all kinds of complexity and things
8 going on, it doesn't work very well. Here what they say is
9 there's some dependent claims that require searching and
10 retrieving. And, Your Honor, searching and retrieving has
11 nothing to do with what we're talking about. Searching and
12 retrieving is not what we're talking about today. We agree
13 that there's this general principle, but when you look at
14 Amgen, this is the example, "unasserted claim 3 is virtually
15 identical to claim 1, save for the express limitation
16 regarding the use of exogenous DNA."

17 And what the Court says is since you have exogenous
18 DNA in a dependent claim, you shouldn't read exogenous DNA in
19 the independent claim. So it's a match. What they're doing
20 here, and this is why we view this as incomprehensible is
21 we're not saying to this Court, and the Court's never heard me
22 say, "Your Honor, by the way, as you know, multidimensional
23 space is this searching and retrieving. That should be the
24 construction of multidimensional space."

25 If I were saying that, they could say to the Court,

1 interesting that Mr. Gross is saying multidimensional space is
2 searching and retrieving, but when you go to the dependent
3 claim, look what it says, searching and retrieving. We're not
4 doing that at all. What we're saying has nothing to do with
5 this dependent claim. We're not asking the Court to read the
6 phrase searching and retrieving into the multidimensional
7 space. And so that's why that doesn't work.

8 And they have another one that's similar where they
9 talk about some dependent claims define linking means with
10 departure and destination points. And I just want to show
11 this, Your Honor. There's a separate term called "linking
12 means" that has a separate dependent claim, so that's the
13 world we're in. That has nothing to do with how the Court is
14 interpreting multidimensional space. But since I didn't hear
15 Mr. Hosteny get into great detail, I'll just keep rolling
16 here, Your Honor.

17 I do want to talk about organizing. It's in their
18 brief. I didn't hear Mr. Hosteny make this argument in any
19 detail. But it's a Markman hearing, so I want to make sure
20 I'm covering the main points from their brief.

21 We agree that certain claims include the phrase "for
22 organizing." And I believe what they're arguing is that "for
23 organizing" implies an organized view. That's the phrase they
24 use in their brief. And they talk about the All button. And
25 I will say Mr. Hosteny mentioned the All button here, Your

1 Honor. He showed the Court the All button. And it's fine
2 that at some point the specification Timebase talked about an
3 All button. But let's be clear, when we look at this, we have
4 all multidimensional space for organizing. What is the "for
5 organizing" talking about? Is it an attribute? Is it a
6 point? Is it multidimensional space? That's not crystal
7 clear. Neither side has asked the Court to interpret "for
8 organizing."

9 So let's just work with the idea that there's "for
10 organizing," and we're trying to understand it. And let's go
11 to this point they make about an organized view. They
12 basically say, Your Honor, we're talking about for organizing,
13 the All button is how you get an organized view. And so what
14 the invention really is about is organizing from an All button
15 or getting an organized view or something like that.

16 Just to be clear, Your Honor, for purposes of
17 Markman, claim construction, and how things work, the patent
18 says this: "The user can also call to the screen all versions
19 of the section as one view or display using the All button."
20 In other words, literally a patent says one thing you can do
21 is push an All button. That's it.

22 Here's what the patent doesn't say, Your Honor. The
23 patent doesn't say this: "As well, the user can organize all
24 versions of the section by using the All button," or something
25 like this, Your Honor. "A great way to organize is by using

1 the All button." There's nothing. And so in the world of
2 claim construction, if you're trying to say that there's this
3 big problem with what we're saying because there's a word
4 "organize," you have to connect what you're saying to the word
5 "organize." You can't just say somewhere there's a list.

6 Our point, Your Honor, is the key, the key to
7 organization in this patent is point-to-point movement.
8 Obviously, that's how you're super-organized. I call it
9 hyper-organized. And the idea of saying point-to-point
10 movement is unorganized or disorganized, anti-organized. That
11 doesn't make any sense. And there's no suggestion in the
12 patent that when you're doing point-to-point movement, you're
13 not organized.

14 So this is how it's organized. In fact, anyone
15 reading the discussion from 1 through 4, which is the
16 discussion of multidimensional space, would say that's your
17 organizational scheme. The idea that somewhere you also say,
18 "You have an All button. You can push it." That's fine.
19 Just like you can do some searches, and the Court was talking
20 about that. "Well, we're doing some searches." Yeah, there's
21 things you can do. But unless you teach someone that when I
22 talk about organize, I mean the All button, that doesn't gain
23 any ground for claim construction. All they said is there's
24 an All button.

