

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GREAT WEST CASUALTY COMPANY; BITCO GENERAL INSURANCE
CORPORATION; and BITCO NATIONAL INSURANCE COMPANY

Petitioners,

v.

INTELLECTUAL VENTURES II LLC,

Patent Owner.

Case No. IPR2015-01707

U.S. Patent 7,516,177

**INTELLECTUAL VENTURES II LLC'S NOTICE OF APPEAL
TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Intellectual Ventures II LLC,
Appellant,
v.
Great West Casualty Company, et al.
Appellees

**NOTICE OF APPEAL TO THE
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
OF FINAL WRITTEN
DECISION OF THE PATENT
TRIAL AND APPEAL BOARD
IN INTER PARTES REVIEW
CASE NO. IPR2015-01707**

Office of the General Counsel
Director of the U.S. Patent & Trademark Office
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Pursuant to 35 U.S.C. §§ 141(c), 142, and 319, 37 C.F.R. §§ 90.2(a) and 90.3(a), Rule 4(a) of the Federal Rules of Appellate Procedure, and 28 U.S.C. § 1292(c), Patent Owner Intellectual Ventures hereby appeals to the United States Court of Appeals for the Federal Circuit from the Final Written Decision (Paper 30) entered by the Patent Trial and Appeal Board on January 17, 2017 (Attachment A). In particular, Patent Owner identifies the following issues on appeal:

- The Board's judgment that claims 11–13 and 15–20 of U.S. Patent No. 7,516,177 are unpatentable;

- The Board's claim constructions; and
- Any Board finding, determination, judgment or order supporting or related to the Final Written Decision and decided adversely to Patent Owner.

Patent Owner is concurrently filing true and correct copies of this Notice of Appeal, along with the required fees, with the United States Court of Appeals for the Federal Circuit, and with the USPTO Patent Trial and Appeal Board.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: March 20, 2017

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ATTACHMENT A

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GREAT WEST CASUALTY COMPANY,
BITCO GENERAL INSURANCE CORPORATION, and
BITCO NATIONAL INSURANCE COMPANY,
Petitioner,

v.

INTELLECTUAL VENTURES II LLC,
Patent Owner.

Case IPR2015-01707
Patent 7,516,177 B2

Before MICHAEL W. KIM, PETER P. CHEN, and
ROBERT A. POLLOCK, *Administrative Patent Judges*.

KIM, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

A. Background

Great West Casualty Company, BITCO General Insurance Corporation, and BITCO National Insurance Company (collectively “Petitioner”) filed a Petition to institute an *inter partes* review of claims 1–20 of U.S. Patent No. 7,516,177 B2 (Ex. 1001, “the ’177 patent”). Paper 1 (“Pet.”). Intellectual Ventures II LLC (“Patent Owner”) filed a Preliminary Response (Paper 8; “Prelim. Resp.”), in which Patent Owner indicated that it had filed a statutory disclaimer under 35 U.S.C. § 253 of claims 1–10. Prelim. Resp. 1 (citing Ex. 2001). On February 9, 2016, based on the record before us at the time, we instituted an *inter partes* review of claims 11–13 and 15–20. Paper 11 (“Decision to Institute” or “Dec.”). We instituted the review on the following challenges to the claims:

References	Basis	Claims challenged
U.S. Patent No. 5,715,314 (Ex. 1006, “Payne”)	§ 103(a)	11, 12, and 16–20
Payne and U.S. Patent No. 8,601,373 B1 (Ex. 1009, “Ackley”)	§ 103	13 and 15

Dec. 21–22.

After we instituted this review, Patent Owner filed a Patent Owner Response (Paper 16, “PO Resp.”) and Petitioner filed a Reply (Paper 19, “Reply”). Petitioner relies on the Declaration of Dr. Philip Greenspun (Ex. 1003). Patent Owner relies on the Declaration of Dr. Yannis Papakonstantinou (Ex. 2009). We heard oral argument on October 3, 2016. A transcript of the argument has been entered in the record (Paper 29, “Tr.”).

We have jurisdiction under 35 U.S.C. § 6. The evidentiary standard is a preponderance of the evidence. *See* 35 U.S.C. § 316(e); *see also* 37 C.F.R. § 42.1(d). This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73.

For the reasons expressed below, we conclude that Petitioner has demonstrated by a preponderance of evidence that claims 11–13 and 15–20 are unpatentable.

B. Related Proceedings

Petitioner and Patent Owner identify the following district court proceedings concerning the '177 patent: *Intellectual Ventures II LLC v. BITCO General Insurance Corporation*, Civ. No. 6-15-cv-00059 (E.D. Tex.); *Intellectual Ventures II LLC v. Great West Casualty Company*, Civ. No. 6-15-cv-00060 (E.D. Tex.); and *Intellectual Ventures I LLC et al. v. HCC Insurance Holdings, Inc. et al.*, Civ. No. 6-15-cv-00660 (E.D. Tex.). Pet. 1–2; *see also* Paper 5 (“PO Mandatory Notice”), 1. Petitioner and Patent Owner collectively identify also the following requests for review of the '177 patent involving the same parties: CBM2015-00171; IPR2015-01706; IPR2016-00453. Pet. 2; *see also* Paper 5, 1; Paper 10, 2.

C. The '177 Patent

The '177 patent discloses the following under the heading “Technical Field:”

This invention pertains to electronic commerce and business. More particularly, the present invention relates to aggregating, enhancing, and distributing content objects with customers over a network-based environment such as via the Internet or some other form of interactive network.

Ex. 1001, 1:22–26. The '177 patent asserts that the storage and retrieval of information has evolved from storing and retrieving information in textbooks and libraries, to storing and retrieving information from online networks such as the Internet. Ex. 1001, 1:30–33. According to the '177 patent, while such advances have led to a significant increase in information available to users, the users now have the problem of being overwhelmed by the amount of information, resulting in a failure to find specific information or losing track of the information that had already been found. Ex. 1001, 1:33–46. Thus, the '177 patent asserts that there is a need to provide improvements in the way demand for information is identified, content is generated in response to a defined demand, and in which users access desired information. Ex. 1001, 2:23–26.

D. Illustrative Claim

Petitioner challenges claims 1–20 of the '177 patent, of which claims 1–10 have been disclaimed. Prelim. Resp. 1 (citing Ex. 2001). Claims 11 and 16 are the only remaining independent claims. Independent claim 11 is illustrative of the challenged claims and is reproduced below:

11. An apparatus for distributing content through one or more distributed information access points to a centralized access point of a user, comprising:

at least one server operative to store one or more of: a) content, b) links to content, c) information about content, and d) information about users including information about which content a user has chosen;

a centralized access point of a user accessible via a communications link and operative to provide the user with access to content chosen by or for the user;

at least one distributed information access point accessible via a communications link and operative to implement one or

more of: a) list one or more content objects, b) allow a user to choose content for addition to their centralized access point, and c) provide the user with logon access to their centralized access point; and

an administrative interface in communication with the server and operative to create groupings of content into one or more distributed information access points;

wherein a user is enabled with the capability to log on to their centralized access point from one or more distributed information access point(s) and access content chosen from one or more distributed information access point(s).

