IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MIRROR WORLDS, LLC	)	
	)	DOCKET NO. 6:08cv88
-vs-	)	
	)	Tyler, Texas
	)	1:30 p.m.
APPLE, INC., ET AL	)	January 27, 2010

TRANSCRIPT OF MARKMAN HEARING
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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P R O C E E D I N G S

THE COURT: Please be seated.

All right. Ms. Ferguson, if you will call the case, please.

THE CLERK: Court calls Case No. 6:08cv88 Mirror Worlds v. Apple.

THE COURT: Announcements?

MR. CARROLL: Good afternoon, Your Honor. Otis Carroll for Mirror Worlds. With me is Joe Diamante, Kenneth Stein, and Alexander Solo. We have already dubbed him "Hans" Solo, but Mr. Stein is going to speak for us today. Thank you, Your Honor.

THE COURT: Thank you, Mr. Carroll.

Mr. Powers.

MR. POWERS: Good afternoon, Your Honor, Matt Powers, Steve Cherensky and Sonal Mehta from the Weil Gotshal Firm for Apple.

MR. BIGGS: Adam Biggs from the Albritton Law Firm.

THE COURT: Very good. Thank you.

All right. I, first of all, want to thank the parties for the email we received with your proposed order of proceeding, and that is quite agreeable with the Court. I think that will be helpful to proceed in that order. I would allow each side to make whatever brief opening statement they would like to for four or five minutes, and then we will

proceed with the terms.

MR. STEIN: Thank you.

THE COURT: Mr. Stein.

MR. STEIN: Good afternoon, Your Honor. My name is Ken Stein. We have handed to the Court and opposing Counsel a packet of slides that give a general outline of the topics that we expect --

THE COURT: I'm having a little trouble hearing you. You might want to try to get a little closer to that microphone.

THE COURT: Okay.

MR. STEIN: We handed the Court and opposing Counsel a general outline, a packet of slides that is a general outline of the topics we expect to cover today. I hope it is of assistance of the Court. I know you have a copy up there.

Just briefly I want to go over initial remarks, just general comments about the patented invention and how we got here together. The patented inventions represent a break-through technology developed at Yale University by Dr. David Gelernter. Dr. Gelernter is a preeminent computer scientist, a professor at Yale University, and he is truly an icon in the field of computer science.

Generally, the patents-in-suit in this case relate to a new model and system for organizing and locating information on a computer system. Dr. Gelernter recognized

that there was severe limitations of the existing model, which basically tried to emulate people's physical work environment on a computer screen, and sometimes those conventional systems are referred to as employing a so-called desktop metaphor. And of particular note here, part of that metaphor is to file documents into folders and subfolders. And then there is other aspects of it, too; but the basic idea is to take the workplace, including the desktop and your file cabinets, and replicate them or mimic them on the computer.

Now, that model worked fine for a long time; but as the information people were storing on their computers became larger and larger, it became more and more difficult for people to organize and locate that information. Quite often the -- it required a lot of effort on behalf of the user to decide what folders and subfolders to create, to name files, and then locate -- you know, to name files and put them in the proper categories. Quite often after all that was done the user is trying to go back to find a particular file at a future point in time, may have considerable difficulty in actually locating that file.

So Dr. Gelernter's vision was basically to throw out this sort of idea of replicating the physical world on the computer and take a new, different approach to organizing information that could have broke the bounds of what people were used to seeing. And his concept was what he called a

"stream"; and the idea is that instead of dealing with data in specific categories, to basically put all of the data that is of interest to a user onto a stream and maintain the time ordering of that data. And time ordering is important because people generally intuitively can locate information based on time. It is a natural type of tool for people to think about when -- you know, when information and where information and -- where information was created and where it is.

So in order to locate, say, a file that may be of particular interest to a person, instead of having to remember the name of the file or where in some subdirectory structure this file was created, his concept was that users would have a much better idea of when that file was created, for example. And then in order to locate that file, that person would go to that general point in time and scan around the documents, browse through the documents in that time period to locate that file.

In addition to that, you know, he recognized that this general framework could be used to basically refine the search based on time, so that users could look for categories, information, say, all information related to a particular person or all information related to a particular project. And that would reduce the number of documents in this stream to look at for a particular purpose, and then a person could use this time-based ordering to zero in on the document that

would be of interest.

An important aspect of this is that instead of in the conventional systems of having data separated, not only by directory structure but in terms of a type of data, for example emails being stored by an email system and calendar entries being stored in some sort of calendaring system, what users are interested in is getting all information related to a particular topic.

So instead of having to go through these individual applications to access data, all of this information would be put onto the stream and the user could search all types of documents relating to a particular document to create, one, a substream -- is the term that he used -- of data on that particular document, and it would go across the board from correspondence to calendar entries, to emails, et cetera.

Another aspect of the invention described in the patents is providing an intuitive user interface for accessing the stream. The interface described in the patent displays this stream in a way that in one potential embodiment where the documents that are more recent in time would appear closer to the user and the documents that are more distant or further back in time would appear further away and it would be a visual cue to the user -- to aid the user in zeroing in on a document that may be of interest.

The third aspect relevant to the claims in this case

are archiving of documents and doing that automatically, you know, to assist the user in that function.

Now, another very significant point relevant to this case is that, as I said, Dr. Gelernter's work was very -- he is a very well-known computer scientist. In fact, Apple has been monitoring his work prior to the time they came out with the accused products in this case and executives -- high-level executives at Apple have been monitoring that work and considered -- actually considered taking a license from Mirror Worlds' technologies, which was a company formed by David Gelernter to commercialize his technology prior to the time that they came out with the accused products and actually met with Mirror Worlds Technologies prior to that time.

Now, those accused products basically have -- there are three primary features of those accused products that are at issue here. One is called Spotlight. It is a feature of Apple's recent operating systems which create the same kind of pool of -- time-ordered pool of documents across all types of formats and document types.

Basically, the Spotlight technology, if you read what Apple says about it, could just as easily be marketing materials for Mirror Worlds Technologies. Another aspect of those accused products is Apple's Cover Flow feature, which displays the documents on Apple's operating system in the same visual format, the same -- what the patent calls "receding,

foreshortened stack" as was described in the patent.

And the third significant feature is a feature Apple calls Time Machine, which performs the automatic archiving function described in the patent.

So that concludes my opening remarks.

THE COURT: Counsel for defendant, Mr. Powers.

MR. POWERS: Thank you, Your Honor. On behalf of Apple, we thank Your Honor for the opportunity to give a brief opening statement.

I would like to cover three subjects. The first is a brief overview over all of the disputed terms to give the Court a sense from Apple's perspective of prioritization if we end up pressed for time.

Second is to cover very briefly some legal subjects which we think are particularly relevant here.

And, thirdly, a brief overview of the patents-in-suit as well.

First beginning with the terms, we have on Slide 2, Your Honor, a list of the terms presented in the email you referenced earlier. And at least in Apple's view, we recognize that there is limited time. The terms on the left side we think are the ones that are most important to have argument to the Court. The ones on the right, obviously we are happy to answer any questions Your Honor has. But if we have to, from Apple's point of view at least, those are terms

we think that could be submitted on the papers.

One final note on the terms, we have agreed, Counsel for both sides, that the separately pending motion for summary judgment on indefiniteness that is intertwined with many of these terms would just be discussed as we are discussing those terms rather than separately, if that is okay with the Court.

THE COURT: That would be my preference.

MR. POWERS: On Slide 3, Your Honor, I put up the limited number of terms that are relevant to the Apple patent that is in suit as well. With the Court's permission we think there are a very small number of disputed terms and a very narrow set of issues. We think ten minutes would be sufficient to discuss those terms, and we would like to try to make sure there is room for that. We know it is hard toward the end of the day; but if it is possible we would like to have about ten minutes to discuss those terms. And my colleague Sonal Mehta will be discussing those terms as well.

I know Your Honor is deeply familiar with the law of claim construction, so we wanted to offer thoughts, not by way of purported education, but highlighting what we think are the important legal principles in this particular Markman that we think drives some of the analysis.

The first is a concept that we know and is quite familiar to Your Honor, comes from Phillips, also originally comes from several other cases, Reneshaw originally; and it is

not a formula that is easy to apply but it is a principle that is important to think through, which is that words in a claim are attempting to capture an idea. And all too often in claim construction we end up engaged in a process of linguistic deconstruction by which we attempt to divorce those words from the context in which they were written, which was an actual invention made by someone.

And the Reneshaw and Phillips quote takes us back to that first principle which says you have to go back to what that person actually thought they invented. In this case that is extremely important for the stream-based terms, because just as Mr. Stein said, what Dr. Gelernter was trying to get away from was a hierarchical-based model by which you stored and organized information in folders and subfolders and subfolders.

And Dr. Gelernter was very, very clear in many sources of the patent and file history and extrinsically, that that is exactly what he wanted to get away from. That concept formed several of the terms at issue before Your Honor today.

The second principle that, again, I know is familiar is that where the specification of the patent says in various forms that this is the problem of the prior art, this is what we are trying to get away from, that that is very, very important for claim construction. Case after case, of course,

has highlighted that issue. And that, again, is very important to several terms at issue here, notably the stream-based terms that will be covered at the beginning of the parties' constructions.

The third concept, again very familiar but here particularly important, is that where the patentee acts as what is called his own lexicographer but sets forth a definition. Now, in this case often, as I know Your Honor is familiar with, the parties are debating whether something is a definition. Here the patentee helpfully said both in the specification and the file history several times, I'm calling this a definition. And it is that definition and words which the courts have said clearly demonstrate a desire to express a definition that we are relying upon for many of our constructions and which Mirror Worlds is attempting to avoid.

So we think in this case more than most, the patentee-as-lexicographer doctrine is critically important because in some cases the Mirror Worlds inventors actually said here is a definition and had bullets with definitions of particular terms. And our definitions come straight out of what -- of those definitions in the specification and file history.

The next doctrine is, again I know familiar, where the specification consistently uses a term in a very specific way, even though that term could have broader meanings outside

the context of that particular specification. The Federal Circuit has said over and over again, that we are going to limit that otherwise apparently broad term to the narrow usage in which it is found consistently in the specification. And that is true in several cases and in this case particularly with regard to, for example, the "archiving" term.

A brief overview of the Mirror Worlds patents that, at least was helpful for us and we hope it is helpful for the Court, there are four of them at issue. Three of them share a common specification, the three on the left, the '227, '313 and '427. When we use specification cites throughout this presentation for that set of patents, we are going to be citing to the '227 patent just for consistency and ease use, so I wanted to flag that at the front end. So that is a common specification for all three patents. David Gelernter and Eric Freeman are the named inventors there.

The fourth patent is this '999 patent, which has a different specification and different inventors, and we will discuss that separately, of course.

The final issue I wanted to talk about is describing the two rough classes of claims into which those Mirror Worlds patents fall. The first overall concept is this organizing data into streams that Mr. Stein talked about as an alternative to the folder, subfolder hierarchical base system that had dominated the world before that. The '227 patent is

particularly focused on that in terms of the claims. The specifications, of course, cross over, as I said earlier.

Within that overall universe of claims, there is a subset of claims that we have denominated the "user interface" claims. Those are talking about how the user sees the data that is organized in those streams and how the user can interact and manipulate those documents that are on their system. And we have put on the screen the three patents, the '313, '427, and '999 that fall into that category of "user interface" claims. We have given the Court just an example of a stream claim, which is '227, Claim 1. And you see the major elements of that claim are the "stream", "substream" and the use of that timestamp to identify the documents.

And, finally, an example of the user interface claim, the '427, Claim 1 where you talk about document representations and these "receding, foreshortened stack" as a way of viewing that "stream"; and those will be terms that we will be construing later.

So with those comments, Your Honor, I think that's all we wanted to do as an introduction; and I think we are ready to go into the terms.

THE COURT: Very well. Let's begin with "stream."

Would the plaintiff like to go first on that one?

MR. STEIN: With respect to the term "stream," I will just dive right into the issue, as I will with all of the

terms, the parties' positions were set forth in the claim construction chart in the briefs.