25 So that, and by the way, just to be -- I will say

1 one thing, Your Honor. The word "organize" is used in
2 discussion of figure 3. So we have an organized connection.
3 Figure 3 illustrates the mapping of various axis intersection
4 points that is used to organize.

5 And what do they say about figure 3? The effect of
6 mapping nodes as shown in figure 3 is that a course 320, that
7 the Court has already been talking about, through the
8 information represented in the three dimensional space can be
9 easily plotted. The user begins the course 320 at node 302,
10 and progresses vertically downward to the fourth node 304.

11 In other words, if you want to organize,
12 point-to-point movement is the ticket, and no connection
13 between the All button.

14 And at that point, we've run out of what I call
15 their escape hatches. And so now we're in the world of what
16 we've seen today is a discussion about regulations, and CFR,
17 and statutes which are not in any way discussed in the patent.
18 Almost no discussion of what the specification teaches. And
19 even no discussion of the arguments they've been presenting.
20 And so we think what the Court should do is adopt our proposed
21 construction of multidimensional space which is simply taking
22 that sentence in the patent and clarifying dimensions very
23 similar to the way they had first suggested. So for all of
24 those reasons, that's what we would ask for that construction,
25 Your Honor.

1 So now we have work to do on these other claim
2 terms. And what I can do, Your Honor, is try to go through
3 these very quickly.

4 THE COURT: Well, let me ask Mr. Hosteny if he wants
5 to go now or is that --

6 MR. GROSS: Yeah, I was to going address some of
7 Mr. Hosteny's arguments that he had presented on the other
8 stuff because see, in theory, he was supposed to present the
9 Markman position that they had, and so I was going to try to
10 get to these other things. What would the Court prefer?

11 THE COURT: Let me ask Mr. Hosteny, did you think
12 that you were going to have a chance to respond after
13 Mr. Gross went through or have you --

14 MR. HOSTENY: Well, I want to save some time for
15 that, Judge. But I don't think the oral argument has a
16 repetition of the briefs, so it's supposed to be different and
17 accomplish a different goal. It's focused different.

18 THE COURT: So you anticipated a brief sort of
19 rebuttal to whatever Mr. Gross was going to say?

20 MR. HOSTENY: What he said so far, yes.

21 MR. GROSS: We're definitely there, Your Honor.
22 When I'm finished, he's going to have a brief rebuttal. And
23 then I'm going to have a brief, brief, brief rebuttal. So
24 that's the idea. That's how we planned it.

25 THE COURT: Okay.

1 MR. GROSS: So what I'm going to do in the interest
2 of time, Your Honor, is go pretty fast through these other
3 terms.

4 There's one issue that I'll address out of turn and
5 that is this idea that Mr. Hosteny talked about. This is a
6 very technical point, but Mr. Hosteny said that we, when we
7 talk about a single reference ID having a single attribute.
8 He says that an ID that we show has two attributes. Your
9 Honor, I'm going to do this pretty quickly, but I just want to
10 make it clear that that's not how it works. And so what I'm
11 going to do is this, is the patents at columns 97 and 98, it's
12 not in our tabbed booklet. I think it's part of the middle
13 material, and the Court doesn't have to do this now. At
14 columns 97 and 98, there is a section ID. There is this
15 reference ID that we're talking about.

16 Let me see if I can focus. All right. I'm
17 surrendering. So, Your Honor, it says that all
18 cross-references point to directly to a target by providing
19 the ID of the target as a value of an attribute. In other
20 words, this is column 97 and 98. The patent teaches that the
21 ID is an attribute. That's what we're talking about. And
22 then if the Court were to look at --

23 THE COURT: Just a minute, I have that aspect, that
24 patent. I have it right in front of me now and the actual
25 patent.

1 MR. GROSS: Okay, Your Honor. If you go down to the
2 middle, you'll see "cross reference."

3 THE COURT: I do. I've got it.

4 MR. GROSS: And then you see where it says, "the ID"
5 is of an attribute which means an ID is an attribute.

6 THE COURT: All cross references point directly to a
7 target by providing the ID of the target as the value of an
8 attribute.

9 MR. GROSS: So our point is that we disagree with
10 them when they say, a reference ID is not an attribute. Now,
11 it gets a little complicated, but we'll work through this. If
12 you look at the section ID. The first thing it talks about is
13 the type, and then it has number 2, the year. And then it has
14 another -- I'm sorry. It has -- I think we're going to call
15 the first one. I'll show that you in a second.

