TRANSCRIPTION OF AUDIO

CAFC oral argument

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Cisco Systems, Inc. v. Focarino v. Teles

2012-1513

JUDGE MOORE: Miss Nelson, you want them to change the [UI]

JUDGE DYK: You can even stay where you are if you want or [UI] go ahead and switch [UI]

Mr. Downs: Oh, we had talk before that

JUDGE DYK: [UI]

Mr. Downs: Good morning Your Honor. Your Honor. May it please the Court, I'd like to focus my time on the 2 dependent claims that the board allows. Those 2 claims we submit should have been rejected and that the board made an error in claim construction, an error of law in deciding that the multiplexor that was disclosed in Focsaneanu was somehow different and didn't satisfy the claim language. And specifically the board looked beyond the claim language to require also that the multiplexor be "disclosed to support changing over between switching networks for data transfers having real time properties." And that's in the board's opinion at page 42. And I'd like to just briefly walk through the claim language and then kind of put side by side what's in the 902 patent and then what's in Focsaneanu and show you that, in fact, the multiplexor in both instances and what's claimed is just your basic classis multiplexor, it takes multiple incoming lines and puts them on a single outgoing line to the line switching network. And that's shown in figure 4 of the 902 patent. But let me first look at the claim language of 84. Both of the 2 dependent claims I think can be considered the same for our purposes. And both 84 and 104, which are are the independent claims…I'm sorry, 84 and 102, require a switching apparatus for switching data packets from multiple origin end terminals. We're talking about a claim in which there's more than

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1 end terminal. And that switching apparatus has a line switching device for

establishing line communications through a line switching network, which

might be something like the ISDN or the public, regular public telephone

network. And then also a control device for controlling the line switching

device and changing over to line switching transfer. The actual claim

language of the dependent claim was the switching apparatus as claimed in

claim 84, wherein the line switching device, so just the line switching device

we're talking about here, includes a multiplexor for multiplexing data of

several origin end terminals over a single line connection through the public

telephone network or the line switching network. Now, in our blue brief, our

appeal brief, at page 9, in figure 4, is figure 4 of the 902 patent. And if you

look at the figure, it discloses the switch and it shows multiple devices that

can submit data into the switch. And the data goes into something called this

change control unit, it's 711 in the figure. And from there the data either goes

to a line switching device, which is 73, or to a packet switching switch, which

is 72.

JUDGE MOORE: Multiplexor 732 within 73.

Mr. Downs: That's right. So if there is any kind of changeover to be made in data that's

coming in through the switch in figure 4, the changeover is already made by

the time it gets to the line switching device. And also the switch is designed

to handle other devices that might just send data out through the line network.

So you could have data from multiple devices going through the 73, the line

switching device.

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JUDGE MOORE: And is your argument that, well not only does the patent not disclose a

multiplexor used to do the changeover, but also is part of your argument that

figure 8 of Focsaneanu is virtually identical to figure of the patent, namely

that the multiplexor in figure 8 of Focsaneanu appears almost to me in the

identical location?

Mr. Downs: Exactly, exactly. And the only purpose of the multiplexor in both of these

things is just to take data from more than one device it's going through the

line switching and put it out on a single line. And that's shown both in [UI

simultaneous conversation]…

JUDGE MOORE: I'm no expert but I couldn't even figure out how a multiplexor could have

possibly been used in the packet switching portion of this cause I don't think

of packet switching utilizing a multiplexor in any set of circumstances.

Mr. Downs: There's really no dispute about what a multiplexor is. It's on a line switching

but it's classically used in an ISDN line switching connection where you have

multiple channels and which you have many communications going at the

same time. So now some of those communications may be packet switched

but and that's a different question. But the multiplexor, even the government

agrees, you know, it's got a standard definition. So there's all that the claim

requires is basically the addition of a multiplexor to allow more than one

device to signal out over line switch. Now I also point the Court to column 5,

19 to 31 of the 902 patent, which talks about how in the ISDN it was known

that these multiple channels were available in the multiplexors to kind of

make use of them by sending out multiple communications over a single line

switching device. So there's, when the board concluded that Focsaneanu

didn't disclose enough, in fact, it disclosed exactly what's claimed, and that's

our point. And then there, the board made the statement that it certainly may

be obvious to use a multiplexor, and I submit that the evidence fully supports

that it is because the multiplexors are all over the art in this particular context

for sending more than one connection over the line switching device. And

the, you know, the board said in its opinion at 42, the requestor may be correct

in including that a multiplexor in the system of combining Focsaneanu;