Both parties agree that the term "stream" -- that this term is not a term of art as used in the specification and claims of the patents-in-suit; and that the specification of the patents must be consulted in order to construe that term.

There are basically five issues that the Court must address with respect to the construction of "stream." The first is whether the term should be construed to be a "diary," as Apple proposes. The second relates to whether there are separate and distinct past, present, and future portions of the stream. The third relates whether a stream is properly construed as unbounded in number. Fourth is whether the stream is properly construed as something in which the location of file storage is transparent to the user. And the last issue is whether the construction should use the term "collection" as Mirror Worlds proposes or "sequence" as Apple proposes.

With respect to that first issue "diary," Apple proposes that the term should be construed to be, "A diary of a person or entity's electronic life." Now the term "diary" is not in the claim. It was used in the patent as basically a useful analogy; it was anecdotal. Frankly, Mirror Worlds' position is that it was not useful for definitional purposes.

Both parties agree that a "diary" is not a term of art in computer science. In fact, when Apple's expert was asked at his deposition to explain when something is or is not a diary, he struggled with that answer and went on at length, as we noted in our reply brief in claim construction.

Basically, we feel like Apple was elevating a metaphor from the specification into an unclear definition that will not be useful to a jury in determining issues in this case, and it should not be part of the construction.

The second issue relates to whether the stream should be construed to have, basically, separate and distinct past, present, and future portions, which is what Apple has proposed. In particular, Apple argues that a stream must have a future portion at all times. But that has nothing to do really with the fundamental concept of the stream. What is important when it comes to the concept of the stream is that the stream may include data units associated with past, present, and future times.

There is nothing, basically, in the concept of the patent or the specification which would lead one of skill in the art to conclude there are basically three separate buckets; a past bucket, a present bucket, and a future bucket. And that during operation that data units are moved from one bucket to another. In fact, even Apple's expert testified that is not necessary. He also said that it would

be, frankly, grossly inefficient and would not make sense.

The third term is "unbounded in number." This is another aspect, a fundamental aspect of a stream that we think is important to include in the construction. The stream, as described in the patent, basically, includes all data units received by or generated by a computer -- by a user or by the computer system. And that type of operation is clearly unbounded. There is no constraint within the specification that there is a bound. It basically describes the stream as including all those data units. And as each new data unit is received or generated, it is added to the stream.

There is also a description in the specification that a stream may contain millions of documents or more, which is a further indication of the unbounded nature of the stream. Apple apparently opposes including that phrase because the word "unbounded" does not appear in the specification; but as I just described, although that word may not appear, that concept which is fundamental to a stream is clearly described in the specification. And the specification specifically describes the possibility of containing millions of documents or more.

Another aspect of a stream, which is one that is a characteristic that should be included for construction purposes is that the location of file storage is transparent to the user. In fact, Apple does not dispute that this is a

characteristic of a stream but fails to include that characteristic in its construction.

The last issue relates to whether the term "collection" should be used as Mirror Worlds proposes or "stream" -- I'm sorry or "sequence" should be used as Apple proposes. In particular, Mirror Worlds' proposed construction starts, "a time-ordered collection of data units." And Apple's starts, "a time-ordered sequence of documents."

Frankly, we feel that "collection" is a clearer term to use for definitional purposes here. The patent refers to "streams" as both a collection of documents and a sequence of documents, so both terms to that extent have usage both in the specification and the file history; but both parties' definitions also include the time-ordered nature of a stream. And that encompasses the separate sequence requirement that Apple is putting in the claim construction. And we feel that that makes that addition superfluous and may be viewed as confusing to a jury since it may seem like "time-ordered" and "sequence" are two separate and distinct requirements.

Thank you.

THE COURT: Thank you.

Response?

MR. POWERS: Thank you, Your Honor. I would like to begin at our Slide 16, which just has a figure from the patent to give us a perspective of what we are talking about with the

term "stream." This, I think, isn't disputed that the entire set of those documents from front to back is what we are talking about is a "stream"; and the patent -- we put a quotation from the specification above it talking about the nature of the operating system, which is the overall organizing principle for all of the documents in the system.

Next, of course, we just want to show the context of the term "stream" in the claim. It is the first claim limitation where it is talking about a main stream of data units and the main stream has each data unit received by or generated by the computer system. So the main stream has everything either received or generated by it.

Here at Slide 18 we want just to highlight what the disputes are between the parties before we go into them one by one. The parties agree that it is a time-ordered something of documents. That is the data units of documents. Both sides agree those are interchangeable. And the first dispute is this question of whether the additional language that is in Apple's construction, "that functions as a diary of a person or entity's electronic life" is appropriate. And the reason we chose it is because those are the words that the inventors chose to describe their patent.

And I thought it was useful to note Mr. Stein's statement about why those words are in the specification. He said that was a useful way of conveying what the invention

was. And for the same reason that inventors thought that that was a useful way of conveying what their invention was in the patent, it is a useful way of conveying the invention to the jury. And we have shown at Column 4 the language from the specification which says, "a stream according to the present invention" -- not in one of the preferred embodiments, not any of that -- "is a time-ordered sequence of documents that functions as a diary of a person or entity's electronic life."

We took the language from our construction directly from that definition; and when you hear Mirror Worlds say, well, we don't like that language, we don't think it is precise enough for them, it is the language they chose in the specification to convey what their invention was. We think the law says they are bound by that. But even beyond the specification, Your Honor, when you go to the file history there is a section in the file history -- this is at Page 765 -- in one of the instances where they say "definitions are provided below." One of the definitions that they give is "a stream is a time-ordered sequence of documents that functions as a virtual object (diary)."

So the language we picked came from their definition both in the specification and the file history, and the fact that they now wish to change it is not I think -- or Apples' position as the law permits.

Now, their position that "diary" is too imprecise to

serve as formidable claim construction, we think has two problems. One, we actually think it misses the point. This is a jury instruction to be given to the jury, and the fact that it is colloquial is actually helpful to the jury. The jury is going to understand that more than it will understand some computer science gobbledygook that might be put in. And our point of view is that if it is useful enough to put in the patent, it is useful enough for the jury in terms of whether it is too colloquial.

But second, of course, the law is that the express definitions in the specification file history control. When they choose to be their own lexicographer, as they did, they cannot later in litigation run away from it.

Now, the next issue is this question of past, present, and future. And I note that we no longer have a dispute here it appears. Their Slide 13 said they agree that the system has to be designed to have past, present, and future; but it does not have to have -- but every stream does not necessarily have to have future. We agree with that, but their definition does not say designed to have. Their definition is ambiguous. It says can be in the past, present, or future, which isn't clear as to whether it is designed to be.

THE COURT: Do you not disagree with their argument that it should be in the disjunctive instead of conjunctive?

MR. POWERS: Their argument I think is not that, Your Honor. Their argument, as I heard it, is we agree it should be designed in the conjunctive; i.e., it is designed so that it could support past, present, and future.

THE COURT: I see.

MR. POWERS: But in terms of actual use it is disjunctive; that it need not in each case have future.

THE COURT: So you are agreeing to that?

MR. POWERS: We agree to that. Designed in the conjunctive, in actual use in the disjunctive, we agree to that.

THE COURT: Or it could be the disjunctive?

MR. POWERS: I'm sorry?

THE COURT: Could be the disjunctive?

MR. POWERS: Could be the disjunctive, exactly. And our construction reflects that agreement, and theirs does not because theirs merely says "can be" and that could mean lots of different things and doesn't reflect the conjunctive nature of the design, which, as I understand based on Slide 13, they now agree with. So I think we don't need to cover the language on that that we were going to cover unless they are now going to disagree with that. So we can go now to the next dispute which is "unbounded in number."

And we have a couple of problems with that. First, it is unclear what it means. Do they mean that the system

literally could have an infinite number of documents? That is an odd construction to place in the language of the claim construction because it is not physically possible. So it is unclear as an initial matter what exactly the language they chose means. And there is a reason for that. It comes from nowhere in the specification, nowhere in the file history. The best they can do to support it is this language in the specification that says you can have millions or more documents. Well, that doesn't mean an infinite number of documents. It means you can have a lot of documents. So we think the language they have plucked from certainly nowhere, in our view, not the specification or the file history, is inappropriate.

The last dispute is this question of the location of file storage is transparent to the user. On this one we don't actually have a disagreement as to whether that is true. But we do, as we noted in the briefs, disagree as to whether it is appropriate in this particular limitation. There are other limitations that address that question, which are joined and subject for dispute and we don't think it is appropriate to put here. But as a matter of whether it is true or not, we don't disagree with it, but we don't think it is appropriate for the construction.

That completes our discussion on "stream" unless Your Honor has --

THE COURT: Why don't you lead off on "main stream."

MR. POWERS: I will, Your Honor, thank you.

So first starting at Slide 33, again showing the context in the claim, that "main stream" is the one which has all of the documents in the system, every single document. The real dispute here, when you put up our three-column slide, is the dispute between whether it is stored and the somewhat more amorphous word "of" which Mirror Worlds' construction contains. And just as a matter of form, Your Honor --

THE COURT: How does a "stream" store? Isn't that speaking almost of a function as opposed to a definition of what "stream" is?

MR. POWERS: No. I mean, I understand the thrust of Your Honor's question. But the "stream" is their word applied to the storage of the system. Dr. Gelernter's concept literally -- and we will show this throughout the specification and the file history -- was that you would store each document according to this unique timestamp in time order. And if you wanted to go find it, you would know how because you would be doing it by time. It is almost exactly as Mr. Stein described in his opening statement. So it actually is important to the invention, as I will show from the specification, that it actually is storage.

As a matter of form I wanted to highlight what we are doing in the middle column on Slide 34. The top

construction in quotes is exactly from our joint claim construction statement. The bottom portion in brackets is our attempt to highlight for the Court in what we hope is a helpful way, what the dispute is or isn't. In other words, we have adopted exactly their language from the latter half of the construction to show that is not where any of the disputes lie, even though both parties have slightly different language. The real dispute is the storage issue.

So let me go straight to that. The specification -- and, again, in definitional language they say at Column 4, Line 6, "a stream, according to the present invention, is a time-ordered sequence of documents that functions as a diary of a person or entity's electronic life."

THE COURT: But just saying it is stored in the main stream, that doesn't really define what the "main stream" is. I mean, don't you have -- your argument of storage and other words in the claim that you had up there a moment ago, doesn't it address what the activity on the "main stream" is going to be where it says each data unit -- back up.

MR. POWERS: This one here?

THE COURT: Yes. "Each data unit received by or generated by the computer system" --

MR. POWERS: Yes, that's what's -- I think I understand Your Honor's question. There are two parts to it. One is, is "storage" a complete definition of "stream"? No,

we are not saying that. But "storage" according to the definitions in the file history and the specification is an aspect and an important aspect of "stream"; that the "stream" is actually where you are storing them because what Dr. Gelernter wanted, as he said over and over again, is that this "stream" is the basic organizing principle of all documents in the system. That is essential to everything that he is describing in the remainder.

THE COURT: Let me ask you this, Mr. Powers: Instead of the word "stores" could you live with "a stream that is inclusive of every data unit or document"?

MR. POWERS: If by that it means that the data unit or document is physically in the stream, yes.

THE COURT: Let me ask plaintiff if they could live with that?

MR. STEIN: The term "inclusive" would be fine, but we don't agree --

THE COURT: With the each or every?

MR. STEIN: What?

THE COURT: You disagree with each or every?

MR. STEIN: We disagree with that, but we also disagree with Apple's argument that "store" implies a certain type of storage, which I can get to when I go over there or now, but "store" is used in many different ways in computer science. For example, the patent talks in the beginning about

storing --

THE COURT: Why don't you go to that podium over there, if you would.

MR. STEIN: The patent refers in the background section to storing documents in folders and subfolders or directories and subdirectories. It is no different storing a document in a stream than it is storing a document in a directory. And the use of one type of -- by the way, our expert opined on that and Apple's expert did not disagree, there are many different ways of storing information in the field of computer science.

THE COURT: Let me ask you, Mr. Stein, though, can you live with a stream that is inclusive of either each or every data unit or document?

MR. STEIN: Yes, but with the caveat that we don't agree that that has the implication that Mr. Powers just said he thinks it has.