16 THE COURT: Known what that type is pointing to
17 though.

18 MR. GROSS: Ms. Sooter? Ms. Sooter is coming to
19 join me.

20 THE COURT: That's an admission of failure.

21 MR. GROSS: It is, it is. We're going to compare
22 what we're looking at to another page of a patent which is
23 columns 123 and 124. I'll show the Court that. And I'll just
24 work through this nice and slowly, Your Honor. Just because
25 Mr. Hosteny brought this up is worth doing.

1 So if we look at section ID, and we go through
2 columns 123 and 124. We have field 1 is the type of document,
3 and so this is the type of document, and it says --

4 THE COURT: Okay. So field 1, I have that, which is
5 being referenced. The current valid value is ACT. So then
6 I'm going to go back to column whatever it is, 97, 98.

7 MR. GROSS: And I'm pointing to what we would say is
8 field 1.

9 THE COURT: So you think that CWACT is field 1. And
10 I guess that makes sense. I'm going to go back to 73 because
11 the current valid value is ACT.

12 MR. GROSS: Your Honor, if we go back to columns 123
13 and 124, and we say field 2 is the abbreviated form of the
14 year, and the number of the -- and if you go back, I put 2 of
15 the year and number; do you see that, Your Honor?

16 And then if we come back to field 3 which is as
17 columns 123 and 124, it identifies the type of object being
18 referenced, and so that's another field. And then it goes to
19 the next one, and it goes down here. It says, "field 4 is the
20 identifier of the element being referenced which is formed by
21 concatenating the values of the attributes." And so here we
22 are, we're now bringing it all together.

23 And so our point, Your Honor, is that, and this is a
24 very technical point. We're simply saying that we're not
25 wrong to say a reference ID is the value of an attribute.

1 What a reference ID does is bring things together and form an
2 attribute. And that's what the patent teaches. A hyper-
3 technical point, but we just wanted to raise that issue
4 because Mr. Hosteny mentioned it. I don't think the world
5 turns on that particular point, but we wanted to just make it
6 clear what we were reading in the specification.

7 So now I'm going to go pretty fast through the rest
8 of the claim terms because, like I said, multidimensional
9 space is by far the most important.

10 So let's do "linking means" very briefly, Your
11 Honor. Your Honor, Mr. Hosteny made clear in the first patent
12 you've got linking means, and the second patent, you've got
13 link. So let's go through this. Is linking means means-
14 plus-function? The Court is pretty familiar with that. The
15 question is when you see a plurality of linking means of
16 markup language, is that enough structure?

17 And, Your Honor, we really think this is more in the
18 neighborhood of a computer or of software of something like
19 that. It's very generic. There's all kinds of different ways
20 people could use or discuss markup language. So the idea that
21 by throwing in that, that's enough. We don't think that's
22 enough.

23 But also, Your Honor, it doesn't say what's being
24 linked. It doesn't say it's this linked with this. So
25 there's no structure of what's being linked. So when you ask,

1 all right, well, what's going on? You say linking. What are
2 you linking? How is this working? We don't think there's
3 enough structure. We don't think it's clear enough.

4 In fact, we have a presumption, and they've agreed
5 there is a presumption. So we're in the world of it's means-
6 plus-function unless they can convince the Court to get out of
7 it. We don't think they've done that. We don't think they've
8 explained the structure. And we think that if you go through
9 the claim term itself, there's just not enough there. You're
10 not clear on what's being linked to what, and you're using a
11 two generic at the time. And they say things like many
12 different and more complicated markups can be used, and they
13 have wide latitude.

14 Now, what do they do, Your Honor? They do one thing
15 which is interesting, is they say, "the dependent claims
16 provide sufficient structure." They say this in their brief.
17 This is where we start to see some structure. Dependent claim
18 9 says, well, you're allowing departure and destination points
19 to be created, so now you're saying you're linking, you're
20 using departure and destination points. But the law says that
21 you can't escape the mandate by adding a claim or claims that
22 recite structure. You can't go to a dependent claim and go
23 now the independent claim has a structure. You can't do that.
24 It doesn't work that way.

25 The independent claim is either means-plus-function

1 or not. When you've decided that it is means-plus-function,
2 you will be further limited by that dependent claim, but you
3 can't suddenly go back and go, I want to start over. I'm now
4 going to change what's meant by the means-plus-function
5 language.

6 THE COURT: Look what an old case that is for such a
7 big concept.

8 MR. GROSS: Well, yeah, Your Honor, I will say this
9 to the Court that I haven't seen a lot of this discussion,
10 this idea of I have a dependent claim, and I would like to use
11 that to provide structure. You know, it may be we've missed a
12 more recent case or maybe it's just not done a whole lot.
13 But, yeah, it is, Your Honor.