Lucent and Jonas could be obvious. And Teles doesn't really, doesn't really,

or SSBG doesn't really dispute that, they don't attack, they're just saying that

the Focsaneanu doesn't disclose the multiplexor when, in fact, it does. So I,

the other point I'd like to make before I gonna reserve the rest of my time is I

agree with the government that the Mayo doesn't change the standard that's

applied here for claim construction. And for the rest of the 902 arguments,

their arguments against the rejection of the other claims, almost all of which

were based on Jonas and other, and then 3 other piece of art, including

Yoshida, which is nearly all of them, that clearly show a mid-connection

changeover.

JUDGE MOORE: Is this part of your appeal?

Mr. Downs: It's part of my response to theirs but I can reserve it 'til later, whatever, I'll sit

down and reserve it. But the claim constructions were correct, there is no new

standard, and that's our basic position. I'll address it then [UI]

JUDGE DYK: Okay - any

Mr. Downs: Unless there's any further questions.

JUDGE DYK: Thank you, Mr. Downs. [UI]

Mr. Kaminski: Thank you.   If I could say a few preliminary remarks. First of all, yes, Mr.

                  Downs is correct, our legal arguments and where we alleged legal error is the

                  same as in the prior, prior appeal as, as in this, the 2 patents, of course, that are

                  involved, the 2 appears are, share, are related to each other, they share the

                  same specification and priorities. We do think that there are differences here,

                  there are anticipation rejections that, that, that, that, that were accepted, as

                  opposed to anticipation and the prior art is a little bit different. So, so we do

                  think there are differences. Please allow me a second then to talk about

                  claims 91 and 104 because in this case we do believe that the, that, that the

                  board was correct and please allow me to direct your attention to the 90…902

                  patent claim on column 11, lines 6 through 12 or 13, which actually

                  specifically talk about this multiplex device, and it's, it's very specific in what

                  this does. Multiplexing is a, quote, unquote, standard thing but it's not

                  standard in these kind of communication devices at all in that what, what

                  we're doing here is, is, is a typical multiplexor takes many or several lines into

                  the device and then takes one of those lines and puts it on another line. So all

                  it is is basically taking it and routing one of the lines. What we're doing is

                  different and, as claim…column 11…

JUDGE WALLACH: That may be true that what you're doing is different from what a

                  multiplexor does but why is adding a multiplexor to what you have here not

                  obvious?

Mr. Kaminski: Because it's an entirely new use of the multiplexor. What we're…

JUDGE WALLACH: How, what's the new use?

Mr. Kaminski: The new use is that we're taking several lines into the multiplexor and we're

taking all of those signals from, that, that are coming in, and creating one

channel with different bands of communications data. And that's to different.

What Cisco would like to argue is that all of the lines go in and, therefore, you

just have one line coming out and that's it. But when you take a look at what

the claim language specifically says and what this says in column 11 where it

says the, the band, the data of several channels in this way multiplexed on one

data channel so you have many lines coming in but then you have one line

coming out but that line uniquely and novelly has several bands of data,

several channels on it. And that's, that's what's different here.

JUDGE DYK: I don't understand.

Mr. Kaminski: Okay.

JUDGE DYK: Why isn't it possible to add a multiplexor to what you have here?

Mr. Kaminski: Because it's not impossible to do a multiplexor but for the multiplexor to do

what the claim says is actually novel and unique.

JUDGE DYK: Well, what does the claim say it's supposed to do?

Mr. Kaminski: Well, the claim says specifically that…let's take a look at claim 91. Claim 91

says for multiplexing data of several origin end terminals over a single line

connection through a line switching network. So, so what they're doing is is

what we're saying is that the, the, the, the single line coming out has different

bands of data on it at the same time.