THE COURT: What implication is that that you are concerned with?

MR. STEIN: That it refers to a particular type of storing. For example, I'm not even sure --

THE COURT: I don't think you are referring to a particular type of storing, are you?

MR. POWERS: I was not. My clarification was that if "inclusive" meant that the actual data unit or document is

in that stream, which I think is the implication of Your Honor's construction, we agree with it. The problem -- the dispute between the parties, as I understand it, is that Mirror Worlds is arguing that stream does not itself have to have the actual documents. It can just have something that says, well, that document is over there. It doesn't have to have the document itself.

THE COURT: Are you arguing that?

MR. STEIN: Yes, that is one way of storing information in the data structure, and that is the way, for example, Dr. Feiner testified that documents are stored in a folder is by -- you know, it is by putting a pointer in the data structure for the folder that points to where the data is actually stored on a disk. There is all levels --

THE COURT: What is your support for that argument?

MR. STEIN: Well, that is just common -- "store" is a common term used in computer science, and it means -- it refers to many different things. It is almost a little confusing in a way --

THE COURT: Is "storing" one of y'all's disputed terms somewhere in the claims or anything? I'm trying to figure --

MR. STEIN: "Store" isn't actually in the claim. There is a reference to "store" in one of the dependent claims, but "store" is not in this claim. And Apple -- the

term "store" in that dependent claim was not identified --

THE COURT: I think we are getting pretty far afield of the definition -- or the construction of "main stream" by getting off into the storage issue or how storage can be accomplished. I'm not sure that is really an issue for claim construction or at least of this term.

MR. STEIN: I would agree with that.

THE COURT: Would you agree with that, Mr. Powers?

MR. POWERS: I would not, Your Honor. Our view is when the specification has a definitional sentence, as it does, which says here is what a "stream" is, we believe that should be honored. And with regard to Mr. Stein's point, I would like to jump ahead -- we have given in the slides several examples where the specification says over and over again that what is important is that the documents are stored in the streams, not the pointers or something else. That is the central organizing principle that Dr. Gelernter thought he was changing the world with.

But the point I wanted to make now, Your Honor, is on Slide 38, and this is an important point from the file history because when you think about their time-ordered stream, a time-ordered stream is what all of us have seen in every email we have had. Every email system has basically an order of emails you get from the earliest received to the most recent. And so that is a time-ordered collection of documents

in your email, so when the examiner raised that point to Dr. Gelernter's attorneys in the file history, their response is important. Their response says in contrast to those prior art email systems which admittedly have time-ordered documents in them, the present invention does not permit data units to be removed from the main stream and still remain in the computer system because -- and that is a good example. So in their pointer system, if you remove that pointer from the stream, the data unit document is still over there somewhere in the computer system. All you have done is --

THE COURT: I think we are getting into, though, what a "stream" does rather than what a "stream" is.

MR. POWERS: It is certainly part of what a "stream" is in terms of what it does. I agree with you that there is a fine line between "is" and "does"; but in this case it is what is the essential purpose of the "stream" according to his invention? And he made that very clear.

And the part of this I wanted to focus on, because it is important, is the requirement that a data unit be in the "main stream" results from the inherent structure of the "main stream" as the storage backbone of the invention, so that goes to really what it is.

THE COURT: In other words, you are saying that a data unit that is in a "main stream" cannot be a pointer; it has to contain the data itself?

MR. POWERS: Precisely.

THE COURT: And you say it can be a pointer?

MR. STEIN: Precisely the -- that is what it is -- the exact same arguments he is making could be made with respect to folder. People refer to storing a document in a folder. And it is not the way computers work. You have a data structure that has a pointer to the document out on disk. It is not clear what Apple is actually proposing from a computer science point of view. There is no computer system that operates today, as far as I know, that would have -- I guess referring to physical disks, you know, say you have an image file, a video file, you have the bits one after another in the sequence on disk. Everything has levels of structure. And when it comes to things like streams and subdirectories and folders, there is going to be a data structure. If there is anything more than a few bits of data, there is going to be a pointer somewhere else where that data is stored. Sometimes, depending on the filing system, there is going to be a number of different pointers until you get to the physical data on disk. And that's why we don't think it should be included.

THE COURT: Mr. Powers, this is getting reminiscent of another case I heard in this Court not too long ago.

MR. POWERS: They all start to blur together.

THE COURT: It seems like the experts battled that

out rather than claim construction.

MR. POWERS: Well, it would but for one thing, I think, Your Honor. In this case you had a critical distinction made in the file history to get around very strong prior art. And the argument they make is that there is a requirement -- that is the word they used and argued to the examiner -- the requirement that the data unit -- and that data unit is the document, as both sides have agreed. So not a pointer. The document be in the "main stream." Results from the inherent structure of the main stream as the storage backbone of the present invention.

So with all respect, Your Honor, what I feel is going on here is that Dr. Gelernter had -- he is a Yale professor. He has great ideas sometimes. Sometimes they don't always translate into reality. What has happened in this case is that he wrote a specification and argued a file history and wrote claims that covered what he thought was going to change the world.

As with a lot of ideas that come out of university professors who don't actually work in the real world that much, this one doesn't. Mr. Stein is now trying to now make that square peg fit into a round hole by changing the language. But our view is the law requires that they be stuck with two things: One, what they have said over and over again definitionally in the specification. And, two, with -- they

can't now run from what they told the Patent Office to get the patent granted.

And the last point I would like to make, Your Honor, is this idea of storing the pointer instead of actually storing that document in the string, appears nowhere in the specification and nowhere in the file history.

THE COURT: Does it appear anywhere in the spec or file history, or are you talking as a matter of general computer science?

MR. STEIN: Just a matter of general computer science. A "stream" is defined as a data structure.

THE COURT: All right.

MR. STEIN: Anyone in this field would understand that --

THE COURT: Let me see if I can summarize where we are, and then we will move on. I think the parties are in agreement that we can agree on the definition that a "main stream" means "a stream that is inclusive of every data unit or document received by or generated by the computer." But you have a claim scope dispute as to whether or not that stream can include pointers or has to include the document, and the Court will resolve that claim scope dispute for you.

MR. POWERS: Precisely, Your Honor.

MR. STEIN: Yes.

THE COURT: Everybody on the same page?

MR. POWERS: We are exactly in agreement.

THE COURT: Is the plaintiff in agreement?

MR. STEIN: Yes.

THE COURT: Okay. All right. Let's move on then to the next one, and I will let the plaintiff go first on that if you would like.

MR. STEIN: There was one other dispute on the "main stream" which is whether the word "each" which is used in the claims should be changed to "every." There is no reason for doing that. And to the extent they mean the same thing, there is no reason to substitute one simple word for another to the extent they mean something different.

THE COURT: So you are agreeable to "every"?

MR. STEIN: What?

THE COURT: So you are agreeable to "every"?

MR. STEIN: No, I'm not, because "each" is used in the claim. But to the extent they don't mean the same thing, and Apple's expert indicated that every --

THE COURT: Do they mean the same thing to you, to the plaintiff?

MR. STEIN: Yes.

THE COURT: Do they mean the same thing to the defendant?

MR. POWERS: Yes, Your Honor. I just don't want any argument later as to whether -- if "each" is chosen I don't

want to hear an argument that "each" doesn't mean "every" is all; that if there is a real dispute, we should just clear it up here.

THE COURT: Do you agree that "each" means "every"?

MR. STEIN: I believe "each" means "every" in the context of these claims. Again, Apple's expert thought it may have a different connotation -- "every" might have a different connotation than "each" --

THE COURT: Well, we will cross that bridge when we get to it.

All right. "Substream." Would plaintiff like to go first on that one?

MR. STEIN: Yes.

THE COURT: Did I skip one?

MR. DIAMANTE: I think so, Your Honor.

MR. POWERS: It's the right order, Your Honor. You have the right order.

MR. STEIN: Okay. With respect to "substream" the only disagreement between the parties is whether the phrase "a stream that" should be appended to the beginning of the construction. Otherwise the constructions --

THE COURT: That is not really a big dispute, is it?

MR. STEIN: Not in our view. We just think it would be -- is clear for construction purposes not to use those words at the beginning. A "stream" and "substream" may be

implemented differently so that it could potentially lead to confusion. And then also there is multiple instances of stream then appearing in Apple's construction. And it is confusing because I'm not sure what the antecedent basis for some of the later references to "stream" so we don't consider it a big dispute, but we do think --

THE COURT: Mr. Powers.

MR. POWERS: Thank you, Your Honor. The reason for our choosing the language we did is it came from the definitional language that the patentee chose. And going straight to Slide 43, in the file history again this is a section where they said we are providing several definitions. And the definition they said of "substream" is a type of stream. And then it goes on where the parties don't have a dispute.

And in our view working the fact that plaintiff is arguing against its own definition, suggests that they are going to try to dispute that it is not a type of "stream" as they represented to the Patent Office in an explicit definition. And since the Court is construing "stream," there should be no ambiguity that a "substream" is a type of "stream," as they said, and, therefore, must meet the requirements of "streams." In our view it is that simple.

THE COURT: Okay. Final word? Any rebuttal to that or new rebuttal?

MR. STEIN: If the Court is inclined to add those two words or a few words to the beginning, I think it would be clear to say it is a type of stream as opposed to a stream, but I think the definition is clearer without, you know, reference to a stream.

THE COURT: Okay. "Stream-based operating system," Mr. Powers.

MR. POWERS: Thank you, Your Honor. So at Slide 46 we have put it up in context from '427, Claim 1. It is both in the preamble and in the body of the claims, and it is defining an operating system.

Now, there is really I think two main disputes here, maybe three depending on where we end up. The first is this concept of a non-hierarchical operating system. That, of course, goes to exactly what it is. Whether it a stream-based operating system is hierarchical or not, goes to its core. It's not what it is -- what it does, but it is plainly what it is.

In our view this is exactly what Dr. Gelernter said in every forum that he could find, on any soap box that he could stand on that he was, in fact, freeing the world from the tyranny of the file based creating folders, naming folders, et cetera; and that he was going to have this elegant operating system that required none of that and wasn't hierarchical. So the real dispute, the first dispute --

THE COURT: But how do you read non-hierarchical into an operating system -- or a stream-based operating system? Why does it have to be non-hierarchical?

MR. POWERS: Because that is what a "stream" is as opposed to what was going on before. This is an example, Your Honor, of what I described in the opening statement where when the specification goes on at length to say here is the problem we are trying to solve, here is what we don't want to be, which this specification does repeatedly say about hierarchical operating systems; and where the history does the same thing, in that case the law says it is a "stream-based operating system." What makes it stream-based, what defines it at least in part is that it is non-hierarchical.

And I just want to give the Court an example of what we are talking about. At Slide 49 we have given an example of a hierarchical structure where you have my computer, you have all of my photographs, and the photographs are labeled in folders and subfolders and subsubfolders and subsubsubfolders. It is that structure. It is the idea that you are naming all of that that Dr. Gelernter wanted to get away from, and he said that repeatedly many, many times.

And the stream-based is what he discloses in Figure 1 which gets away -- you can see visually, of course, it is not hierarchical. It is just start from the beginning and end at the end in terms of time. And that was the defining nature

in his mind as he reflected in the specification of a "stream-based operating system."

And I want to go through just very briefly the law on that. The law says that -- as I know Your Honor is familiar with -- that where the specification repeatedly criticizes or distinguishes a particular aspect of the prior art, that you can't then later bring that aspect back into the claims because that is what the specification teaches that it is not. And the Edwards Lifesciences case, the Astrazeneca case and many, many others stand for that point.

A related but somewhat different point is this concept of problem and solution. Very often patent specification people say here is the problem we are trying to solve, and here is the solution we are bringing to solve that problem. And in this case and the law says that is highly relevant to claim construction, and you can't make the problem part of the solution; i.e., part of the claims.