14 All right. So the function we're pretty close on,
15 so I'm not even going to spend a lot of time on it. We don't
16 think there's a big disagreement on the function. You know,
17 how we define the function with respect to portions is
18 similar, how they talk about portions and other materials. So
19 I'm not getting into that.

20 Let's talk about their corresponding structure.
21 Their corresponding structure is pretty vague, a piece of
22 information of a code or markup. Usually in a means-plus-
23 function world, in that world, the structure is pretty
24 detailed so the Court can guide the experts so they can look
25 at the structure and then have this infringement argument.

1 Here they really haven't provided any guidance. They might as
2 well have said that the linking means of a markup language is
3 a linking means of a markup language. You want to look for
4 some information that has something about a markup. That's
5 not typically what you do.

6 So what we've done is said in this specification
7 what's taught is a single reference ID, and so we give
8 examples in the brief, and here's what we mean. It has ID.
9 It's a reference ID, Your Honor. That's the example. Another
10 ID. That's the example. Folio views as an ID. So that's
11 what we mean. That's specific. That's right out of the
12 specification.

13 All right. So I'm going to keep rolling. Yeah,
14 they do say things like folio views is not a markup language,
15 but folio views in the patent. The patent says at column 9,
16 line 53, "folio views has its own proprietary markup
17 language," so we do think that it's taught in there.

18 You can support multiple links, but they have to
19 have a specific reference ID. And so you can't have more than
20 one reference ID, but there has to be a reference ID. They do
21 talk about dependent claim 10 as an identification code which
22 is the same as reference. We don't think it is the same. We
23 looked for what they were talking about in identification
24 code. We found identification string, but that had a
25 different definition, so we don't think that hurts us.

1 We think what we're doing is pretty straightforward,
2 that it's a unique identifier, and that's a reference ID. And
3 that's not the same as an identification code which is more
4 narrow.

5 I'll talk about link briefly, Your Honor. What's
6 link? By the way, if the Court finds linking means is not
7 means-plus-function, than this discussion is pretty much the
8 same thing. So that's why Mr. Hosteny was right is that each
9 side presented alternatives, and so that makes this a little
10 easier for the Court.

11 Links are connections between text-based data. We
12 agree. We agree that link and linking means use a markup
13 language, and this idea of related material we don't think
14 matters. They talk about utilizing any piece of code. We
15 don't know what they're getting at, that allows departure and
16 destination points. We don't know what they're getting at.
17 What we do is say look, in the patent, actually one of the
18 claims, you define a link as one of a plurality of attributes,
19 and you can't define a link as one attribute, one of a
20 plurality, and then later on say we're just kidding over here.
21 Now, it's more.

22 So, you know, the Court knows when you interpret the
23 word "link" in one claim, we're really striving to have it be
24 the same in other claims. And so we think we've got a good
25 argument there, Your Honor. And that's why a single is

1 dictated by the claim language, and that the unique reference
2 ID is taught in the text, provided the ID, providing the ID
3 string which must contain the ID string.

4 There are a couple of external references where
5 Timebase agreed with us, but, Your Honor, those are external
6 so those are really tangentially irrelevant, but we just put
7 them in there for background. And then I'm going to keep
8 moving.

9 We're going to go to the next one. So you get the
10 idea of link of where the discussion is.

11 Now, "each," I'll pretty much fly through, Your
12 Honor. The Court talks about the ordinary meaning of the word
13 "each" is every one. And so we think we're in good shape.

14 "Attributes," we don't understand what they're
15 saying, but what our definition is comes right out of the
16 texts. Attributes (characteristics or descriptors). We think
17 that's easy for the Court. You really don't need to spend a
18 lot of time on that one because it's pretty straight forward
19 right out of the patent. And in fact, it comes out of the
20 re-examination. And, Your Honor, I'm moving fast to land the
21 plane.

22 The graphical representation Mr. Hosteny said he's
23 not going to address. The only point we'll make is that they
24 did tell the Patent Office this, Your Honor. They said that
25 this one piece of prior art provides a graphical view, and

1 then they said, "In contrast to the claimed invention, which
2 provides a non-graphical view." And when the Court looks at
3 the prior art that shows pictures, and so graphical does not
4 include pictures. That's the big fight.

5 THE COURT: That's that one a couple of times ago
6 with the Starburst.

7 MR. GROSS: Yes.

8 THE COURT: When my daughter asked me what I was
9 going to do at work today, I showed her that.

10 MR. GROSS: Oh, you did. All right. That's not
11 what I told -- I said I had a really boring hearing that I'm
12 going to try to make interesting. So it's good that you found
13 something that made it more interesting. Good job.