II. ANALYSIS

A. *Claim Interpretation*

“A claim in an unexpired patent that will not expire before a final written decision is issued shall be given its broadest reasonable construction in light of the specification of the patent in which it appears.” 37 C.F.R. § 42.100(b); *see also Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) (Affirming that USPTO has statutory authority to construe claims according to 37 C.F.R. § 42.100(b)). When applying that standard, we interpret the claim language as it would have been understood by one of ordinary skill in the art in light of the Specification. *In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010). Thus, we generally give claim terms their ordinary and customary meaning. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) (“The ordinary and customary meaning ‘is the meaning that the term would have to a person of ordinary skill in the art in question.’”). For the purposes of this decision, and on this record, we determine that most claim terms do not need express interpretation. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795,

803 (Fed. Cir. 1999) (Only those terms which are in controversy need to be construed, and only to the extent necessary to resolve the controversy.).

We determine that only the following claim terms require construction.

1. “content”

Independent claims 11 and 16 each recite “content.” Petitioner does not construe “content,” but asserts that “content object” should be construed as “a discrete unit of information that can be selected by the user such as: a tutorial, article, advertisement, or link to a web page.” Pet. 7–8 (citing Ex. 1001, Fig. 53, 2:35–40, 23:20–26, 25:3–28, and 32:22–25; Ex. 1003 ¶¶ 70–74).¹ Patent Owner asserts that “content” should be construed as “electronic data embodying information for an individual or individuals,” but not including links to content. PO Resp. 10–16 (citing Ex. 1001, 1:23–26, 2:23–26, 2:30–32, 6:53–54, 6:57–60, 7:11, 9:39–41, 34:55–59, and 55:7–10; Ex. 1003 ¶¶ 72–73). Petitioner replies that a proper construction of “‘content’ [must] embrace all examples of content disclosed in the [S]pecification, so the claim term ‘content’ must include a link to content.” Reply 2–11 (citing Ex. 1001, 3:58–60, 3:65–67, 17:31–35, 22:20–22, 23:11–24:35, 25:20–23, 47:5–7, 47:15–18, 47:47–48, 47:64, 53:54–56, and 55:28–31, Figs. 8–10, 43; Ex. 1048, 43–49).

As an initial matter, after considering Petitioner and Patent Owner’s assertions, we do not discern any real disagreement that “content” should be construed as “electronic data embodying information for an individual or individuals.” Patent Owner asserts, and we agree, that the ’177 patent is

¹ In the Decision on Institution, we partially and preliminarily construed “content” as excluding “links to content.” Dec. 6–7.

almost entirely devoted to only electronic forms of information, most prominently, information rendered by a computer.² Petitioner advocates for a construction that is, essentially, the broadest possible construction in view of the Specification. To that end, we are unable to discern a construction of “content,” in the context of the ’177 patent, that is broader than “electronic data embodying information for an individual or individuals.” PO Resp. 10.

The disagreement, then, comes down to whether or not “electronic data embodying information for an individual or individuals” includes or excludes links to content and information about content. For that, we note that the above construction is unhelpful, without further explanation, in resolving this disagreement. For example, take the word “LOGON” in the upper right corner of Figure 8 of the ’177 patent. To be sure, “LOGON” indicates the presence of a link, but it is clearly also “electronic,” in that it is in an electronic format, and it clearly also embodies “data” or “information for an individual,” in that an individual reading the word “LOGON” would glean the “information” that selecting “LOGON” would activate an underlying link that would take that an individual to a webpage where the individual could logon. Accordingly, on a cursory level, the word

² A bit cryptically, Patent Owner does assert that “[t]he patent does not contemplate content in the context of other media, such as speech, print documents, or gestures.” PO Resp. 11. Patent Owner’s assertion is confusing, because such media can be presented in electronic form, for example, speech may be rendered by a computer in a *.wav or *.mp3 format. Accordingly, we analyze the aforementioned assertion in a manner that is consistent with the overall framework of Patent Owner’s positions, namely, that “content” excludes “speech, print documents, or gestures” not rendered by a computer, for example, “speech” verbally communicated by an actual human being.

“LOGON” would appear to meet the construction of “content” as “electronic data embodying information for an individual or individuals.”

Given this, we begin by turning to the express claim language for guidance in resolving this disagreement. To that end, the relevant portion of independent claim 11 recites “at least one server operative to store one or more of: a) content, b) links to content.” As an initial matter, controlling precedent from our reviewing court instructs us that different claim terms are presumed to have different meanings. *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1333 n.3 (Fed. Cir. 2006) (“[T]he use of two terms in a claim requires that they connote different meanings.”); *CAE Screenplates Inc. v. Heinrich Fiedler GmbH & Co. KG*, 224 F.3d 1308, 1317 (Fed. Cir. 2000) (“In the absence of . . . evidence to the contrary, we must presume that the use of these different terms in the claims connotes different meanings.”). Accordingly, on a high level, each of the following express claim terms are presumed to have different meanings: “content”; and, “links to content.”

Of course, we do not discern that either Petitioner or Patent Owner is actually arguing that, for example, “content” and “links to content” do not differ in scope. The disagreement, when distilled to its core, is that Patent Owner asserts that there cannot be any overlap between “content” and “links to content,” whereas Petitioner asserts that difference in claim scope does not preclude at least some overlap, for example, that “content” is a genus and “links to content” is a species. In literal terms we agree with Patent Owner, but in application we agree with Petitioner, for the following reasons and as explained below.

Most illuminating in this regard is Petitioner's analysis of "content object," specifically, Petitioner's assertion that "[i]t is true that the patent also states that a 'content object' may be added to a user's personal web page. Ex. 1001, 25:20–23. But a content object is not content; *it is the container for content*, as even Patent Owner recognizes (Paper 7 at 23–24)." Reply 10 (emphasis added). A relevant tangible analogy is provided by a "cereal box." A "cereal box" is, of course, intended to contain cereal. If a "cereal box" does not contain any cereal, however, the question becomes whether it is still a "cereal box." We believe it is. Even without cereal in a "cereal box," the "cereal box" nevertheless has a design, shape, weight, markings, and material composition that would indicate that it is a "cereal box," even if it does not contain cereal. Put more simply, a "cereal box" is a box with features indicating that it is intended to contain cereal, but does not need to contain cereal in order to be considered a "cereal box."