So let's go to the specification. At the very beginning section in the background of the invention where they are telling you what this is all about -- and as I know Your Honor is familiar with -- that is the section of the patent where they say here is the problem we are trying to solve and here is the issue we are dealing with. And over and over again this patent says that the conventional operating systems are bad, they confuse inexperienced users, they

require the user to invent pointless names for files and construct organizational hierarchies that quickly become obsolete. Named files are an invention of the '50s and '60s and the hierarchical directories of the '60s. That is the problem that he is trying to solve, and he says it over and over again. Two paragraphs later that discusses the disadvantages and criticisms --

THE COURT: Why couldn't such a stream be hierarchical as well as non-hierarchical?

MR. POWERS: Because he describes it in a non-hierarchical way. What I am trying to get away from --

THE COURT: Well, it is describing the problem, but the solution doesn't necessarily have to be one or the other, does it?

MR. POWERS: That's true in the theoretical sense, but it is not true in the sense of this specification. What he said is I am trying to get away from the idea that you have these files and subfiles and folders and subfolders. What they are accusing is an operating system that has files and subfiles and folders and subfolders. They are accusing of infringement a system that has its operating system based on exactly this hierarchical structure that is being criticized here. He is saying over and over again I don't want you to have to name directories, I don't want you to have to name files. That is what I am stopping.

How does he stop it? He stops it with something that is totally non-hierarchical. All that exists, the only thing that you use to organize your documents is time. It is just when the thing was created. That is it. In his mind that had an elegant simplicity to it that solved the problem of hierarchies. And that is what a "stream" was. And we have agreed that "stream" is a time-ordered sequence and all of that, so the reality is he has by this concept of "stream" eliminated hierarchies. And I don't think there is a fair reading in the specification that goes any other way.

He then says explicitly the solution to these problems is to use this document stream operating system, which he described, of course, as this using only time based as the parties have agreed. And the object of the present invention is to provide a document stream operating system and method which solves many, if not all, of the disadvantages of the conventional operating systems.

And, finally, file names are only used if the user chooses to invent such names. No requirement at all of doing so, but that is squarely inconsistent with what they are accusing in this case. He said this intrinsically obviously many, many times. He also said it extrinsically many times. In his articles he says I don't want to organize my computer documents into files. I don't want to have to make up names. I want to spend no time organizing my system.

And he said those names and directories should be junked; they are just pointless, useless; I don't want them. Yet, again, this is exactly what they are accusing here, so this would be a classic case in which the specification says I am not "X," I am trying to get away from "X." In this case, a hierarchical operating system. And yet they are trying to have "X" be what it can include. In our view, that is improper.

THE COURT: Okay. Response?

MR. POWERS: There is a second dispute. Do you want to do that afterwards?

THE COURT: Let me hear the response this far.

MR. STEIN: I think that Mr. Powers alluded to the nub of the issue there which is they are including this extra requirement in the claim because they think it will give rise to a non-infringement argument if the term non-hierarchical is anywhere in the claim. In fact, what Apple is doing is precisely what is described in the patent. The patent describes implementing a document stream or a stream-based operating stream on top of a conventional operating system, and there is no -- there is no description that you have to eliminate capabilities from the conventional operating system when you implement the document stream operating the system in that way. And there is nothing incompatible about having the two co-exist, and there is no reason to add that extraneous

limitation into the claim.

MR. POWERS: Your Honor, if I may, just very briefly on that issue have the last word. The comment that Mr. Stein just made is directly inconsistent with what the specification and Dr. Gelernter said. He is saying I don't want to have to ever do the files and subfiles and directory names and all that. I don't want to have to deal with all that. The whole point of his invention was you never have to do that. And what he just described is accusing something where you have to do that for everything. And then on top he wants to bolt on something else but heap all of the problems of the basic operating system, and that is exactly what Dr. Gelernter said his invention was designed to eliminate.

THE COURT: Okay. Anything further on "steam-based operating system"?

MR. POWERS: Yes, Your Honor. At Slide 62 there is one further dispute, which is the highlighted language which is, "in which, as each document is presented to the operating system, the document is placed according to a time indicator in the sequence of documents already stored relative to the time indicators of the stored documents." And they are concerned with -- the argument that Mirror Worlds makes to that language specifically is that goes beyond the plain claim language. And at this level I don't disagree with them because claim construction is often a question of going beyond

the language that is just in the claims. And the issue is what does the specification, the file history, and other evidence teach you?

And, again, we took this straight out of a definitional section of the patent. The patent says, "In another words, that is"; and then as each -- and then the language in haec verba, exactly the language I read that is in our construction. So this is the definition of a non-hierarchical operating system according to the specification. And it starts with, "in other words, that is," which, of course, as the Edwards Lifesciences case says and others, when you use that kind of language, that "signals an intent to define the word to which it refers." So in our view that is definitional. It is plainly intending to define that language.

The only other point I want to make, Your Honor, is a response to Mr. Stein's argument that this would be excluding an embodiment in the patent, and they make this in their reply brief and Mr. Stein just alluded to it. And I want to address that issue directly because it is obviously an important question.

In our view, this proposed construction would not exclude any embodiment of the asserted claims. And, of course, the starting principle, the important starting principle is not everything in the specification is an

embodiment of every claim. Very often specifications contain multiple types of -- descriptions of multiple types of claims, and the patent has some claims that relate to some embodiments, some claims that relate to other embodiments, and sometimes, as the Johnson & Johnson case teaches, something in the specification is not claimed at all.

In this case we actually have a clear statement in the claims of which embodiment it is attached to. And if you go to Column 14, Lines 43 to 51 -- I have got it up on the screen, Your Honor -- this is actually the section of the specification. This is Slide 66. This is exactly the section to the specification to which Mirror Worlds referred in its brief, arguing that embodiments were excluded. And this portion of the specification describes two embodiments, two ideas.

The first is implementation to which utilized subsystems from other operating systems. That is an embodiment which is claimed in certain of the claims in suit; but as to that embodiment, there is very important language in the specification. In that embodiment the specification says, "In such implementations the graphic user interface of the other operating system can be replaced by the present invention viewports."

So what they are saying is, yes, you can use these subsystems, but the main operating system is still our

stream-based, not the hierarchical operating system. And all you are doing is using these subsystems below. And to reflect the fact that you are using our operating system, not the hierarchical one, you use our stream-based GUI.

So when we made that argument, Mirror Worlds said, well, but, yeah, there is actually another embodiment which is this last one. And they are right. There is another embodiment. So this is the one they now appear to be really arguing, which says alternatively the present invention can operate as a document stream utility for the other operating system.

The problem with Mirror Worlds' argument is that there is no claim that is directed to that embodiment. There is no claim that they have asserted which talks about being a utility for another operating system. In fact, every claim that is asserted talks about the claim being directed to an operating system. And that is embodiment one or embodiment two, not this last embodiment where it is not the operating system. So in this instance the exact language to which Mirror Worlds refers relates to something that is not the subject of the asserted claims; and, therefore, the excluded preferred embodiment or excluded embodiment simply doesn't work.

The only other point I wanted to make, Your Honor, is that their construction has this language "provides support

for streams," so it is a little ambiguous; but as I understand what they are trying to get at, they are trying to say, well, this is an operating system that could support steams but doesn't necessarily use streams. Well, as an initial matter, that is not stream-based. That is what the claims require.

So as an example, the Apple operating system and, for that matter, Windows support Word; but they are not Word-based. No one would say they are Word based. But perhaps even more importantly, that example of that definition they provided to the Court, that proposed construction would ensnare exactly the email prior art they distinguished because Windows -- or any operating system -- supports email and email historically is stream-based and that is exactly what they distinguished by saying that is not what we are. We are different because everything in our system, every document -- not just email -- every single document is actually in that main stream and that is the operating, organizing principle of the operating system, so their proposed construction would explicitly ensnare exactly the prior art they distinguished on exactly the ground they talked about.

It is also ambiguous because something that provides support for streams might not even have streams, which, of course, is in our view -- would be inappropriate given the nature of the description of the invention.

THE COURT: Okay.

MR. STEIN: Okay. There were a lot of points there. I will try to hit them if I got them all down. The first point was he referred to a portion of the specification -- Mr. Powers referred to a portion of the specification that he said contained a definition of either "stream-based operating system" or document-stream operating system, but the section actually was describing the present invention -- was not providing a definition for those terms. It was describing the invention. It was in the field of the invention section. The Court can refer back to that.

In terms of whether we're picking embodiments -- Mr. Powers was saying that we are picking embodiments that aren't covered by these two terms. The patents describe a document stream operating system. They are entitled document stream operating system. The parties agree that a document stream operating system means the same thing as a "stream-based operating system." All of the description in the patent relates to what a document stream operating system is.

He also referred to a section towards the end of the patent where it talks about a document stream operating system being implemented on top of a conventional operating system. And then that section said in that case the graphical user interface can be replaced with the -- can replace -- or the interface for the conventional operating system can be

replaced with the interface for the document stream operating system. It doesn't say that it has to be replaced. It is another way -- you could replace it or give you a way of accessing the information on the system, but it is not a requirement.

And to the extent that Mr. Powers was making an argument that the construction we proposed would read on prior art, we disagree. But if he believes that and you adopt our construction, then we can wait to see how that plays out. But we don't believe our construction will read on prior art.

THE COURT: All right. We have been going for about an hour and 20 minutes. Let's take about a 10-minute break and then we will come back and pick up with the next one. Be in recess for ten minutes.

(Recess was taken.)

THE COURT: Please be seated.

Let's go to "timestamp to identify." Who would like to go first?

MR. STEIN: Do you want us to go to the same --

THE COURT: We are probably going to use both podiums, so whichever one you would like to go to.

MR. STEIN: Well, it appears at this point that I believe Apple has changed its position with respect to this term in its reply brief, and the parties may no longer have a dispute.

THE COURT: Oh, wonderful.

MR. STEIN: He may disagree. But the dispute was whether or not a timestamp was a date and time value alone or could include other additional information. In their original proposed construction was "a date and time value that uniquely identifies each data unit." Both experts agree that a timestamp need not be a date and time value alone; that one of skill in the art would understand there would be additional information that could be included in the timestamp in order to ensure that the timestamp was unique. That is not reflected in Apple's construction.

I think that the natural reading, the reading that we were giving it was they required the timestamp to be only a date and time value. In their reply brief in connection with -- it might have been their motion that they -- yeah, their summary judgment of indefiniteness reply brief they concede now that there is no dispute --

THE COURT: Okay. Let me just -- what is the dispute, Mr. Powers, is there one?

MR. POWERS: Well, there is one, Your Honor. Let me make sure we get our slides up. There we go. There are -- with regard to timestamp, there are three issues. And I think one of those issues is no longer a dispute. But two remain. The first issue was originally whether the timestamp must uniquely identify each document. That was one of the

disputes. Their reply brief appears to concede that. I want to make sure that is clear on the record they do concede that. But if they do concede that, that is no longer a dispute. That is in our construction. It is not in our construction. So the "uniquely" aspect needs to be added.

THE COURT: Let me see, are you in agreement that it uniquely identifies each document?

MR. STEIN: Yes.

THE COURT: Okay.

MR. POWERS: So that issue is gone. The next question -- there are then two remaining issues. The next question is by what means does a timestamp uniquely -- as defined in the claims, as used in the claims, by what means must it uniquely identify each document? I can skip forward. Their position now is that it need not be just date and time alone.

Let me go back to Slide 76, Your Honor, their position, their reply brief on claim construction is that both experts agree that a timestamp may include additional information to ensure uniqueness. What that argument combines is two separate issues. First, we do agree that in order to ensure uniqueness, date and time are not sufficient. That is the basis -- you would have to add additional information. That is the basis for the indefiniteness motion because the specification nowhere teaches how you would do that, what

additional information it would be, or anything required to do that. That is the argument to which Mr. Stein was referring.

But the claim construction issue is, as a matter of claim construction -- not as a matter of what experts could do, what people in the technology might do, the question as a matter of claim construction is a timestamp under the meaning of the claims a date and time value alone that uniquely identifies each document. That comes straight out of the definition in the file history. That is Slide 78, Your Honor. That is Page 765. Again, this is the portion that is explicitly definitional where they say here are definitions based on the specification, and we are providing them below.

No. 5 is a timestamp, is a date/time used to uniquely identify each data unit. It does not say a date/time plus whatever additional information you might need. It is exclusively date and time. That is why as a matter of claim construction we adopted exactly their language used in the definitional section of the file history for our construction.