14 So we have here a display, and I'm not going to get
15 into it because Mr. Hosteny didn't spend a lot of time on it.
16 But, basically, our point is display doesn't work with
17 printing. They're trying to add printing, and that doesn't
18 work. You don't do any links on printed paper. That doesn't
19 make sense, so we're not going to spend any time on that.

20 And I'm not going to worry about suitable. The
21 Court understands we say it's too vague. It doesn't work with
22 predefined portions. Our test is straightforward. It's
23 treated for storage. Their test is it a part that is more
24 than a word that has been determined to be suitable? That
25 doesn't work. We don't think that's helpful at all.

1 All right. And we have some differentiation
2 arguments that are a lot more like Amgen where we say specific
3 language that you can't read into a claim. All right.

4 So, Your Honor, I'm going to stop there in the
5 interest of time. I think the big issues are multidimensional
6 space, and then we are discussing links, and I think the Court
7 has heard some oral argument on links. The other stuff is
8 from the briefs, but also I think we've highlighted a few of
9 the issues. But I think it seems like there's a lot going on,
10 but a lot of the issues are pretty narrow. The discussion and
11 debate is pretty narrow. So I'll let Mr. Hosteny go for a
12 little bit, and then I'll have a brief talk with the Court,
13 and then I think we'll be finished.

14 THE COURT: Ms. Sooter, what's the verdict? What's
15 your -- do you agree that what is listed as agreed is agreed?
16 Where are you?

17 MS. SOOTER: I'm right here. I am looking at
18 Thomson West's opening claim construction brief at page 15. I
19 can put it on the Elmo.

20 THE COURT: No, I'm just looking, do you see this
21 "agreed terms, terms no longer in dispute." Do you agree that
22 amended, modified, means for searching, step of searching and
23 allowing the user to search are no longer at issue?

24 MS. SOOTER: I do agree that they're no longer at
25 issue. The parties had agreed previously to some slightly

1 different constructions of those, but they are very close. I
2 think we would need to confer briefly with Mr. Hosteny to make
3 sure that we are still indeed on the same page, and those
4 slight alterations were not purposeful or meant to change the
5 prior agreement. So in broad brush, we are in agreement.

6 THE COURT: All right. That's what I needed to
7 know. Thank you very much. Mr. Hosteny?

8 MR. HOSTENY: Thank you, Your Honor.

9 THE COURT: You're done, huh?

10 MR. HOSTENY: One brief point that I heard, markup
11 language, Mr. Gross says it's computer language. That
12 couldn't be farther off the mark. One of the problems I have
13 with their tabbed notebook is that Mr. Gross suggests it
14 eliminates paper which may not be necessary to the Court's
15 consideration of what a markup language is. The omitted paper
16 deals with exactly that point.

17 The specification of the '592 patent says, "Again,
18 the ability to relate such to time and cases." I'm sorry.
19 "Again, the ability to relate such to time and then to mix and
20 match different types of information from different sources
21 (jurisdictions) is a feature provided by the coding technique
22 used for the data and not the folio view software used to
23 deliver the data to the end user."

24 So folio views isn't the markup language that we're
25 talking about. This patent goes on 50 to 75 columns in

1 describing what I've referred to earlier as the data type
2 definition. It is a detailed guideline for how to use a
3 markup language for the embodiments shown in the
4 specification.

5 THE COURT: Okay. Are you in column 14?

6 MR. GASEY: Yes, Your Honor.

7 THE COURT: It's at column 14, line 14, maybe?

8 MR. GASEY: Yes, correct.

9 MR. HOSTENY: Yes, we referred to, we have a DTD
10 that's a table in the patent application, and then we also
11 have instructions for using the database that's referred to in
12 some of the claims.

13 There's abundant detail here about how to using Your
14 Honor's earlier analogy, I think you're referring to those
15 cases that refer to a general purpose computer and the claim,
16 but don't give any guidance about how to program that
17 computer. What's the algorithm that's used in it?

18 This specification is replete with the algorithm for
19 the markup language, for the embodiments that are in the
20 specification. And that's what it has to show is how do you
21 make and use at least one embodiment of the invention. When
22 the defendant's say folio views, it's just one of a variety of
23 ill-described markup languages. They could not be further off
24 the mark.

25 Multidimensional space, it seems to me that where

1 you must start is -- let me get back to my correct page here
2 and get on to the Elmo -- where you have to claim 1, first,
3 let's start with claim. That's the principle of claim
4 construction. Claim 1, like every other independent claim
5 with a few exceptions in the '592, the one I've got on the
6 Elmo now, does not recite any movement. It does not recite
7 point-to-point. It does not recite searching. It does not
8 recite retrieving. How one gets from a particular point in
9 space defined by a bunch of attributes to another point in
10 space defined by a bunch of attributes is not recited in claim
11 1. It is clearly adding a limitation to say that
12 multidimensional space must be defined as allowing
13 point-to-point movement.