We determine that the above analogy for "cereal box" holds for "content object." A "content object" is, by itself, just an object, essentially, a virtual container, with features indicating that it can include certain items, such as "content." We are unpersuaded by Petitioner's implication, however, that "content objects" must contain "content," or that "content objects" can only contain "content.": The disclosures of the '177 patent support this determination. To be sure, the '177 patent discloses expressly that "content objects" contain "content." Ex. 1001, 17:31–35 ("[S]uch aggregation encompasses the provision of *content within content objects* to the personal web site by a user and/or an authorized party such as a system administrator on Applicant's HowZone.com web site." (Emphasis added)). The '177 patent, however, also discloses "link" type content objects, which

would only include “links to content,” and not “content.” Ex. 1001, 48:63–64 (“For example, content builder page 504 of FIG. 43 shows how content is built for a ‘link’ type of content object.”) Furthermore, the ’177 patent refers expressly to “content objects” as being of several generic “types,” some of which refer to containing items other than “content.” Ex. 1001, 47:15–19 (“FIG. 43 is a diagram of a screen display showing a link content builder page 504 provided for a content object type comprising a link. All other content object types, except for tutorial content objects, use a similar content builder page.”), 47:27–30, 48:45–48, and 48:65–49:4. Additionally, the ’177 patent discloses manipulating generic “content objects” in manner independent from any items, “content” or otherwise, that those “content objects” may actually contain. Ex. 1001, 23:11–24:34; 25:20–23.

We determine that the same analysis applies for “links to content” and “content,” in that “link to content” is not itself “content.” Aside from the above analysis of “content object,” there are several factors that inform our determination. Initially, we return to the presumption, set forth above, that different claim terms are presumed to have different meanings. To that end, a “link to content” is no more than that, a “link,” which is a technical set of computer instructions that is in itself not “content.”³ This construction is supported also by the ’177 patent, which distinguishes expressly between

³ The ’177 patent supports our determination that a “link” is a set a computer instructions. Ex. 1001, 1:53–2:22 (“The World Wide Web provides an Internet facility that links documents locally and remotely. A Web document, referred to as a Web page, includes links in a page that let users jump from page to page (hypertext links) whether the pages are stored on the same server or on servers around the world A user then merely clicks on the link in order to go to the corresponding Web page.”)

“content” and “links to content.” Ex. 1001, 6:57–60 (“Furthermore, contributors are given the ability to contribute information by uploading content and/or by distributing links to content that is available over a network system”), 7:11–13 (“In order to organize links and/or uploaded content so that it can be viewed by individuals, a dynamically generated category network is implemented to sort and distribute information.”). Accordingly, it is for these reasons that, as a literal matter, we agree with Patent Owner that there is no overlap between “content” and “links to content.”

Having said all this, however, we return to our above discussion of “LOGON” in Figure 8 of the ’177 patent, because it best exemplifies that while as a literal matter, Patent Owner is correct that there is no overlap between “content” and “links to content,” as this construction is applied, Petitioner is correct, to the extent that the examples for activating links in the ’177 patent encompass both semantic “content” as well as the actual “links to content.” More specifically, by its express terms, “LOGON” encompasses a “link to content.” In application, however, the “LOGON” is actually two separate components: (1) the underlying technical set of computer instructions that, upon clicking the “LOGON” link, transports a user to a web page associated with a “LOGON” procedures; and (2) the word “LOGON” itself displayed on the computer display, but separate from the technical set of computer instructions set forth in (1).

In brief, (1) is “link to content, but not itself “content,” however, (2) is itself “content.” More precisely, when we now consider “LOGON,” and its respective components, in relation to the aforementioned construction of “content” as “electronic data embodying information for an individual or

individuals,” it becomes clear that “LOGON” is both “links to content” and “content.” Specifically, component (1) of “LOGON” is “links to content,” but not “content” itself, because the underlying technical set of computer instructions is not “electronic data embodying information *for an individual or individuals*,” but for a computer. By contrast, component (2) of “LOGON” is “content,” as it is clearly “electronic data embodying information *for an individual or individuals*,” in that the words “LOGON” is intended to convey information to an individual. So, as a practical matter, we discern that every disclosure of a “link to content” that includes “electronic data embodying information for an individual or individuals” (i.e., any information associated with a “link” that is separate from a generic indication of the “link” itself), is “content.”

The claims and Specification of the ’177 patent support this determination. Specifically, independent claim 16 recites “selecting content . . . for addition to a centralized access point.” The only examples in the ’177 patent identified by either party for “selecting content . . . for addition to a centralized access point” are Figures 8–10. Reply 8–11 (emphasis omitted) (citing Ex. 1001, Figs. 8–10, 23:11–24:35). Figures 9 and 10 are reproduced below.

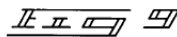
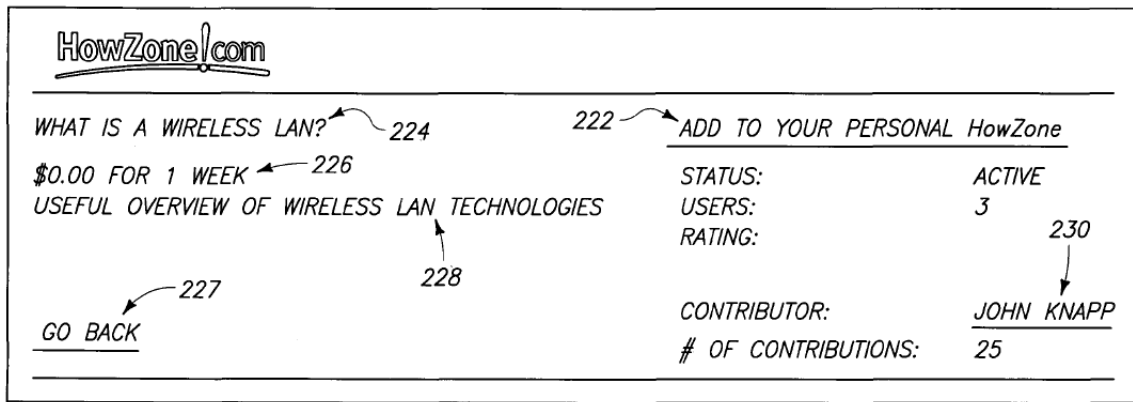


Figure 9 is a diagram of a screen display.