Our point which -- our point to which Mr. Stein alludes is not that as a matter of claim construction a timestamp can include additional information because the definition -- that would be inconsistent with the definition. Our point is that it is clear and admitted by both experts -- and this is now in the indefiniteness motion, not as a matter

of claim construction -- our point is that both experts admit that (a) uniqueness is required for the claims for a timestamp; and (b) that date and time alone can't do it. Why? Because you can have multiple documents created at the same date and time even if you do it as of a second.

And so for the purpose that both sides, both parties and both experts agree that that timestamp -- the function it must perform, it cannot do so based solely on what is in the spec, and the claim is indefinite because it does not -- the specification doesn't teach you how to do it. So as a matter of claim construction is one thing. Indefiniteness is another.

THE COURT: I understand your argument.

Response?

MR. STEIN: If I understand what Mr. Powers just said, it looks like he is shifting position again on this. In the reply brief on indefiniteness Apple stated that there is no dispute that -- this is on Page 2 of their reply brief regarding indefiniteness, Docket No. 168 -- there is no dispute that under Apple's proposed construction of the "timestamp to identify" limitation a timestamp must include both a date and time value and additional information to uniquely identify each data unit.

And it is talking about Apple's construction of the term at issue here "timestamp to identify." It was a

concession we believe that our construction -- that it was not just a date and time value alone was correct. I think it is very explicit. It is based on the expert testimony of both our expert and Apple's expert who understood as one skilled in the art would --

THE COURT: I think he is arguing that is trumped by the prosecution history definition.

MR. STEIN: I think --

THE COURT: Is it or is it not?

MR. STEIN: No, the prosecution history says a date/time -- I forget the exact --

THE COURT: Would you put the prosecution history back up?

MR. POWERS: Yes, Your Honor.

THE COURT: There it is.

MR. STEIN: That sentence is not the model of clarity in the prosecution history, but it was meant -- it was not meant to convey because it couldn't be meant to convey that the timestamp had to be a date and time alone. There is a component -- there is an aspect of the timestamp that is based on the date and time, but no one skilled in the art -- well everyone -- anyone skilled in the art reading the patent would understand that there are very common situations in which the date and time for a particular -- for two data units may be the same.

And I guess, frankly, in addition to that point, the issue of this date/time being unique is very tangential to the invention in terms of the uniqueness of that. The point of the timestamp is to place the data unit in the stream so that a user could locate the data unit later on. As Apple's expert acknowledged, the user is not going to use the timestamp itself to later locate the data unit. It is going to use the date and time to approximate where that data unit is in the stream. So the full value of the timestamp, the timestamp plus the additional information that might be necessary to ensure uniqueness is very tangential.

The way the invention works in operation is that the user uses time as an intuitive way to get a ballpark of where the document of interest is, goes to that time, and then browses the browse card -- the document of representations and the stream around that time to locate the specific document.

THE COURT: All right. Thank you.

Let's go to No. 6, "glance views," Mr. Powers.

MR. POWERS: Yes, Your Honor, No. 6.

MR. STEIN: Excuse me. I don't know if we are going to get to this, but there was a separate issue regarding indefiniteness that Mr. Powers mentioned. It wasn't necessarily on the list. I would like to address it.

THE COURT: All right.

MR. STEIN: When it comes to indefiniteness, the

argument is not that "timestamp to identify" is indefinite. Apple proposed a definition. Both parties have. That is not the issue. The issue is whether there is a means for limitation, means for -- I think it was selecting a timestamp to identify each data unit. And really the issue is whether there is sufficient structure described in the specification for selecting the data unit.

Now, Apple's argument appears to be that there is insufficient description of the structure of the timestamp itself, but that goes really -- it is an enablement argument, not an indefiniteness argument. They have a definition for timestamp. With respect to the means for selecting a timestamp, the issue is how the patent describes that mechanism. And there are mechanisms described in the patent for selecting a timestamp, and it is only by conflating those two separate and distinct issues that they argue that other term, the "means for" term is indefinite.

THE COURT: "Glance views."

MR. POWERS: Your Honor, may I have a brief response on the indefiniteness issue?

THE COURT: No.

MR. POWERS: So with regard to "glance views," Your Honor, we have got on Slide 83 a place in the claim in which that term appears. This is '427, Claim 1, we are talking about the display facility further displaying a cursor or

pointer and responding to user-controlled sliding without clicking of the cursor over the stack to display a glance view of a document whose document representation is currently touched by the cursor or pointer.

So this is an instance in which the claim is really highly specific, not conceptual at all but highly specific about -- in the claim, not in the specification, to how a "glance view" works and what it does. It is saying that you don't see a "glance view" until you slide a cursor over one of the document --

THE COURT: But, Mr. Powers, it says that in the claim. Why repeat it in the definition?

MR. POWERS: It does, and to the extent there is no dispute about that, as long as it is clear from the overall construction, we certainly have no objection to that. So the issue that we have with regard to "glance view," I just want to put up their Figure 1 so the context is clear. In Figure 1 there is a document that is called out on the far left, Your Honor, that is numbered 100. And there is a series of documents that you don't really see any of the content at all. You just see sort of the outline of the document. This patent and the claim itself refers to three specific things that have to be given specific and different meanings.

One is the document itself, of course. And second is the document representation, which are those outlines, if

you will, of the documents where you can't really see anything. And the "glance view" is the one that pops up, as the claim says, when your cursor goes over that particular document representation. So what the claim is teaching is exactly that, and what the claim is requiring is that.

Now, I agree with Your Honor that as long as it is clear -- as long as no argument may be made based on whatever construction is adopted that the other language of the claim doesn't apply, then it doesn't need to be repeated twice. We certainly agree with that. But it is part of the essence of the "glance view." That's what it is. And the concern that we have here is that when you look at Mirror Worlds' construction, Mirror Worlds' construction merely says "an abbreviated presentation of the document." That could be anything.

And what that doesn't capture is that this "glance view" is the thing that provides more information when your cursor touches it and it pops out so you can see if that is the document that you really want. That is the whole purpose of the "glance view" is that you are scanning through these documents --

THE COURT: Well, for example, a music album where the document might contain all of the songs but the cover would be perhaps a "glance view."

MR. POWERS: Exactly. You could have that. You

could have a variety of things; but an abbreviated presentation of a document, that could just be a shrunken document representation. That is a very vague statement about what an abbreviated presentation of a document is.

THE COURT: What are you saying by your definition it should be?

MR. POWERS: What we are saying is two things, and the two things are important. The first is this cause and effect point that we discussed that is explicitly in the claim that only appears when the document representation is touched by the cursor.

THE COURT: Well, let's stop right there. Do we have any disagreement that the claim calls for it is not going to appear until it is touched by the cursor?

MR. STEIN: I think we do. I think that a document representation could appear -- there could be one up on the screen, for example, of the document and it could remain there, for example, until like another document -- document representation is touched.

MR. POWERS: So we do have a dispute on exactly the core language of the claim, Your Honor, and that is why we put it there to try to eliminate that dispute. So, Your Honor, there are two issues. One is we think that language is absolutely required by the plain language of the claim, but the second point is at the bottom of our construction where it

says it provides additional information about the document than the document representation, and that is an important distinction between our construction and Mirror Worlds' construction because their construction really says it is really something less than the whole document.

Now, that could be a document representation and they are not willing to say it isn't. That is exactly what the document specification says it can't be. There have to be different things. At a minimum we know that because this claim says you don't even see the "glance view" until you touch the document representation with the cursor. So the document representation is on the screen, you touch it with the cursor, and up pops the "glance view," which wasn't visible until then. So under their construction the document representation and the "glance view" could be the very same thing because it is so vague what is -- theirs is anything less than the full document itself. And that is squarely inconsistent with the language of the claim.

Their own expert admitted that where he says, yes, the "glance view" isn't visible until the cursor touches the document representation, and the specification is replete with evidence about that. And the purpose of this "glance view" is to help the user identify the document, as it says, by providing the user some idea of the document's contents. The document representation, when we go back, doesn't do that at

all. And the whole purpose of the "glance view" as the specification teaches is to give the user some idea of what the document is that that representation represents so they can decide if that is the one they want. But that certainly wouldn't be true if it is the document representation itself. And their construction is so vague that it would clearly include a document representation.

And the patent itself makes quite clear that the purpose is to provide the user some idea of the contents. And even in their original brief they acknowledge -- this is at Page 13, Your Honor. The purpose of the "glance view" is to help the user identify the document. That means it is giving you more information than you had before. And their construction does not reflect that. Their construction is so vague that it could cover anything that is less than the entire document itself, so on that ground I think --

THE COURT: Theirs is that it can contain, you are saying anything as long as it is not -- wait a minute. I'm getting confused because you are saying it has to provide additional information about the document than is represented in the document or than is represented in the document representation?

MR. POWERS: The latter. If we go back to Slide 90, Your Honor.

THE COURT: And you are saying that cannot be the

same as the document representation?

MR. POWERS: Precisely. And the reason for that -- so if we go to Slide 90 it is the parties' two constructions.

THE COURT: And you are saying it has to be more than the document representation but less than the document?

MR. POWERS: Precisely.

THE COURT: Where do you find all of the support for that?

MR. POWERS: Well, there is two pieces to that.

THE COURT: And isn't that really talking about when and how rather than what a "glance view" is?

MR. POWERS: No, it is exactly what it is because it is that it is in the middle between the document representation and the document. And there is a little bit of confusion between the parties' constructions because they are really addressing it from different ends. Their construction with regard to Slide 90 is that it is an abbreviated version of a document, so it is something less than the whole document. We don't know what that is. Ours is going the other direction and saying it provides more information about the document than the document representation.

Now, how do we know that, is your question? We know that from the specification that says the purpose of that is to help the user -- this is at the '227 patent, Column 7, Line 64, is to help the user identify a document to provide the

user with some idea of the document's contents.

THE COURT: But it could do that by displaying, say, a small portion of the document, say, the subject line or something --

MR. POWERS: Exactly.

THE COURT: -- could it not?

MR. POWERS: We are not saying -- let's go back to their construction. We are not saying that a "glance view" is not an abbreviated presentation of a document. That's true. It just doesn't go far enough because their construction is clearly less than the whole document. We agree with that. The issue is, is it anything less than the whole document? Is it anything -- anything in the world that is less than the whole document? The answer, as we know, it cannot be a document representation. Why? Because it doesn't even appear until you touch the document representation. That is straight out of the claim language. That is not out of the specification --

THE COURT: How do you know what is on a document representation? Does a document representation not contain any data?

MR. POWERS: Well, in the specification it contains no data. That is Figure 1, and there is no embodiment that does otherwise.

THE COURT: Where is that in Figure 1?

MR. POWERS: I have it up on the screen. The unannotated version is at Slide 84, and so the docket representations are just those outlines of documents, the whole stream. Everything in that stream is a document representation. And the cursor 10 is on that one that has a little shading on it.

THE COURT: Let me ask you this: If the cursor touched the top page -- which would clearly have the whole thing that is on the "glance view" -- wouldn't that representation of Page 1 contain the -- all of the data that is on the "glance view"?

MR. POWERS: That patent doesn't say that. The patent shows nothing on the first page.

THE COURT: Well, you are referring to Figure 1, so that is what I am looking at.

MR. POWERS: And Figure 1 has no information on the first page. It is blank.

THE COURT: Well --

MR. POWERS: The "glance view" that is 100 is of the shaded representation that is about seven or eight from the upper left. So it is saying you have this stream of things that give you no information, and you are trying to find which one is the one you want. And this is straight out of the claim. You scroll your cursor over it without clicking it.

THE COURT: I understand. But it seems to me it

would a bit limiting that says on that representation it can't show anything other than a colored line.

MR. POWERS: That is what the figure shows. That is what they are trying to convey --

THE COURT: Response?

MR. POWERS: -- that you don't need a document representation to provide information because that is the purpose of the "glance view." There is nothing in the spec that teaches otherwise.

THE COURT: Response?