14 And in fact, if you go down further, you will see
15 claim 2, means for searching within the system. Now we're
16 talking about getting around in some manner. Not
17 point-to-point movement, by searching. "3, searching uses one
18 or more attributes," one or more attributes. So I can find a
19 point in the space that has a group of attributes, and I can
20 go directly there if I wish. That's one of the things that
21 the patent teaches.

22 THE COURT: That's my diagonal.

23 MR. HOSTENY: Yes. There's an even shorter route
24 than that which I'll come to in a minute. And then claim 5,
25 says, and here's more detail about searching. You can use the

1 text based. You can use the plurality of attributes connected
2 to a predefined portion by the linking means. And then you
3 can retrieve one or more of the portions using the plurality
4 of attributes.

5 So if I'm at some point in that space that's got
6 five unique attributes, I can get exactly what I want from
7 that point in space. And anybody who knows anything about
8 relational databases, knows that the point-to-point movement
9 that Mr. Gross is describing is only one way one could move in
10 a relational database.

11 THE COURT: Well, how is the user going to do that
12 though? And that information is not accessible to the lawyer
13 sitting at his desk.

14 MR. HOSTENY: But indeed it is. For example, figure
15 17 in the '592, and this also appears in the '228 patent.
16 Here's where a person has plugged in those boxes on the left,
17 and this is what they call the user template plate for the
18 user of the research system. This is a picture of Timebase's
19 case search where the user has plugging in Social Security
20 Secretary, Commonwealth, and Case and a particular date. And
21 in this case, it's the Australian format, so it's 10-July,
22 1995.

23 And it tells you to insert the date in the
24 particular format date, month, year, and it gives you a word
25 wheel to help auto complete on some of the search terms. And

1 then look at what it tells you down at the bottom. It tells
2 you you have two hits. It has two points in the space that
3 can potentially satisfy that inquiry. So it does tell you a
4 way to search using the attributes or using the text of the
5 text-based portions. And that's exactly what the claims say.

6 The claims say that you can search based on the
7 attributes. You can search based on the text within the
8 portions, if you wish. There's a number of places in the
9 specification. And keep in mind, somebody that's going to be
10 practicing this invention and setup, and they're going to know
11 something about markup language, about XML, and something
12 about relatable databases. It says that, wait a minute, I
13 want to use a different code here.

14 Column 7, down at about line 55, it doesn't refer to
15 the ability to move. This patent never says that the
16 invention is moving point-to-point. It says point-to-point
17 can be done. But it also says, "For example, referring to
18 figure 2, the ability to locate, assign, or map each node or
19 key intersection points of the various axes or pathways, is a
20 significant functional aspect of the embodiment of the
21 invention."

22 If you go to the defendant's tabbed notebook. Where
23 is that? Where they were purporting to quote parts of the
24 specification that require point-to-point movement, they say
25 row 2 says, "It is possible to move easily between points."

1 It doesn't say adjacent points. It doesn't say point-to
2 point. In another of their quotes, "it allows movement along
3 different axes or pathways."

4 THE COURT: I guess then the question that was
5 raised in my mind, based on this morning's discussion, would
6 be how then does it differ from just a general search? If you
7 put in what you want and up pops a couple --

8 MR. HOSTENY: It's because, and let me go back to an
9 example here. Spinning off Mr. Gross' house example, you can
10 go at this a couple of different ways. Down here, an SGML or
11 XML, you have what's called an element. I shouldn't say
12 house, I should say house photo. Suppose I have a database of
13 photographs of a house and each of those house photos I can
14 assign attributes, street number, street name, and city name.
15 And now down at the bottom I have drafted what would be a
16 record in the field of a recreational database. It would have
17 the block text data and have to the right in each of those
18 columns all of the attributes.

19 Up at the top, I show something that has figure 4,
20 the application. There's two ways I can get to the photo of
21 that house. I can march through cities starting from New
22 York, Minneapolis to Chicago. Starting from New York to
23 Chicago. Then I can march point-to-point to addresses until I
24 get an address that's 8950. And then I can march point to
25 point until I cross the right street, whether it's Damon or

1 Hamilton Streets in my neighborhood. I could do that going
2 point to point, but I think it's obvious to go pretty slow in
3 this particular case.