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JUDGE MOORE: Where does it say that? Where does it say that in claim 91?

Mr. Kaminski: Where it says multiplexing data all the way to over a single line connection.

JUDGE MOORE: Right. Okay, multiplexing data…so taking a bunch of data…

Mr. Kaminski: Several, mm-hmm.

JUDGE MOORE: …and putting it on a single line.

Mr. Kaminski: Right. At, at the same time, that's, that's, that's, that's what we're saying.

JUDGE MOORE: But I don't understand how, I mean this, all of the specification that you pointed to is a description of figure 4 and figure 4 shows the multiplexor, 732, in the line switching network portion of the device. And seems to be almost identical to Focsaneanu. I don't, I don't follow what it is that you think the multiplexor has to do that isn't disclosed in Focsaneanu

Mr. Kaminski: Well, because our contention is column 11, lines 6 through 13 describe a multiplexor operation that's different than Focsaneanu and…

JUDGE WALLACH: What does the multiplexor have to do with this switch over from packet switch network to a line switch network?

Mr. Kaminski: That's a good question, Your Honor. What it, what this device does is this apparatus doesn't just take a look at one call, it handles many calls at the same time. So what it does is it's, it, it, it, it has to have the capability of taking in case there's many problems with many calls and putting them over this line switching network and, therefore, there has to be some retooling of the packets of the line switching network by having many of these switched over packet switching lines onto the, the, the line switch because of, of, of the potential volume. I mean these…

JUDGE MOORE: I have no idea what you just said and how it bears on a multiplexor that your figure shows at basically the output of the line switching network.

Mr. Kaminski: Because…

JUDGE MOORE: How does that multi…how does that multiplexor in this figure have anything to do with the switch over? It's shown after 731, after all the switch over technology, at the *end* of the output. So how does it have anything to do with switching from packet to line?

Mr. Kaminski: Well, because once things are switched over, you have to deal with them somehow.

JUDGE MOORE: But *once* they're switched over…

Mr. Kaminski: Once they're switched over.

JUDGE MOORE: …the problem is the board actually found that it didn't support changing over between switching networks for data transfer having real time. And I guess I'm having trouble understanding how that is a component of a multiplexor which the figure demonstrates at the end of the line switching network.

Mr. Kaminski: I, I have to go back to the same discussion, Your Honor, about column 11 and what the function is.

JUDGE MOORE: But don't you agree that column 11, by it's own language, is a description of what appears in figure 4?

Mr. Kaminski: I don't know, Your Honor.

JUDGE MOORE: So you can't give the multiplexor a function that it physically can't do based on where it's located in the circuit.

Mr. Kaminski: Our contention is that the multiplexor has a novel and different function than had ever been described before in prior. We also talk, Your Honor, in the briefs about the concept of changeover and control signal, that's basically the same arguments as we have had before and, therefore, we believe that all of that discussion should apply here as well. Thank you.

JUDGE WALLACH: Thank you Mr. Kaminski.

Miss Nelson: Yeah, I guess I'll go ahead and discuss this multiplexor issue because [UI simultaneous conversation]

JUDGE DYK: [UI] I think got a problem with what the board did here [UI simultaneous conversation] They, they, they, the board seemed to think that there was some requirement that the multiplexor support the changeover or, as you've heard, I think we're having difficulty seeing where that is in the specification of the plans.

Miss Nelson: Okay, well let me like I guess there's, there are sort of 3 issues going on here and let me begin by sort of giving you a backdrop to sort of what went on during re-examination. There were 2, 2 S&Qs raised.

JUDGE DYK: While you're doing that background, explain something to me, okay.

Miss Nelson: Okay.

JUDGE DYK: 91 and 104 descend from 84 and 100, right?

Miss Nelson: Yep.

JUDGE DYK: And the board found those, 84 and 100, are anticipated by Jonas, right?

Miss Nelson: Correct.

JUDGE DYK: Okay. As a matter of law then, Jonas discloses each and every element of 84

                and 100, okay. If it could be obvious to add a multiplexor to Jonas, then it

                would be equally obvious to add a multiplexor to 84 and 100, right?