MR. STEIN: Two points. First, as Your Honor recognized, there is claim language already there that describes when a "glance view" is displayed; and that should not be part of the construction of "glance view." It is in the claim. It is different claim language. I think that claim language is very straightforward and clear on its face and doesn't require construction. Apple didn't identify that other claim language as requiring construction and, therefore, I don't think it is appropriate to include it in the construction of "glance view" itself. Second --

Mr. Powers, could you put that slide back up?

MR. POWERS: Which one?

MR. STEIN: 84.

MR. POWERS: Sure.

MR. STEIN: That is a representation of the

graphical user interface. But it is one embodiment. It differs even from the embodiment described in the patent in that the patent describes each document representation in that stream displaying the top line, and there are other possible embodiments of this invention where those document representations contain more information.

For example, in the '999 patent if you look at Figure 1 the document representations in the stream contain much more information than they are in that particular figure. The claims aren't limited to what is displayed in the document representation. Mr. Powers is right that the patent describes the purpose of what the "glance view" is is to give the user some idea of what document is currently being browsed; and it provides additional information that would give the user a sense of the document.

But only the first document in that stream is visible to the user. All of the rest are obscured, so it is perfectly within the scope of the claims to envision an embodiment in which the "glance views" are, in fact, the information what is -- or the information that would be displayed to the side is the same information. You can't see it. You don't know it until in this particular claim you point and point with a cursor or some other technique at that particular document and then you can see the obscured information.

And it is also within the scope of the claim that that information could appear in the place in the stream. There is nothing within the plain terms of the claim that would require it to be displayed off to the side like it is in that particular embodiment. It could just be displayed in the stream. That one would pop up. It might obscure some of the documents in front of it, but you still would be able to see the other document representations in the stream, and Apple is trying to exclude that type of embodiment. We believe it is because they think it would give rise to a non-infringement argument.

MR. POWERS: May I respond very briefly, Your Honor?

THE COURT: Yes.

MR. POWERS: I think, perhaps, the most import of Mr. Stein's argument was his admission that what makes a glance view a "glance view" is that it does provide more information, which is exactly what he just said, than the user has otherwise from the document representations. That is exactly what our construction says, and it is exactly what their construction does not say.

And under their construction it is just anything less than the whole document which clearly includes a document representation. And we know from the claim that the "glance view" can't be the same as a document representation because the claim says you don't even see the "glance view" until you

touch the document representation that it relates to and out pops the "glance view." So we know that their construction can't be right, and we know that our construction which says it gives more information than the document representation, is consistent with what Mr. Stein just admitted and is exactly what the specification says.

And the last point I wanted to make, Your Honor, is that Mr. Stein was arguing about all sorts of potential embodiments that one could imagine. But those aren't taught in the specification. This specification is what we have to use for claim construction, not what embodiments can be imagined now.

THE COURT: Let's move on to "receding, foreshortened stack." I guess my question is, is there really any dispute? You seem to be fairly close on this. Can either one of you live with the others?

MR. POWERS: Yes, Your Honor, there is one major dispute.

THE COURT: Okay. What is that?

MR. POWERS: The dispute is that their construction does not include the concept of "foreshortened."

THE COURT: Of what?

MR. POWERS: "Foreshortened," which is one of the terms in the claim. It does include the concept of "receding" but it does not include the concept of "foreshortened" which

is explicitly required by the claim. That is precisely what the dispute is.

MR. STEIN: I would characterize it differently.

MR. POWERS: Who would Your Honor like to go first on this one?

THE COURT: Who went first on the last one?

MR. POWERS: I think --

THE COURT: All right. Plaintiff can --

MR. POWERS: -- Mr. Stein.

THE COURT: -- go first on this one. That is you.

MR. STEIN: I would characterize the dispute is that Apple was attempting to limit this term to the preferred -- to the embodiment shown in Figure 1 of the patent that was just displayed; and that the terms are broader than that; that the concept of the "receding, foreshortened stack" the terms within it are related terms. "Receding" and "foreshortened" both relate to similar concepts. The parties have agreed to construe them as a whole, not separating out the terms.

But the "foreshortened" is reflected in the perspective used in Mirror Worlds' proposed construction. But more importantly we don't agree that the claim is limited to a display where the document representations get smaller. That is not required by either the term "receding" or "foreshortened"; and it is Apple's attempt to limit this claim

term to Claim 1 -- Figure 1 of the patent.

THE COURT: Response?

MR. POWERS: Thank you, Your Honor. Counsel has argued that we are trying to limit it to the preferred embodiment or the only embodiment. And what we are limiting it to is the language in the claim because the claim says "receding, foreshortened stack." Both are required, not just one or the other.

And when you look at the figure it, of course, shows both. It is "receding" and "foreshortened." This is the figure we have seen several times. And I wanted to put up the parties' constructions -- this is Slide 98, Your Honor -- because I think it is important to understand where they differ, and we have highlighted them at Slide 99 to show that. Both constructions do have the concept of "receding." They express it in different terms. We believe our language is clearer to a jury. We don't like the language of illusion because we think it is unclear.

But both of those are trying to capture the concept of "receding" no doubt. But "receding" and "foreshortened" are distinct concepts. They mean different things, and their construction does not capture "foreshortened" at all. Foreshortened, as its name implies, means something smaller, shorter. And when we look at Figure 1 -- and I agree with Counsel this is not the be all and end all. You don't stop by

looking at Figure 1. You don't just import it because that is what Figure 1 does.

But it is clear in Figure 1 they do get smaller from front to back. There is no doubt about it. It can't be denied. And I want to now look at their construction because their construction plainly does not require any change in size. This is Slide 102, Your Honor. Their construction is on the left. "A representation of a stack that uses perspective to create the illusion of increasing distance." Perspective just means a two-dimensional representation that creates the illusion of a three-dimensional object.

The figure on the right meets that construction, Mirror Worlds' construction. It uses perspective by the use of overlapping documents to create the illusion of increasing distance, but it does not foreshorten in any sense. The documents are the same size. So it has "receding" for sure; and "perspective" which is a term that includes foreshortening -- foreshortening can be the use of perspective, but perspective does not require the use of foreshortening. That is the key point.

And when we look at the sources of intrinsic evidence, the claim cites "foreshortening" as a separate requirement. Their construction clearly does not include it. They acknowledge that in interpreting Figure 1 it is foreshortened with the successive documents smaller in size.

This is their statement in reexamination where they are telling the Patent Office what "foreshortening" means. The successive documents are smaller in size, which is exactly our construction. So what they have told the Patent Office is consistent with what we are saying the construction should be and what is omitted from their construction.

THE COURT: Let me back up to your prior screen and let me ask you, are the first and second documents, is the second document foreshortened from the first document?

MR. POWERS: On the bottom right do you mean?

THE COURT: The top of the stack, is it foreshortened from the first document?

MR. POWERS: Well, it is sort of hard to tell, but that is -- the point of the claim is that the stack is foreshortened, so when you look at this stack from front to back, there is no doubt that the stack is foreshortened. And obviously if you are going to take the two that are the closest together, the degree of foreshortening will be the least discernible. But the stack as a whole is undeniably foreshortened, and their statement to the Patent Office is exactly that, that successive documents are smaller in size.

So that, although in those two specific ones I haven't brought a ruler to try to measure it, but the concept as it is displaying, as Mirror Worlds admitted to the Patent Office is exactly that; that each document is successively

smaller in size so that the stack when viewed as a stack is foreshortened. And that concept is conspicuously missing from their construction.

It is also really important I think -- there is a point in the file history I want to bring out, Your Honor. There is a prior reference called Cowart, C-O-W-A-R-T. The Cowart had overlapping windows where the windows did not get smaller. And here is a picture of Cowart at Slide 107, so that is exactly what we showed earlier of the use of perspective creates the illusion of distance but no change in size. That was a prior art reference that was cited, and they hadn't responded to it.

So what did they respond? They responded that Cowart shows an orthogonal of windows; that is the windows do not get smaller towards the bottom of the stack. They made exactly the distinction that we are saying must be contained in the claim construction and that is omitted from their claim construction. And the very bottom says Outlook and Cowart do not recognize this key aspect of streams. It is not tangential. It is key. By teaching away from such diminishment. Indeed both Outlook and Cowart present all displayed data units as the same size.

So this concept of reduced size contained in our construction and omitted from theirs is not only critical from claim -- it comes straight out of the claim, but also is

critical from the file history.

THE COURT: Okay. Mr. Stein, what is your response to that, the file history?

MR. STEIN: There are other ways of -- just in general there are other ways of showing perspective, foreshortening than the specific embodiment shown in Figure 1. Now, Cowart and the example that was shown earlier by Mr. Powers from an artist and technical point of view, images of rectangles that were displayed do not show perspective one on top of another if there is no other visual cue to displaying perspective. A visual cue could be shading, for example, or could be distorting the lines to show that there is some type of projection in space. And there are other ways of showing perspective. But Apple is attempting to limit the ways of foreshortening and showing perspective to the specific example shown in the patent; and, again, that is because they think that will give rise to a non-infringement argument. But there are other ways of showing perspective than the one shown in the patent. And the claim isn't limited to that particular example and would be improper.

THE COURT: But the claim uses the word "foreshortened."

MR. STEIN: That's correct, but the term "foreshortened" -- and I don't have a dictionary definition right in front of me but we cite a couple to the Court --

relates to the use of perspective to show projection in space. There are various ways of doing that. It is not the only way of doing that is decreasing -- what is the words that Apple uses? Making the document representation smaller. There are other ways of showing projection in space that do not involve that. The argument with respect to Cowart is that it does not show a projection in space.

THE COURT: Okay. Let's go on to the next one.

"Archiving," Mr. Powers.

MR. POWERS: Thank you, Your Honor. So for "archiving" this is going to be the term where their consistent use of a term is going to drive, in our view, the proper claim construction. We put up at Slide 112 --

THE COURT: Do you agree that it can include copying?

MR. POWERS: Absolutely, Your Honor. In fact, the way it includes copying is part of its process. The way that you archive -- and I don't think there is a technical dispute about this -- is that first you copy and then you move it and then you delete it from where it is presently.

THE COURT: Do you have to delete it?

MR. POWERS: That's what makes it an archive as opposed to just a copy. That is a point that what we are talking about from the intrinsic evidence. And is it one of those terms that people can use sloppily inconsistently? Of

course, there is a lot of terms like that. But in this case, in this specification they consistently used it in one way and for one purpose. And the language that we have got here it comes straight out of the specification, moved by the server from immediately accessible storage to cheaper, long-term storage.

The whole point of this is that you are moving it where you don't want to clutter your expensive storage because you are not using it anymore to a place where it is cheaper to store and you can go get it if you need to, but you are not going to need it very often. That is over and over again in the specification. Column 10 is an example of that. Later on archived document needs to be reloaded. If it were just copied and not deleted, you wouldn't need to reload it. So The consistent usage of the term "archived" here is that is what he meant by "archived"; and there is a technical reason for that in his mind and in this invention. And, of course, the job of claim construction is to --

THE COURT: So by moving you really mean copying and deleting?

MR. POWERS: That is the process by which you move, yes, exactly.

THE COURT: Response?

MR. STEIN: The term "archiving" is simply not limited to moving. The example -- it is another example of

Apple trying to import a limitation from the specific example in the specification into the claim.

THE COURT: Let me ask you this, Mr. Stein: Could you live with your definition if it said "copying or moving"?

MR. STEIN: Or moving? Yes.

THE COURT: Could defendant live with that?

MR. POWERS: No, Your Honor, because we think if copying or moving meant copying and then not deleting, we think it is inconsistent with the specification.

THE COURT: Where is there in the specification that it says in order to archive something that the original has to be deleted?

MR. POWERS: Can we go back to our slides, please?

The point of this is that you locate it and reload it. So the idea is that you are moving it from this immediately accessible storage, so you are obviously not keeping it there. That is what the whole point of what they are discussing is that is why you are archiving. You are not using it regularly anymore, you don't want to use up expensive storage so you wouldn't copy it and just keep it there. Now you have got it in both places. You are not accomplishing the purpose of the specification. And that is why he keeps talking about reloading. You wouldn't reload it if it was still there. So one of the points --

THE COURT: I keep thinking, though, I mean if I am

going to save something like out of a Word document or something and I copy it; and then when I paste it, I am in essence archiving it but I am not necessarily deleting it. I may come back and delete it later, but I am nevertheless archiving that particular paragraph that I have copied. Am I not?