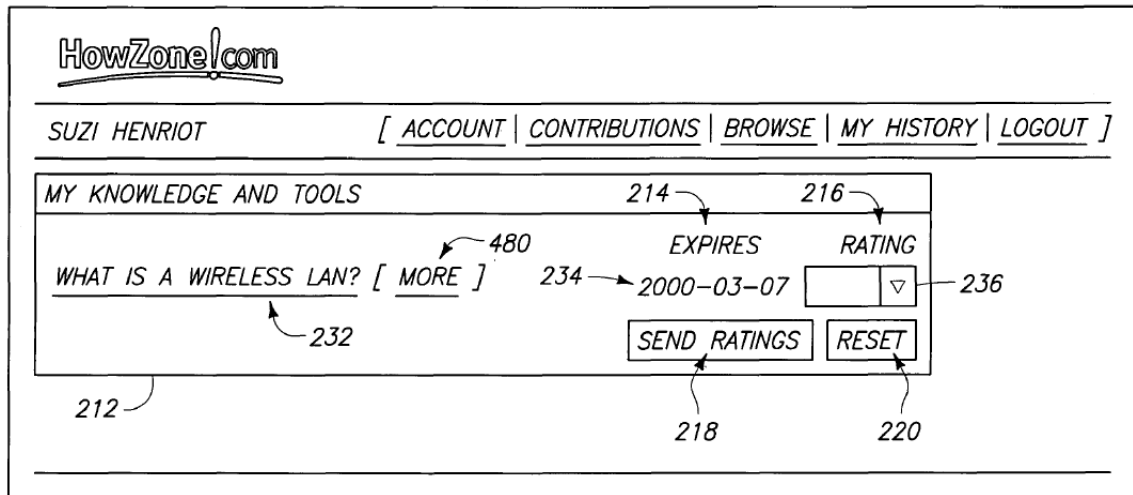


Figure 10 is a diagram of a screen display.

The only item “selected” and “added” in Figures 8–10 is the text “what is a wireless LAN” 232 in Figure 10, which is shown above. Ex. 1001, 24:5–11. Indeed, the ’177 patent even distinguishes expressly between specific content object access *link* 232, labelled in Figure 10, and content object *title* 224 entitled “what is a wireless LAN,” labelled in Figure 8. Ex. 1001, 24:5–11. Accordingly, this example is consistent with our application of the above construction, in that specific content object access link 232 would be a

“link to content,” but the phrase “what is a wireless LAN” 224, 232 would be “content.”

At oral argument, the Board and counsel for Patent Owner had the following exchange concerning content object access link 232 and content object title 224 entitled “what is a wireless LAN”:

JUDGE KIM: Let’s look at a scenario. So let’s say 232 was not a hyperlink. It was just text. Now is it content?

MR. BABCOCK: I’d say yes. I’d say yes.

JUDGE KIM: Okay. So your position is that it’s the functionality that basically fundamentally changes content to content link?

MR. BABCOCK: A hundred percent correct. It’s a hypertext link that embeds within that link, it embeds functionality that allows you to click on the text. You don’t click on the underline. You click on the text. I guess you could click on the underline. But you basically click on anywhere in the text and that takes you to another page. The hypertext link. That’s what the link is. If there is no link capability, then it’s content.

Tr. 48:18–49:8; *see also* Tr. 7:3–8:23 (Petitioner’s counsel agrees that the words “what is a wireless LAN” is content). In other words, all parties agree that the words “what is a wireless LAN” has meaning, i.e., “electronic data embodying information for an individual or individuals,” independent of the presence or absence of functionality associated with this words. Given this, we are unpersuaded that merely adding “link” functionality to those words would so fundamentally change the nature of those words that they would have been taken out of the realm of “electronic data embodying information for an individual or individuals.”

Additionally, we note that Patent Owner’s infringement contentions in the related district court proceeding assert that bookmarks and links to

websites are sufficient to meet the aforementioned “selecting content” limitation. Ex. 1048, 71–72; Tr. 25:20–29:19. Despite the Board’s application of a claim construction standard (broadest reasonable interpretation) that could not result in a narrower construction than applicable in the district court, Patent Owner, here, has advocated an application of a construction of “content” that is narrower than that asserted in district court, which the United States Court of Appeals for the Federal Circuit has counseled against. *See Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) (“A patent may not, like a ‘nose of wax,’ be twisted one way to avoid anticipation and another to find infringement.” (quoting *Sterner Lighting, Inc. v. Allied Elec. Supply, Inc.*, 431 F.2d 539, 544 (5th Cir. 1970))).⁴

At oral argument, Patent Owner asserted that the infringement contentions constituted extrinsic evidence that was merely preliminary, and should be accorded little weight in a claim construction which should primarily be based on intrinsic evidence. Tr. 61:20–63:16. While we agree that the weight given to the infringement contentions on this issue should be discounted, we are persuaded that the infringement contentions are a factor that should be weighed, even if discounted, against Patent Owner’s proposed claim construction.

⁴ We note that, by the same reasoning, it would be equally improper for Petitioner, upon agreeing to a broad construction in District Court, to use this forum to attempt to obtain a more narrow construction contrary to that agreement and use that narrow construction to potentially avoid a finding of infringement in the District Court.

In summary, we construe “content” as “electronic data embodying information for an individual or individuals,” and excluding “links to content,” but not excluding “content” associated with the “links to content.”⁵

2. “*access point*”

Independent claims 11 and 16 each recite “access point.” Petitioner asserts that “[t]he broadest reasonable construction of ‘*access point*’ is a resource on a network, such as a web page, that allows a user to access links and content objects.” Pet. 8 (citing Ex. 1001, 7:17–22, 8:19–30, 23:46–50, 52:40–43; Ex. 1003 ¶¶ 75–78). Patent Owner does not challenge Petitioner’s proposed construction. *See generally* PO Resp. We have considered Petitioner’s assertion and supporting evidence, and are persuaded that it is correct. Accordingly, we construe “access point” as “a resource on a network, such as a web page, that allows a user to access links and content objects.”

3. “*centralized access point of [a] user*”

Independent claims 11 and 16 each recite “*centralized access point of [a] user*.” Petitioner asserts that “[t]he broadest reasonable construction of ‘*centralized access point of [a] user*’ is [] an access point that aggregates content objects, or links to content objects, that are selected by or for the

⁵ We acknowledge that Patent Owner also asserts that the recited “content” excludes the recited “information about content.” PO Resp. 10–16. We conclude that it is unnecessary to determine the precise relationship between these terms in order to render our decision. We do note, however, that the ’177 patent is even more sparse concerning “information about content” than “links to content,” as “information about content” is recited explicitly in only two locations (Ex. 1001, 1:67–2:3; 46:15–16), and neither recitation is particularly illuminating. We note further that neither party has briefed this issue in a manner meaningfully distinct from the relationship between “content” and “links to content.”

user.” Pet. 9 (citing Ex. 1001, 8:19–30, 26:8–30, and 43:55–59, Fig. 14; Ex. 1003 ¶¶ 82–89). Patent Owner does not challenge Petitioner’s proposed construction. *See generally* PO Resp. We have considered Petitioner’s assertion and supporting evidence, and are persuaded that it is correct. We also construed “access point” above as “a resource on a network, such as a web page, that allows a user to access links and content objects.” Pet. 8. Accordingly, we construe “centralized access point of [a] user” as “a resource on a network, such as a web page, that aggregates content objects, or links to content objects, that are selected by or for the user.”