Miss Nelson: Well and I'm going to get to why I think it's not obvious. And there was, in

                Jonas there's no multiplexor obviously, there's no teaching of a multiplexor

                and the only…

JUDGE DYK: You see where I'm going…

Miss Nelson: Right.

JUDGE DYK: …the problem I have with that.

Miss Nelson: Right. Well, let me, let me get to what went on I guess at, at the beginning

                and then I'll explain sort of why I think the multiplexor is not obvious. But

                there are sort of 3 issues that are being raised I think by Cisco. One is this

                claim construction issue, which we, we submit that because they're dependent

                on claims 84 and 100 that a multiplexor would have to be able to function in

                the context of the overall switch, which has a line switching network, a packet

                switching network and, as well, the changeover control device. They're also

                sort of making, making arguments underlying this that [UI simultaneous

                conversation]…

JUDGE MOORE: Well it has to function in this system, right? It's a piece of structure added to

                this system so certainly it has to do something but…

Miss Nelson: Right.

JUDGE MOORE: …the question is…

Miss Nelson: And what…

JUDGE MOORE: …why, let's go back to Judge Dyk's question cause I really think that that's

the heart of what we need an answer to, which is why does the multiplexor

have to support changeover between switch networks for data transfer having

real time. The board seems to have interpreted it as the multiplexor has to be

in the center of it all, somehow participating in the switchover, the actual

switchover, the packet to line portion. That seems to be what the board

required by that language and quite frankly, I'm having difficulty seeing how

the 902 patent at all discloses that.

Miss Nelson: No, I think what the board is saying is that the multiplexor has to be able to

coordinate with the changeover device and the way a multiplexor sort of

works, your basic, you know, out of the box multiplexor typically will take

lines and divides up the time and will alternate between, they'll use one line

for all of these connections, all of these committed connections, which is

what's taught in Focsaneanu. Focsaneanu has no teaching of changing over

mid, mid-connection. They're committed lines and it sort of alternates from

this one to this one to this one like a split second for each one and then goes

back and starts over and keeps going. And I think what the board is, and what

the examiner was concerned with now we're, we're not in that environment in

this invention.

JUDGE MOORE: Why not?

Miss Nelson: We're now…

JUDGE MOORE: Based on figure 4, what and where the multiplexor is located…

Miss Nelson: Well it doesn't matter, where the multi…

JUDGE MOORE: …in the picture. No, but it, but it *does* because it's not located within the changeover portion from packet to line, it's located post-line portion, it's location at the *end* of the process when you've got the lines coming out at the end.

Miss Nelson: The lines are going in but those lines, as the, in the specification, they teach that those lines can change at any time to packet switching, given the existing conditions. And that's where the problem lies, you have a multiplexor that's alternating between lines and then it comes around and [UI] this one's gone off packet switching, it's waiting for it and it's not there.

JUDGE DYK: So it has, multiplexing has nothing to do with packet switching.

Miss Nelson: Right. It's only involved in the line.

JUDGE DYK: Line switches.

Miss Nelson: So if it, if you get connections that are taking off and going over to packet switching, then the multiplexor, a typical multiplexor wouldn't be able to account for this and operate. What we see in 902 patent, and I take you to column 11, at the bottom, talks about how the line switching device is sending control commands…

JUDGE MOORE: Can you tell me what line you're on?

Miss Nelson: I'm sorry, down at the bottom of, I'm sorry, I got the wrong column, that's the problem. Column 10, starting at around 61. And although going back, going, continuing over on column 11, but it talks about how the multiplex device, which is 70, 732, is there or sending control commands back and forth to the changeover unit. And we see that at those lines there at the beginning. It says

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the multiplex device of the line switching device depending on the control

commands of the changeover unit will do the multiplexing. And then you go

down and it talks again about according to the control…

JUDGE MOORE: But you acknowledge that it says the multiplex device *of the* line switching

device 73, right?