MR. POWERS: What you have done is a copy move, what you done is a copy command. And if you do an archive command --

THE COURT: And I have archived it, right?

MR. POWERS: No, you have saved it. "Archiving" is a term that doesn't just mean copying and saving. It means taking it and moving it some place else for a purpose and not having it where it was before. And we asked Dr. Gelernter that exact question and this isn't an embodiment or anything else. We are asking about his invention and he says -- we asked him, you said archived in the context of your invention, what did you mean? He didn't say copy and keep it. He said moving it from relatively faster more expensive storage to relatively cheaper less accessible long-term storage.

That is not just copying a paragraph from your Word document. That is accomplishing a totally different function. An archive has a different purpose as specified in this specification, which is to achieve an objective that merely copying doesn't. And if the word "copying" is used as the

definition, it would be contrary to not only what the specification teaches consistently but contrary to what the actual inventor said he meant.

THE COURT: Okay. Response?

MR. STEIN: Well, I don't believe that defining "archiving" is including both copying and moving. It would be inconsistent with the specification. Again, it is an example given in the specification. Both parties' experts agree that all of the known archiving utilities in the relevant time frame back in 1996 permitted users to copy documents into an archive and not delete the original. In fact, Apple's expert testified that an archiving utility that did not permit that functionality would be an extremely bad idea, so we don't believe that the claim should be limited in that way.

THE COURT: Okay. "Document organizing facility." Whose turn is it?

MR. POWERS: I believe it is Mr. Stein's.

THE COURT: Mr. Stein.

MR. STEIN: Okay. There are two issues with the "document organizing facility." The first is whether 35 USC Section 112, Paragraph 6 should apply to that term; in other words, whether that term should be construed as a so-called means-plus-function term. And the second issue is whether if the term is construed in that manner it is indefinite.

Regarding the first issue, the law is quite clear

that if the claim term does not use the words "means for" there is an incredibly strong presumption that Section 112, Paragraph 6 does not apply. The cases have held that as long as -- I a reading from a case that was cited in our briefs. It was Roy-G-Biv -- well, it is in the brief. That it is sufficient if the claim term is used in common parlance or by persons of skill in the pertinent art to designate structure even if the term covers a broad class of structure and even if the term identifies structure by their function.

Many courts have held that limitations that are similar to the term that was used in this claim does convey structure. In fact, Apple's expert during his deposition used the same term "facility" to refer to other types of software structure such as a user interface facility or facility that generates an amount of space.

There are cases that use the term to refer to software modules, and more recently there was a case by Judge Love in which he held that claim terms of the form -- computer code for displaying a plurality of identifiers and computer code for working in conjunction with a network browser, and then it goes on, was sufficient structure to take that term outside of Paragraph 112, Paragraph 6. That case is Aloft Media v. Adobe Systems, 570 F.Supp. --

THE COURT: Let me hear a response. How do you overcome the presumption, Mr. Powers?

MR. POWERS: Your Honor, the way we overcome the presumption is that "facility" is a purely generic term. If you look at dictionaries it basically says it is something that does something. And when you compare it to the terms the Federal Circuit has found does overcome the presumption, mechanism, means, element, device, those are equivalent to "facility" in terms of what they convey. And all of those have been held to be governed by 112, 6 despite the absence of the term "means."

And the second point I wanted to make -- and I think this is an interesting point that if you just -- if you took Mirror Worlds' proposed construction of the term -- and this is at Slide 127, Your Honor. If you took Mirror Worlds's proposed construction of the term "document organizing facility," which is "software that organizes documents" -- that is their proposed construction -- if you took that construction and treated it as if it were the claim language, it would still be governed by 12, 6 because software that performs a function -- which is all theirs is, software that organizes documents -- is not structure under the law.

The WMS Gaming case -- and I know Your Honor is deeply familiar with this law -- provided specifically that the structure is not the software performing a function, but a particular algorithm by which it does perform that function. So their proposed construction is merely that a software that

organizes documents is classic algorithm-less language which under WMS Gaming and its progeny is not structure. And if their proposed construction isn't structure, then neither obviously is the term itself.

Your decision in i4i, of course, upheld that as well; that you have to have the particular algorithm, and there is no structure unless it -- and in the Computer Acceleration Corp case, the holding there specifically was structure of software that performs a claim function is inadequate because this merely restates the function and thus is not sufficient disclosure of structure. So in terms of whether it is governed by 112, 6, facility is equivalent -- no more descriptive of structure than element, device, mechanism, other terms that have been held by the Federal Circuit to be governed by 112, 6 and --

THE COURT: What about resistor/capacitor, does it rise to that level --

MR. POWERS: Not at all. Resistor and capacitor are structures. They are elements that people know about. A "facility" is just a word that means something.

THE COURT: Okay. Response?

MR. STEIN: Well, first of all, courts have, in fact, found that terms using similar formulations were not subject to 112, 6. I just mentioned one by Judge Love. In that case he describes how -- in that case the term was

computer code for doing something. He explains how that would convey structure to one of ordinary skill in the art and compares that to claim terms such as a circuit for doing something, which courts have also held conveys adequate structure.

THE COURT: I don't think Apple has rebutted the presumption on this one. Do you want to argue the definition, Mr. Powers.

MR. POWERS: In our view that definition would be equally vague and purely functional. If their definition is "software that organizes documents," that itself connotes no structure. There is no algorithm. The law is clear you have to have an algorithm.

THE COURT: Are you back to arguing structure? I have already said I didn't think you have met the presumption. So assuming we are talking definition, you are arguing for the -- that "document organizing facility" would mean "the portion of a stream-based operating system whose purpose is to organize documents," right?

MR. POWERS: And we would view that as being indefinite for the reasons stated in our motion.

THE COURT: All right.

Okay. Let's go on then to the means-plus-function terms that are the subject of the motion for summary judgment. I think that was next on your list, wasn't it?

MR. POWERS: It was, Your Honor.

THE COURT: I think I can save us some time on this one. I'm not sure that plaintiff has overcome the presumption the other way on these. Do you want to persuade me otherwise?

MR. STEIN: Well, the first term we addressed was "means for selecting a timestamp to identify each data unit." This term we addressed briefly earlier, but Apple's argument basically conflates two separate issues. Basically, the two issues are the required description in the specification for a non-means-plus-function limitation, which is here timestamp. And the issue of the required description in the specification for a means-plus-function limitation in here that is "means for selecting a timestamp."

And the term "timestamp" both parties agree it can be construed. It is not indefinite. The issue is not indefiniteness with respect to "timestamp." Perhaps Apple may want to argue that it is enablement. They haven't argued that yet. But the question is not whether the term can be construed. Both parties have proposed a construction. I guess whether there is sufficient description in the specification so that one of ordinary skill in the art can make that timestamp. We think clearly it is there. Both parties' experts agree that there was sufficient description; that they would know how to make a timestamp based on what was described in the specification. Apple's expert acknowledged

that it was not anything complicated. It was very straightforward to accomplish that.

So the issue with respect to "timestamp" isn't the issue for today. It has to do with enablement. But we think when we come to it we will prevail.

The second issue is "means for selecting." It appeared that Apple was arguing previously that the claim required a means for generating the timestamp; that the patent did not disclose sufficient structure for generating the timestamp. I mean, Apple agreed in its reply brief, however, that generating the timestamp is not part of the recited function. The recited function is selecting the timestamp. And the patent describes various mechanisms for selecting a timestamp.

One is Figures 4 and 5 of the patent that allows the user to reset the time point which then is used for the basis for the timestamp. Another is the current time it also describes using a software agent to select the time point which is used in connection with the timestamp. So there is no dispute that there are various ways of selecting the timestamp. Again, the important part of the timestamp from the user's perspective is where the thing is going to be placed in the stream. That is clearly described in the specification of the patents.

THE COURT: Okay. Response?

MR. POWERS: Did Mr. Stein persuade you or do you want to move to the second part of the analysis?

THE COURT: Excuse me?

MR. POWERS: I asked if Mr. Stein persuaded you or whether we want to move to the second part --

THE COURT: I think you can move.

MR. POWERS: Thank you.

Let's go to the means-plus-function section, please, Bill.

So now I am only going to address the question of whether -- if all of them are Section 112, 6 is there sufficient structure disclosed in the specification. And the first issue is this "means for selecting a timestamp to identify." Let me first make clear, Mr. Stein is exactly right, we are not arguing that the term "timestamp" is indefinite. That is not our position. That is a term which we have construed it, and it requires a unique identifier and which they have now conceded.

Now, the question is when you have a term where it says "means for selecting a timestamp to identify" is does the specification disclose structure that is capable of having that unique identifier, which we have now all agreed is part of the meaning of "timestamped." As to that, it is undisputed that a date and time timestamp alone, if that is the only information, which is what the definition in the specification

and the file history provided, if it is date and time alone, that is not enough to be unique.

But the problem is that is all that is disclosed in the specification, so we are not arguing here an enablement issue. The question isn't whether one skilled in the art could imagine a way to do it uniquely by adding some other information. The question is whether the "means for selecting the timestamp" structure is disclosed in the specification. And both experts agree that there is no structure in the specification for selecting anything based on that supposed additional information. Their expert says the patent simply leaves that to one of ordinary skill in the art to figure it out. But the law says that is not enough for purposes of indefiniteness on 112, 6. The Blackboard case says the fact that ordinarily skilled artisans could carry out the recited functions in a variety of ways, is exactly what Mirror Worlds argues here.

THE COURT: Okay. Thank you.

Mr. Stein, where is the structure?

MR. STEIN: Well, both parties agree that there is structure for a "timestamp" that includes date and time information. The issue is whether or not the additional information required -- the additional in the timestamp that may be required for uniqueness needs to be disclosed in the specification. And it is our position, based on the case law,

that you don't need to fill in all of the routine details of the structure that corresponds to the means-plus-function limitation. We have cited cases in our briefs that demonstrate that courts acknowledge that those sorts of details don't need to be filled in one routine. As long as there is basically structure in the spec to hang your hat on, which we have here the timestamp -- the data structure -- the date and time information is merely a structural element, and it is our position that creating that unique timestamp that relies on adding additional information is routine. Apple's expert admitted that it was a straightforward, easy task for him. It did not take much time at all to come up with -- to devise various ways of adding that missing element.

Our expert, Mirror Worlds' expert similarly admitted a declaration and testified that extra piece that is not explicitly described in the specification is routine; and that one of ordinary skill in the art would have no problem filling it in --

THE COURT: But can you refer me to any specific place in the specification that provides the structure?

MR. STEIN: Other than the timestamp and the date and time information in the timestamp, no. The additional information that we have talked about and that both experts acknowledge must be in there, it is the only logical way to read the specifications of the patent-in-suit, that additional

information must be there. Both experts testified that that would be a routine exercise for one of skill in the art to fill in that one missing piece.

THE COURT: I'll have the rest of those -- I will just have those submitted on the brief then. I would like some argument on "data unit." Who would like to lead off with that?

MR. POWERS: I'm happy to lead off, Your Honor.

THE COURT: All right.

MR. POWERS: With regard to "data unit," the issue is actually quite narrow. And I have got on Slide 177 the parties' competing constructions. They are really substantively identical but for Mirror Worlds' insertion of the term "collection of data."

THE COURT: Well, but I will tell you the problem that I have with both of the proposed definitions, aside from examples, but in my mind it almost seems circular in that we are talking about a collection of data or an item of significance to the user that the user considers as a unit. Where does that leave one?

MR. POWERS: Well, I will tell you our intent, and perhaps it is not as clear as it could be. What we think the dispute between the parties is that their construction of a collection of data could mean all of my email.

THE COURT: Could be what?

MR. POWERS: All of my email or all of my email from Steve. And we don't think a "data unit" within the meaning of these claims and as the specification teaches it, can -- one unit can be all my email from Steve because then you can't go and select individual emails within that, which the specification teaches is the whole point of this.

THE COURT: Would you agree with "a collection of data that cannot be further divided"?