4 If I were moving from one point from the space to
5 another adjacent point would be a better thing to do. But the
6 fact is that I can get to this node, this collection of
7 attributes in a single step. And that is by using figure 17
8 to plug in the attributes and say tell me what node in the
9 space has those attributes.

10 THE COURT: Okay. Well, let me just find figure 17,
11 so I can follow you.

12 MR. HOSTENY: That was the one I just had up on the
13 screen here for a moment. There's more than one searching
14 than in the patent. So I can do, as the defendant's say we
15 must, I can do this and this and this crossing all the
16 streets, crossing all the cities, crossing all the numbers, or
17 I can simply do this with my search.

18 And there is absolutely no question but that the
19 claims of the '592 and the claims of the '228 might allow
20 point-to-point movement, but they do not recite point-to-point
21 movement. And the kind of movement, if you want to call it
22 that that does occur, is searching reciting in dependent
23 claims, or retrieval which is recited in the new claims that
24 issued in the '592 after the re-examination. By the by, the
25 examiner in the re-examination of '592, his office action is

1 in the bulky file history, we had to give you the whole thing.
2 It's like page 2431. Never says anything about point-to-point
3 movement.

4 The definition we chose for a multidimensional space
5 comes right out of the specification. And I saw on the slide
6 here this morning that we had made a comment to the effect, I
7 think it was slide 84, "The Court cannot further construe its
8 construction of multidimensional space even if the definition
9 is unclear." That's a remark attributed to a brief that we
10 wrote. I cannot, as I sit here, I cannot find that remark on
11 the annotated page or anywhere in the brief.

12 Here's the safe harbor. Stick to the claim. Stick
13 to the definition in the specification. The point-to-point
14 movement is an added limitation and now we know why. That's
15 their best non-infringement hook. Thank you.

16 THE COURT: Could you just take me to the language
17 in the patent that refers to figure 17? I've got up to
18 figure -- here we are. I've got it. Figure 17 illustrates a
19 customized search template for case law which includes a
20 Timebase option connecting cases to legislation on a
21 particular date. For example, again, the ability to relate
22 such time, relate such to time and then to mix and match types
23 of information from different sources is a feature provided by
24 the coding technique used for the data and not the folio view
25 software used to deliver the data to the end user.

1 MR. HOSTENY: By the by, in the second embodiment
2 which occurs just a little after where you are reading there,
3 it describes "a relational database consisting of records,
4 consisting of fields, can be created with one and only one
5 record pursuitable piece or block of text, where the text is
6 the content of a field, and where each item of the markup is
7 assigned its own field in the above record."

8 You put the items in the markup into individual
9 fields of the record, so you can search them individually.
10 Think of it as a student database in a class. If you wanted
11 to find out what a particular student did in History 101 in
12 the second semester of 2008, would you march through all of
13 the students alphabetically? No. You search your relational
14 database by that students name and get a list of his scores
15 and get a list of his grades. There you would be.

16 So, yeah, I agree, the patent talks about moving
17 around, but keep in mind we're talking about a three
18 dimensional model when the specification also says, it talks
19 about a six dimensional model. I defy anyone to show a six
20 dimensional on a piece of paper. And it is also, you know, in
21 response to the question, well, wouldn't this just be
22 searching a database? No, it's not, because the re-examiner
23 said what's different about this from incidentally their best
24 piece of prior art with the multidimensional space with a
25 linking means.

1 By the by, claim 1 doesn't even say where the link
2 goes to. Dependent claims do that. Claim 1 of the '592 says
3 you've got to have at least one linking means encoded on a
4 portion.

5 So I think with that, I've probably used even a
6 little bit more than ten minutes. I appreciate the Court's
7 indulgence.

8 MR. GROSS: Your Honor, I'm going to be --

9 THE COURT: Let me at least say thank you to
10 Mr. Hosteny. Mr. Gross, did you have anything more to say?

11 MR. GROSS: Yeah, I apologize, Your Honor. I was
12 just trying to say how brief I was going to be, and I
13 interrupted the Court, which is now how you're supposed to do
14 that. May I approach, Your Honor?

15 THE COURT: What's that?

16 MR. GROSS: I've got the PowerPoint presentation.
17 And I've given a copy of the disk, if I may.

18 THE COURT: Okay. Mr. Hosteny and Mr. Cunningham
19 and everybody, is that okay with you?

20 COUNSEL (collective response): Yes.

21 THE COURT: It is? Okay.

22 MR. GROSS: Yes, Your Honor. I'm going to make a
23 pretty straightforward point because Mr. Hosteny was focusing
24 a lot about searching. Searching is not point-to-point
25 movement. Claim 2, in fact, adds a means for searching, which

1 means in addition to claim 1, it talks about multidimensional
2 space. It has the definition we've been talking about.