4. “*distributed information access point*”

Independent claims 11 and 16 each recite “*distributed information access point*.” Petitioner asserts that “[t]he broadest reasonable construction of ‘*distributed information access point*’ is an access point that makes information visually perceptible to multiple users, such as a web page or a login page.” Pet. 9–10 (citing Ex. 1001, 6:60–7:10, 14:43–52, and 17:22–29; and Ex. 1003 ¶¶ 90–94). Petitioner asserts further that in construing “distributed information access point,” it is distinct from “a ‘*personalized access point*’ which suggests an association with a particular user.” Pet. 10. Patent Owner does not challenge Petitioner’s proposed construction. *See generally* PO Resp. We have considered Petitioner’s assertion and supporting evidence, and are persuaded that it is correct. We also construed “access point” above as “a resource on a network, such as a web page, that allows a user to access links and content objects.” Accordingly, we construe “distributed information access point” as “a resource on a network, such as a web page, that makes information visually perceptible to multiple users, such as a web page or a login page.”

B. The Parties' Post-Institution Arguments

In our Decision to Institute, we concluded that the argument and evidence adduced by Petitioner demonstrated a reasonable likelihood that various selections of claims 11–13 and 15–20 were unpatentable as obvious based on the challenges identified in the table in Part I.A above. Dec. 10–20. We must now determine whether Petitioner has established by a preponderance of the evidence that the specified claims are unpatentable over the cited prior art. 35 U.S.C. § 316(e). In this connection, we previously instructed Patent Owner “any arguments for patentability not raised in the [Patent Owner Response] will be deemed waived.” Paper 13, 3; *see also* 37 C.F.R. § 42.23(a) (“Any material fact not specifically denied may be considered admitted.”). Additionally, the Board’s Trial Practice Guide states that the Patent Owner Response “should identify all the involved claims that are believed to be patentable and state the basis for that belief.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012).

In connection with the arguments and evidence adduced by Petitioner in the Petition to support its positions that Patent Owner chose not to address in its Patent Owner Response, the record now contains unrebutted arguments and evidence presented by Petitioner regarding the manner in which the asserted prior art teaches all other elements of the claims against which that prior art is asserted. Based on the preponderance of the evidence before us, we conclude that the prior art identified by Petitioner describes all limitations of the reviewed claims, in view of our analysis of those that Patent Owner contested in the Patent Owner Response, which we address below.

C. The Challenges to the Claims

Petitioner challenges the patentability of the challenged claims 11–13 and 15–20 on the grounds that the claims are obvious in light of Payne, and in some instances Ackley.

The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), reaffirmed the framework for determining obviousness as set forth in *Graham v. John Deere Co.*, 383 U.S. 1 (1966). The *KSR* Court summarized the four factual inquiries set forth in *Graham* that we apply in determining whether a claim is reasonably likely to be unpatentable as obvious under 35 U.S.C. § 103(a) as follows:

1. determining the scope and content of the prior art,
2. ascertaining the differences between the prior art and the claims at issue,
3. resolving the level of ordinary skill in the pertinent art, and
4. considering objective evidence present in the application indicating obviousness or nonobviousness.

KSR, 550 U.S. at 406. With these standards in mind, we address each challenge below.

1. Claims 11, 12, and 16–20: Obviousness in view of Payne

Petitioner challenges the patentability of claims 11, 12, and 16–20 as obvious in view of Payne. Pet. 13–15, 32–44, 4 and 8–50 (citing Exs. 1001, 1003, 1006, and 1031). Patent Owner disagrees. PO Resp. 19–30 (citing Exs. 1003, 1006, 1008, 2007, and 2009). Petitioner replies. Reply 11–18 (citing Exs. 1003, 1006, 1008, and 1047).

i. Payne (Ex. 1006)

Payne relates to user-interactive network sales systems for implementing an open marketplace for goods or services over computer networks such as the Internet. Ex. 1006, 1:14–16. Payne discloses advertising documents for products, such as newspapers and newsletter articles available for purchase by buyers. Ex. 1006, 4:50–60. When requested by buyers, these advertising documents are sent from merchant computer 14 to buyer computer 12. Ex. 1006, 5:16–23. After browsing the advertising document, the buyer may purchase a product. Ex. 1006, 5:26–29. The buyer can later request display of a “smart statement” that lists purchase transactions for a given month. Ex. 1006, 8:33–35. The buyer may request display of a product included in the smart statement by sending an access URL contained in the smart statement to merchant computer 14. Ex. 1006, 9:41–50.

ii. Petitioner’s Initial Mapping of Payne to Claims 11, 12, and 16–20

Petitioner asserts that Payne renders obvious claims 11, 12, and 16–20. Pet. 13–15, 32–44, 48–50. For example, independent claim 11 recites “at least one server operative to store one or more of: a) content . . . c) information about content.” Payne discloses merchant computer 14 storing advertising documents for products, such as newspapers and newsletter articles available for purchase by buyers. Ex. 1006, 4:50–60. Independent claim 11 recites further “a centralized access point of a user accessible via a communications link and operative to provide the user with access to content chosen by or for the user.” Payne discloses a “smart statement” that lists purchase transactions for a given month. Ex. 1006, 8:33–35. The buyer may request display of a product included in the smart statement by sending

an access URL contained in the smart statement to merchant computer 14. Ex. 1006, 9:41–50.