MR. POWERS: I think that is fair, yes. That captures our concept.

THE COURT: Could plaintiff live with that?

MR. STEIN: No, as an example there could be files containing, say, multiple PowerPoint slides or multiple tables that a user considers --

THE COURT: But if it is a "data unit" are you saying that a "data unit" can be further divided?

MR. STEIN: It is a unit in the sense that is something the user considers as a unit. So theoretically you could divide this PowerPoint presentation into multiple files each with a single slide in it, so I'm not sure where the bounds are when you say it can't be divided. You can divide a file into multiple files, and it would still be functional. So the word "data unit" basically was -- is used in the patent because the term "document" itself fails to convey the breadth of the types of things that might be in a stream. So

a stream could be --

THE COURT: But the whole claim in the patent talks about manipulating these units. It doesn't talk about subdividing the units.

MR. STEIN: Well, right. That is why the parties agreed to include the phrase at the end that the user considers as a unit. It doesn't mean that the data units could not be subdivided if a user chose to, for example, dividing up a single file into multiple files. But for the purposes of how it is used, the user doesn't normally do that. But I think the requirement that you can't do it would unnecessarily remove things.

THE COURT: So you are both in agreement with the clause "of significance to the user that the user considers as a unit"?

MR. STEIN: I think so.

MR. POWERS: Yes, Your Honor, that is in both constructions. I would just --

THE COURT: So if you are resting the determination of what a unit is in a user, Mr. Powers, why could a user not define a "data unit" as something that would be capable of being divided?

MR. POWERS: Well, because of the nature of the use of "data unit" inside the claim and inside the specification. I have got up on Slide 179 where this appears in the '227,

Claim 1. And, again, it is talking about the main stream receives each "data unit" received by or generated by. That clearly means you receive an email. That is an email. The user considers that a "data unit." That is clear and the collection of data that we are concerned about --

THE COURT: What if a user receives a file that contains multiple emails?

MR. POWERS: If that is received at one time -- so Your Honor makes a good point. So, for example, let's say I received an email that had an attachment to it, as received that is a single "data unit." If it has a pdf attached to it, that is the thing I received. I consider that to be a single "data unit," even though it has an attachment. Our concern with "collection of data" is that it is so vague that they could argue that, again, all of my emails from Steve -- if I have a folder in my system that says all emails from Steve, they can try to argue that that is considered by me to be a unit, which I would disagree with, because that is just the way I have taken to organizing some of the things that have come into my system.

But the claim is talking about everything that is generated by or comes in, is a "data unit." And that is what we were trying to capture. I think ours captures it better. I think theirs introduces ambiguity that will create arguments about what the construction means.

THE COURT: Okay. Very good. I think I understand the parties' arguments on that one.

Let's move to Apple's '101, so we have some time for that. What terms did you want to argue, Mr. Powers?

MR. POWERS: My colleague Sonal Mehta will handle this portion if it is okay for the Court?

THE COURT: Okay. Ms. Mehta.

MS. MEHTA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. MEHTA: I will be very brief.

THE COURT: Good.

MS. MEHTA: I think there is really only a couple of things we need to talk about. I think the first thing that is worth talking about is "graphical iconic representation," which is the parties' primary dispute on the '101 patent. And I think if the Court is interested in hearing a little bit about means-plus-function we can get into that, although I suspect that the Court is probably fully up to speed on that, based on all of the other discussion.

On "graphical iconic representation" really what we are talking about -- I think it is worth stepping back for just a moment to talk about what the Piles invention is about. We heard earlier this afternoon about the desktop metaphor and different ways of organizing information consistent with the desktop metaphor. The Piles invention is along the same

lines. What the people at Apple came up with when they came up with Piles was this idea of organizing documents on your screen such that you could have a stack of documents, a pile of documents, and you could browse them. So you could click on the top or hover over the top, and the document that that represents would pop up and you could see what it is about. You can scroll down. You can see what another document is about. It is a way to interface with a pile of documents in a more intuitive and visually-appealing way. That is what the patent is about.

One of the central points of the patent is that you have to have that pile. You have to have on the screen the pile or the stack that the user interfaces with. And that is what the disputed limitation is about. So the disputed limitation is about -- and there is no disputes that the limitation itself goes to the concept of the pile. Everyone agrees that "graphical iconic representation" goes to the pile. The only question is whether that pile is static and it is a small static stack or whether it can be a dynamic -- it can also be a dynamic stack.

And there is a few different things built into that. I am going to break them down, and I think that will be helpful for the Court hopefully. But the primary dispute is whether or not you have to have a single icon that represents your stack. So you have a pile and it is one icon with maybe

five documents on it. Even if there is a hundred documents in the system, that icon only represents five or whether you can have a pile that is actually a collection of icons representing all of the different documents in the stack.

And the collection can grow as the pile grows, and it can shrink as the pile shrinks. That is the dispute. So Apple's construction is consistent with that idea that a pile is simply -- or "graphical iconic representation" is simply a collection of two or more document icons displayed together. That is the pile.

Mirror Worlds' construction has three additional concepts that are meant to limit the claim further, and those three additional concepts are: One, that it is a single icon; two, that it is static; and, three, that it is small. So those are three additional limitations that they want to build into the pile, and I want to talk about each of those very briefly.

So the first thing is let's talk first about why a pile is a pile. What the patent says very clearly in the detailed description of the invention and throughout the specification is, is your pile is a collection of document icons. What you do is you add and the pile grows and you subtract and the pile can shrink. And in the pile you have an icon for each document in the pile. Very simple. That is what the detailed description of the invention says. And the

summary of the invention describes what I described earlier, which is the concept of allowing the user to browse through this pile. That is the whole point of the invention, a way to browse through a pile that is more accessible to the user.

So what are the disputes? The first and I think most important dispute is whether or not this icon has to be static or not. And what the specification says is the icon of the pile, this graphical representation, can be either dynamic, meaning it can shift as documents are added or subtracted, or it can be static. It can be both. And Mirror Worlds is trying to actually limit it to just one of the two embodiments in the specification. And interestingly enough it is trying to limit it to the one that is not described as the preferred embodiment, which as Your Honor knows, is rarely if ever the right way to approach these things. The specification clearly says that the pile is dynamic in the preferred embodiment and can be both, but certainly it should at least be allowed to be dynamic.

Another reason why the static representation limitation is improper is that in the file history Apple specifically explained exactly what we have explained in our briefing and I have explained today, which is that the point of this dynamic graphical representation is that you should be allowed to browse through or rifle through documents in the pile. This is, again, a file history statement that confirms

that that was the heart of the invention. And this is something that a static representation would not permit.

Finally, I think -- this is a relatively minor dispute, but the question is whether Mirror Worlds' construction that the term should be limited to a small static picture is appropriate or not. And I think here the issue is what does it mean to be small? That is an uncertain term and there is nothing in the claim or in the specification that suggests you should limit the icon to something that is small. But, again, that is not really the heart of the dispute. The heart of the dispute goes to whether it is static or not.

I think that is it on "graphical iconic representation," unless Your Honor has anything further.

THE COURT: Response?

MR. STEIN: The claims at issue in this patent are quite clear that those are directed to one of those two embodiments that Ms. Mehta just described. It is directed to the static icon embodiment. We step through in detail the claim language in our briefs. There is only one logical way to interpret those in that claim. It is talking about an icon of the entire collection. The other claims in the patent when referring to the other embodiments that have the dynamic graphical representation, use different terminology in the claim. They talked about selecting a particular document representation or -- a particular document representation

within the graphical representation of the collection never referring to it as a "graphical iconic representation." And the file history is incontrovertible on this point.

There was a portion of the file history that we cited in our briefs. It is at Page 9 of our responsive brief where the patentee was distinguishing prior art where you could point at an icon, but only one particular type of proxy -- that's the term they used in this patent -- would be displayed no matter where on the icon you pointed.

And in distinguishing that, they explained that the same term used in the parent application, that is a "graphical iconic representation of a collection of said first plurality of documents," represents or is directed to the display of selecting a series of indicia including second indicia, third indicia by positioning the cursor on a second and third position respectively -- I am reading from the Office Action -- on the same icon of the collection. It is clearly using those claims to claim a particular embodiment.

It is the one with an icon that doesn't use icon in the claims in any other context. "Icon" is a well-known term in the art to refer to a small picture that represents something, an object, whatever it is; and basically that is what -- and, oh, the specification also describes that particular icon claimed here as a small static icon. That is where Mirror Worlds is getting its proposed construction

from.

THE COURT: All right. What is next?

MS. MEHTA: If we could switch over, I think the last thing, Your Honor, is 112, 6. Here there is three limitations, but I think really the same issue applies to all three, so we can be quite quick about this, is the question of what corresponding structure should go to these limitations that cover "a means for displaying and interacting with the pile in the Piles patent."

And what Apple has done is it has gone to the specification, as you would in a 112, 6 claim, and looked for the structure that would allow a person to actually perform the claim function. So for the "means for displaying a pile or graphical iconic representation limitation," we have gone and we have looked for what the display means would be. And the specification quite clearly says what they are. It says, "The apparatus of the invention displays graphical representations of a plurality of documents." And then it goes on to say that it does that by a display means such as a video display screen.

It also goes on to talk about the controllers that you would use to connect the screen to the operating system so that you can actually interact with it. That is what Apple's proposed construction includes. It includes your display screen and the controllers that allow you to manipulate the

display using the user interface.

What we have from Mirror Worlds is a very different approach which is similar to their approach on the Mirror Worlds patents, which is rather than look to the specification for the structure, they identify generic executable code that performs the function. And for the reasons Mr. Powers already explained, that is legally insufficient. That is not structure. The specification here in the Piles patent tells us exactly what the structure is for displaying the pile. And that is the corresponding structure to be assigned to the claim limitation under 112, 6, not just any executable code that displays the pile or allows you to interact with the pile.

And the same is true for each of the other means-plus-function limitations where, again, Apple has gone to the specification and pulled out the column and line number, exactly what the structure is, a display, a controller, a mouse that allows you to select a document versus just executable code that would perform the function with no algorithm.

THE COURT: Okay. Response?

MR. STEIN: We don't think there is really a big issue with respect to this term or that particular argument. Our main point is that their proposed construction is basically completely hardware oriented. Basically what they

have identified is a means for displaying anything. It is just the display device and drivers. There is nothing in the identification of the corresponding structure that relates to displaying the particular thing that that means for displaying displays.

THE COURT: Okay. Thank you.

All right. Is that everything?

MS. MEHTA: Yes, Your Honor. Thank you.

THE COURT: Anything else the Court can help you with today?

MR. STEIN: We're good. Thank you.

THE COURT: What about where are you with regard to mediation? Have y'all been to mediation yet? Mr. Carroll --

MR. CARROLL: I'm told we have, Your Honor.

THE COURT: You are what?

MR. CARROLL: I'm told we have.

MR. POWERS: I can confirm we have.

THE COURT: You have?

MR. POWERS: Have.

THE COURT: Okay. Are you going back?

MR. POWERS: I think it was fairly clear from the mediation that we are going to need Your Honor's rulings here to narrow the gap. So I suspect in the normal course when we get Your Honor's constructions, we will probably be back before a mediator again. I'm sure both parties would support

that.

MR. DIAMANTE: Yes, Your Honor, once we have the official rulings, we probably will go forward with the mediation. We have no problem with that, Your Honor.

THE COURT: When are you set for trial?

MR. POWERS: September.

THE COURT: Of this year?

MR. DIAMANTE: Yes, sir.

THE COURT: Would it be helpful to you for me to get you a preliminary ruling of claim constructions and then get the opinion to you in a month or six weeks, or would you rather wait on the full opinion.

MR. POWERS: We would, Your Honor.

MR. DIAMANTE: Six weeks would be fine, Your Honor.

THE COURT: I will see if I can do that. Realize I can always change them. I am -- usually I pretty much stick -- when I issue a preliminary it will pretty much stay the same. I'm not inviting further briefing on it. If you don't like it, you will just have to live with it

All right. Thank you very much. Be adjourned.

(Hearing concluded.)

C E R T I F I C A T I O N

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

/s/ Shea Sloan

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