3 Another thing you might want to be able to do is
4 have a means for searching. Separate issue, talks about
5 searching. The Court has asked a lot of questions about that.
6 So that is not claim differentiation. That's adding on
7 something else.

8 Answering the Court's question, in addition to a
9 multidimensional space, can you do other things? Yeah, you
10 can search. So that argument is not connected to anything
11 other than they added searching to say also you can search in
12 the database. But I want to make a pretty basic point going
13 to my presentation.

14 THE COURT: So that would mean that they were saying
15 they have an invention that also allows you to do the
16 old-fashioned stuff.

17 MR. GROSS: Exactly. In other words,
18 multidimensional space is the big one. That's in every single
19 independent claim, so it's in every single claim. And that's
20 where you go to the definition and talk about it, and that's
21 where you go to figures 1 through 4 and all the teaching.

22 In addition, you can do means for searching. It
23 doesn't say anything like the multidimensional space includes,
24 you know, something like that. It's not at all connected to
25 the phrase "multidimensional space." It's literally just

1 saying you can search in the database.

2 And let me remind the Court, I'm going to show my
3 slide 19 where Timebase said to the PTO, "the multidimensional
4 space may be visualized much like the exemplary space shown in
5 figures 1 through 4." Timebase didn't say, and as you know,
6 this was all about searching, and if you go to figure 17.

7 And then another example, if we go to slide 20.
8 They talk about figures 1 through 4 which is what we've been
9 spending all of our time on when they talked to the PTO. They
10 in no way suggested that some ordinary searching somehow
11 informs multidimensional space. And they even said to the
12 Court, multidimensional space means a number of axes as shown
13 in 1 to 4.

14 And when we go to what the PTO said, which is my
15 slide 42, "By fixing one dimension or two," this is when the
16 PTO added multidimensional space. What they tried to keep out
17 one can trace through the other coordinates or dimension. So
18 my basic point, Your Honor, is, yes, there's some discussion
19 about searching later on in the spec and, yes, they even have
20 claims that talk about searching. That has nothing to do with
21 this multidimensional space and point-to-point movement, and
22 they don't connect it up. We focus on figures 1 through 4,
23 because that's what they focus on. That's what the PTO talked
24 about. That's what we talk about.

25 And if you focused on figures 1 to 4, and the rest

1 of the teaching in the patent, we think our argument prevails.
2 And so I think at this point we've joined issue pretty well,
3 and so I'll stop there.

4 THE COURT: All right. Thank you, Mr. Gross.

5 All right. Mr. Hosteny or Mr. Cunningham, anything
6 to respond to that?

7 MR. HOSTENY: The only other last point I would
8 make, Your Honor, is the examiner did not require any movement
9 in claim 1 in allowing that claim, so it's just it's not an
10 issue with respect to claim 1. My point with respect to the
11 dependent claims is they allow a way to travel in that
12 multidimensional space. Claim 1 was allowable without any
13 such requirement, and I would refer the Court to the
14 re-examiner on that score.

15 No doubt they say that's how it can be used, but you
16 have to keep careful distinction between what the definition
17 of the invention is and the description in the embodiment of
18 how the invention may be used. There's more than one way in
19 which it may be used in the embodiments here. Thank you.

20 THE COURT: Okay. All right. Well, thank you very
21 much. Talk about a well-organized argument. I appreciate it,
22 everybody. I'll take it under advisement, do my best, and get
23 you an order.

24 COUNSEL(collective response): Thank you, Your
25 Honor.

1 MR. LITSEY: Your Honor, there is one matter, with
2 the Court's indulgence, there is one housekeeping order that's
3 completely beyond what we've discussed today. I thought it
4 might be helpful to get the Court's guidance on it. It has to
5 do with scheduling.

6 THE COURT: Yep. You don't want to schedule until
7 you get your Markman order.

8 MR. LITSEY: And that's the issue, Your Honor. We
9 have a schedule in place for expert reports which we moved
10 back through Magistrate Judge Graham. What didn't get changed
11 was the summary judgment date. She stuck with the old one
12 which is February which is before even our expert reports are
13 due.

14 THE COURT: No, I know, I know. I just don't want
15 to address that until the Markman Order comes out, and then
16 we'll be able to have meaningful dates.

17 MR. LITSEY: So just wait?

18 THE COURT: So just stay, yeah.

19 (End of proceedings.)

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I certify that the foregoing is a correct transcript
from the record of proceedings in the above matter.

Maria Weinbeck

Court Reporter