Independent claim 11 recites additionally “at least one distributed information access point accessible via a communications link and operative to implement one or more of: [] b) allow a user to choose content for addition to their centralized access point.” Payne discloses advertising documents for products, such as newspapers and newsletter articles available for purchase by buyers. Ex. 1006, 4:50–60. After browsing the advertising document, the buyer may purchase a product. Ex. 1006, 5:26–29. The buyer can later request display of a “smart statement” that lists purchase transactions for a given month. Ex. 1006, 8:33–35. Independent claim 11 recites also “an administrative interface in communication with the server and operative to create groupings of content into one or more distributed information access points.” Payne discloses creation computer 20 communicates with merchant computer 14. Ex. 1006, 4:60–5:4. Petitioner cites Appendix F for disclosing “grouping content into product departments, such as ‘Boys’ department.” Pet. 49, 50 (citing Ex. 1007 ¶¶ 129, 135). Independent claim 11 recites further “wherein a user is enabled with the capability to log on to their centralized access point from one or more distributed information access point(s) and access content chosen from one or more distributed information access point(s).” Petitioner provides the following analysis concerning this claim limitation:

To the extent one might argue Payne does not disclose the ability to log on to a “*centralized access point*” from a “*distributed information access point*” as required by the “wherein clause” of claim 11, it would have been obvious to include that functionality in Payne. It was well-known in the art to include or link to a log in facility prominently on, for example,

the homepage of a website. *See, e.g.*, U.S. Patent No. 5,987,440 to O’Neil et al. (Nov. 16, 1999) (Ex. 1008) at Fig. 25 (showing registration link on website homepage). The system of Payne already includes functionality requiring a user to log on to an account, Ex. 1006 at 6:9–42, 8:38–53, so it would have been trivial to place the log in functionality directly on the digital advertising documents, which are web pages, *see id.* at 9:64–10:1, 5:16–25, Fig. 5. Ex. 1003 at ¶ 240. When a patent simply arranges old elements, each performing the same function it had been known to perform and together yielding no more than one would expect from such an arrangement, the combination is obvious. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007).

Moreover, one of skill would have been motivated to include the log in functionality on the digital advertising documents of Payne. Placing a log in facility directly on an advertising document provides the user an efficient and user friendly way to purchase the content objects being advertised on the document or to make use of functionality of the system provided to registered users. *See, e.g.*, Linda A. Rich et al., *How Libraries are Providing Access to Electronic Serials: A Survey of Academic Library Web Sites*, 25:2 SERIALS REVIEW 35, 42 (1999) (Ex. 1032) (explaining that minimizing the number of clicks between web pages improves user accessibility); David Lidsky, *Home on the Web*, PC MAGAZINE, Sept. 1, 1998, at 137-39 (Ex. 1030) (critiquing MyYahoo’s user accessibility because certain features can only be found “many levels deep in the site”). For example, placing a log in facility on the advertising document would have permitted the user to quickly check if she had already purchased the advertised content object. Ex. 1003 at ¶ 241. Therefore, one of ordinary skill in the art would have found it obvious to modify Payne to include a log in facility on the advertising documents.

Pet. 48–49. Petitioner provides similar analysis for claims 12 and 16–20.

Pet. 39–44, 50.

*iii. Patent Owner's Assertions Concerning
Independent Claim 11*

Independent claim 11 recites “wherein a user is enabled with the capability to log on to their centralized access point from one or more distributed information access point(s) and access content chosen from one or more distributed information access point(s).” Patent Owner asserts that the Petition asserts that Payne’s smart statement and advertising documents correspond, respectively, to the recited “centralized access point” and “distributed information access points.” Patent Owner asserts further that Payne does not disclose expressly that a user can log on to the smart statement from the advertising document. PO Resp. 20–21. We agree with both assertions. That agreement, however, is not dispositive, as Payne is proffered by Petitioner as rendering the challenged claims obvious rather than as an anticipating reference, and Petitioner proposes modifying Payne to meet the aforementioned claim limitation.

Specifically, the dispositive issue that Patent Owner really disagrees with is that, according to Patent Owner, the Petition just asserts conclusorily that it was well-known to place a link to login facility on the advertising document of Payne, and that the only objective factual support for this conclusory assertion is a cursory reference to a registration link of O’Neil. Patent Owner asserts that this conclusory explanation with such minimal factual support is legally insufficient to sustain a determination that it was well-known to place a link to login facility on the advertising document of Payne. PO Resp. 22–25.

We disagree with Patent Owner because Patent Owner’s assertions are misplaced. Most prominently, were O’Neil the only factual support for Patent Owner’s position, it may be persuasive. Petitioner’s proposed

modification, however, relies not only on O’Neil, but also on Payne and the Declaration of Dr. Greenspun. Pet. 48–49 (citing Ex. 1003 ¶¶ 240, 241; Ex. 1006, 6:9–42, 8:38–53, 9:64–10:1, 5:16–25, and Fig. 5); *see also* Ex. 1003 ¶ 272. In short, we are persuaded that the following findings in Payne asserted by Petitioner are accurate, and that it supports adequately Petitioner’s proposed modification.

The system of Payne already includes functionality requiring a user to log on to an account, Ex. 1006 at 6:9–42, 8:38–53, so it would have been trivial to place the log in functionality directly on the digital advertising documents, which are web pages, *see id.* at 9:64–10:1, 5:16–25, Fig. 5. Ex. 1003 at ¶ 240. When a patent simply arranges old elements, each performing the same function it had been known to perform and together yielding no more than one would expect from such an arrangement, the combination is obvious. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007).

Pet. 48; *see also* Reply 11–16. As counter-evidence, Patent Owner cites to paragraphs 46–48 of the Declaration of Dr. Papakonstantinou. Those paragraphs, however, suffer from the same logical flaw identified above.

*iv. Patent Owner’s Assertions Concerning
Independent Claim 16*

Independent claim 16 recites “selecting content from one or more of an entire range of distributed information access points for addition to a centralized access point of the particular user.” Patent Owner asserts that Payne does not disclose this limitation, because Payne only discloses selecting links to articles, and not the news articles themselves. Again, this is an obviousness analysis. Figure 11 of Payne disclosing such links are set forth below.

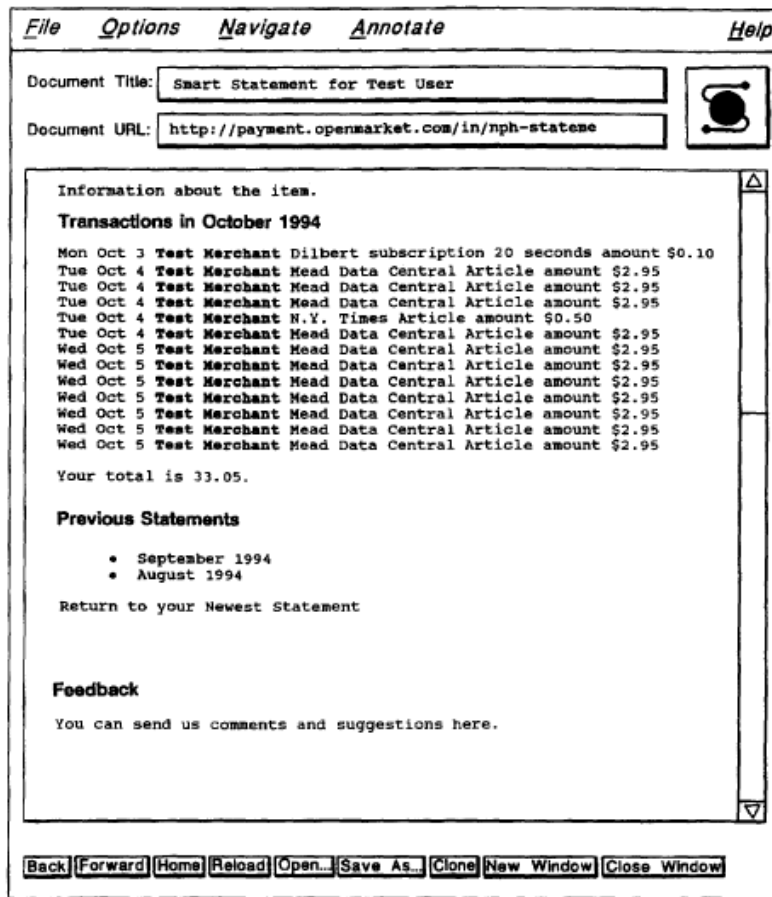


FIG. 11

Figure 11 is a screen snapshot of a smart statement that a payment computer sends to a buyer computer.

Ex. 1006, Fig. 11. In line with its assertions concerning the proper claim construction of “content,” Patent Owner asserts that these links to articles do not correspond properly to the recited “content.” PO Resp. 26–29. We disagree because, as set forth above, we construe “content” as “electronic data embodying information for an individual or individuals,” and excluding “links to content,” but not excluding “content” associated with the “links to content.” Here, the “links to content” have associated “content” that is “electronic data embodying information for an individual or individuals,”

namely, “Dilbert subscription,” “Mead Data Central Article,” and “N.Y. Times Article.”⁶

Independent claim 16 recites further “accessing the centralized access point of the particular user from one or more distributed information access points to gain access to the selected content.” Patent Owner advances the same positions as set forth above with respect to the “wherein” limitation of independent claim 11 and the “selecting content” limitation of independent claim 16. PO Resp. 29–30. Our analysis is the same as set forth above, and need not be repeated here.⁷

v. *Conclusion*

We are persuaded that Petitioner has shown, by a preponderance of the evidence, that claims 11, 12, and 16–20 are unpatentable as obvious in view of Payne. In addition to findings we make above in connection with our analysis of claims 11, 12, and 16–20 as obvious in view Payne, we also adopt as our findings Petitioner’s positions as to how Payne discloses each of the limitations of claims 11, 12, and 16–20. We further adopt as our own Petitioner’s rationales for modifying Payne, as referenced above.

⁶ As counter-evidence, Patent Owner cites to paragraphs 53–56 of the Declaration of Dr. Papakonstantinou. Those paragraphs, however, suffer from the same logical flaw identified above in that they do not apply a proper construction of “content.”

⁷ As counter-evidence, Patent Owner cites to paragraphs 58–59 of the Declaration of Dr. Papakonstantinou. Those paragraphs, however, suffer from the same logical flaws identified for the “wherein” limitation of independent claim 11 and the “selecting content” limitation of independent claim 16.

2. *Dependent Claims 13 and 15: Obviousness
in view of Payne and Ackley*

Petitioner challenges the patentability of dependent claims 13 and 15 as obvious in view of Payne and Ackley. Pet. 54–60 (citing Exs. 1003, 1006, and 1009). Patent Owner disagrees. PO Resp. 30–36 (citing Exs. 1006, 1008, 1009, and 2009). Petitioner replies. Reply 18–25 (citing Exs. 1001, 1003, 1006, 1009, and 1048).

i. *Ackley*

Ackley relates “to computer-based systems and methods that enable sales transactions between third parties through a communications network, such as internet auction and classified systems.” Ex. 1009, 1:21–24.

ii. *Petitioner’s Initial Mapping of Payne and
Ackley to Dependent Claims 13 and 15*

Petitioner asserts that a combination of Payne and Ackley renders obvious dependent claims 13 and 15. Pet. 54–60. For example, dependent claim 13 recites “wherein the distributed information access point is further operative to accept content contributions from a user.” In setting forth its position concerning dependent claim 13, Petitioner references its analysis of (disclaimed) dependent claim 9. The relevant portion of Petitioner’s analysis concerning dependent claim 9 reads as follows:

In early 2000, it would have been obvious to modify Payne’s buyer computer (“*selection client*”) to allow a logged-in user to contribute content for sale on the network sales system (“*accept content contributions from a user*”), per the teachings of Ackley. Payne discloses existing web functionality that allow a user to purchase items, Ex. 1006 at 5:26–31, 10:9–13, and a merchant to list items for sale, *id.* at 4:65–5:4. Allowing a single user to perform both roles simply arranges existing functionality in Payne to perform the same role previously performed, to yield no more than one would expect: a single user buying and selling

products. Ex. 1003 at ¶ 210. Additionally, an Ordinary Artisan would have been motivated to incorporate this functionality so as to expand the content available in Payne's network sales system. *See* Ex. 1009 at Fig. 4; Ex. 1003 at 210. Therefore, modifying Payne's buyer computer to allow a user to contribute content for sale on the network sales system would have been the straightforward combination of existing techniques, and therefore obvious. Ex. 1003 at ¶ 210.

Pet. 57. Petitioner provides a similar initial analysis for dependent claim 15.

*iii. Patent Owner's Assertions Concerning
Dependent Claims 13 and 15*

Patent Owner asserts that one of ordinary skill at the time of the invention would not have looked to an auction reference, such as Ackley, to modify a news sales reference, such as Payne, because there is no evidence that, at the time of the invention, anyone auctioned news articles contributed by users. PO Resp. 31–32 (citing Ex 2009 ¶¶ 63–64). Beginning with the latter assertion, Patent Owner's assertion is misplaced, because Petitioner does not propose auctioning news articles contributed by users.

Insofar as Patent Owner is asserting that Payne and Ackley are non-analogous art, we disagree. A reference is analogous art to the claimed invention if: (1) the reference is from the same field of endeavor as the claimed invention (even if it addresses a different problem); or (2) the reference is reasonably pertinent to the problem faced by the inventor (even if it is not in the same field of endeavor as the claimed invention). *See In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004). To that end, Payne discloses that it relates to the field of “user-interactive network sales systems for implementing an open marketplace for goods or services over computer networks such as the Internet.” Ex. 1006, 1:14–17. Ackley discloses that it relates to the field “computer-based systems and methods that enable sales

transactions between third parties through a communications network, such as internet auctions and classified systems.” Ex. 1008, 1:21–25. We see little daylight between these two fields, especially given that Ackley’s use of the word “such as” with “internet auctions” indicates that such “internet auctions” are a non-limiting example, and, thus, do not materially limit Ackley’s field of endeavor.

Patent Owner asserts further that “there is no evidence that either Payne or Ackley had even recognized a key problem solved by the ’177 Patent: how to enable users to submit their own content to a centralized place for consumption by other users.” PO Resp. 32 (citing Ex 2009 ¶ 65). Patent Owner’s assertion is misplaced, because obviousness does not require that the prior art recognize the same problem solved by the claimed invention. Indeed, the Supreme Court expressly mandated against following Patent Owner’s overly narrow approach when it wrote the following:

The first error of the Court of Appeals in this case was to foreclose this reasoning by holding that courts and patent examiners should look only to the problem the patentee was trying to solve Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.

KSR Int’l Co. v. Teleflex Inc., 550 U.S. 398, 420 (2016). To that end, from Petitioner’s above analysis, we are able to glean at least two problems purportedly solved by Petitioner’s proffered modification: (1) allowing a user to act as a merchant by listing items for sale; and (2) expanding the content available on Payne’s network sale system. We determine that both problems, and the solutions to those problems effected by the proffered

modification, are adequately articulated and supported by Petitioner with sufficient evidence.

Patent Owner asserts additionally that user-written blogs cannot provide a sufficient rationale for modification, because blogs were not sufficiently available during the time of Payne and Ackley. PO Resp. 32–33 (citing Ex 2009 ¶ 64). While we agree, we do not see the relevance of this assertion in relation to Petitioner’s proffered rationales.

*iv. Patent Owner’s Assertions Concerning
Dependent Claim 13 Alone*

Patent Owner asserts that Petitioner maps respectively Payne’s advertising document and smart statements to the “distributed information access point” and “centralized access point of a user” recited in independent claim 11, from which claim 13 depends, and that it would be “nonsensical” to modify Payne so as to place the “accept content contributions from a user” functionality on the “distributed information access point,” as opposed to the “centralized access point of a user.” PO Resp. 34–35 (citing Ex. 2009 ¶¶ 69–70). Patent Owner’s assertions are misplaced, because Patent Owner is asserting essentially that Petitioner’s mapping of the “distributed information access point” is limited to Payne’s advertising document alone, and that those documents do not have a logged-in user, which is required to logically add a “accept content contributions from a user” functionality. That is incorrect.

As set forth above, we construe “distributed information access point” as “a resource on a network, such as a web page, that makes information visually perceptible to multiple users, such as a web page or a login page.” For the “distributed information access point,” Petitioner identifies advertising documents, but also identifies other webpages that allow users to

select products for purchase and add them to their smart statements as corresponding to the recited “distributed information access point.” Pet. 35–36 (citing Ex. 1006, Fig. 5, 3:3–6, 5:16–25, 6:9–42, 8:38–53, 9:41–50); Reply 24–25 (citing Ex. 1006, 4:46–5:4, 6:9–42); *see also* Tr. 86:6–87:12 (confirming Petitioner’s proffered modification is not to the advertising page alone). In particular, both the Petition and the Reply cite column 6, lines 9–42, which identify expressly account and payments webpages that are not the advertising document. We are persuaded that these other account and payments webpages meet our construction of “distributed information access point” as “a resource on a network, such as a web page, that makes information visually perceptible to multiple users, such as a web page or a login page.” With this mapping of “distributed information access point,” Patent Owner’s above assertions fall away, as the user is already “logged-in” in at least some of these account and payment pages of Payne, and we do not understand either party as advocating any issues with adding the “accept content contributions from a user” functionality of either Ackley or Payne to these account and payment pages of Payne.

Indeed, Petitioner asserts, and we agree, that Patent Owner’s above assertion is further undercut, because the ’177 patent itself does not disclose the type of “*distributed information access point*” advocated by Patent Owner with the “*accept content contributions from a user*” functionality. Reply 21–25 (citing Ex. 1001, 6:60–7:10, 14:43–52, 17:22–47, 37:4–36, 38:50–39:13, 40:16–41:4, Figs. 28, 30, 32, 34B; Ex. 1003 ¶¶ 92, 210, 248; Ex. 1048, 50–51, and 56–57). For example, the only web page distributed to multiple users and having a login capability is a not illustrated “opening security screen” referenced at column 17, lines 22–47 of the ’177 patent, and

the '177 patent does not disclose this “opening security screen” having an “accept content contributions from a user” functionality. Relatedly, the only web pages disclosed in the '177 patent with an “accept content contributions from a user” functionality are each user’s personal “HowZone” web page or other user-only equivalent, and Patent Owner’s infringement contentions concerning dependent claim 13 (Ex. 1048, 56–57) are consistent with this understanding. Pet. 5–6. Accordingly, we agree with Petitioner that mapping similar webpages of Payne, as modified by Ackley and other portions of Payne, to the “wherein the distributed information access point is further operative to accept content contributions from a user” of dependent claim 13 is proper.

v. *Conclusion*

For the reasons expressed above, we conclude that Petitioner has demonstrated by a preponderance of evidence that dependent claims 13 and 15 are unpatentable as obvious in view of Payne and Ackley. In addition to findings we make above in connection with our analysis of claims 13 and 15 as obvious in view of Payne and Ackley, we also adopt as our findings Petitioner’s positions as to how Payne and Ackley disclose each of the limitations of claims 13 and 15. We further adopt as our own Petitioner’s rationales for modifying Payne in view of Ackley, as referenced above.

D. *Credibility of Experts*

There have been interspersed arguments made in the substantive papers, as well as at oral argument, concerning the credibility of experts. *See, e.g.*, Tr. 38:23–43:2, 72:8–77:9. We note expressly that the Board has taken into account all factors, identified by the parties, weighing for and against the credibility of any particular expert in rendering its decision.

E. Conclusion

For the reasons expressed above, we conclude that Petitioner has demonstrated by a preponderance of evidence that claims 11–13 and 15–20 are unpatentable.

III. ORDER

For the reasons given, it is:

ORDERED that claims 11–13 and 15–20 of the '177 patent are held unpatentable; and

FURTHER ORDERED that because this is a final written decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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Patent 7,516,177 B2

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I hereby certify that the original of this Notice of Appeal was filed via U.S.P.S. Priority Mail Express on March 20, 2017 with the Director of the United States Patent and Trademark Office at the address below:

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Copies of this Notice of Appeal are being filed and served on March 20, 2017 as follows:

To the U.S. Court of Appeals for the Federal Circuit
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(via CM/ECF – with filing fee)

To the USPTO Patent Trial and Appeal Board
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