Miss Nelson: Yes, it's sitting in the line switching device but it has to be able to coordinate

with the changeover because so it has to know when it has, when the lines are

coming and when they've gone off the packing so that it, it can account and

not expect a line coming in there. So I think that if you look at lines, columns

10 and 11, what you see is this is a much more sophisticated multiplexor than

your usual standard multiplexor. It's a multiplexor that can respond and

coordinate with…

JUDGE DYK: It has to accommodate the changeover to packet switch…

Miss Nelson: Exactly.

JUDGE DYK: …is what you're saying.

Miss Nelson: That's what I'm saying. And I, we, we don't have that in Focsaneanu because

Focsaneanu is work, is working with committed things that are selected at the

beginning of the, the call, the communication and it, it knows that these things

are there and it's doing multiplexing with these. And so that's where I think

the difference is.

JUDGE DYK: I'm not sure what that's what the board said.

Miss Nelson: Well the board, you know, didn't the board in very short, I mean you have to

understand that there were a lot, a lot of rejections going on and the examiner

went through, it had like 200 pages of discussion of each and every limitation. The board and the examiner *did* go through and discuss why Focsaneanu does not support changeover [UI simultaneous conversation]

JUDGE DYK: [UI] you would have expected the board to say that it's complicated where you're switching back and forth between packet switching and line switching for the multiplexor to know when to go back to packet switching and to accommodate that. I don't understand what you're saying. I don't see that in the board decision.

Miss Nelson: Well, what the board is, *does* say, I mean I think it, it's essentially saying that much because the board is saying that the multiplexing disclosed in Focsaneanu is not disclosed to support changing over between switching networks. And that's on page 43 of its decision. So it certain is thinking in those, in that line that this is a different environment. Once you get into a changing over environment where you're going back and forth between packets and lines…

JUDGE DYK: That doesn't explain to us why the different environment creates a problem of adding the multiplexor.

Miss Nelson: It's not that it, you can't, well you can put a multiplexor in but the multiplexor is not gonna be able to operate correctly in that environment because…

JUDGE DYK: But it doesn't say that is the problem.

Miss Nelson: It, it doesn't say that expressly? I think in so many words it does but yes, it didn't come out and go to that in that kind of detail. But I think that is the essence of what the board is trying to say.

JUDGE MOORE: You're [UI] your entire argument, as best as I can tell, on the words depending on the control command in the specification because there's no other support for what you're saying. And then I have to accept as part of that argument, and when it says depending on the control command, it is the changeover commands as opposed to simply a binary now it's time to output data command multiplexor. Is that right, is that what I have to read into this specification in order to get where you're going?

Miss Nelson: I don't think you have to read anything into the specification, I mean I think simply…

JUDGE MOORE: No but you're, you're interpreting the word depending, everything, am I wrong, does your entire argument hinge on depending on the control command? That's the only way you get where you just said you wanted to go, which was to pull the multiplexor into the support, right?

Miss Nelson: I think you need to have a multiplexor that can coordinate with the changeover and which is what is depicted in figure…

JUDGE MOORE: But couldn't it coordinate by virtue of simply receiving a command from the control that says output data now? Wouldn't that be coordinating? It would, right, and under broadest reasonable construction, isn't that where you should have gone?

Miss Nelson: We don't, we don't even have any of that kind of thing. I mean we don't have that in, in Focsaneanu.

JUDGE MOORE: We also don't have any, you don't, what do you mean you don't have it in [UI simultaneous conversation]

Miss Nelson: In Focsaneanu we don't, we do not have any kind of changeover device and

their figure, there is no changing over going on, there's simply a line

switching and a packet switching and you select, you pre-select which way

you're gonna go. And then you're committed to line switching and the line,

and then the multiplexor is operating in that environment. And this is very

different.

JUDGE DYK: Well, Cisco doesn't agree with that, right? They view Focsaneanu as showing

dynamic switching over.

Miss Nelson: And I'd be happy to address that.

JUDGE MOORE: Not only that, you, so basically I think you've acknowledged, and maybe I'm

wrong, that the plain and ordinary definition of multiplexor would not

generally require functionally a multiplexor that's capable of this level of

coordination that you're describing, that they have deviated from the plain and

ordinary meaning and through lexicography defined a well known structural

device in electrical engineering to be required to do more than what people

would normally understand it to do, right, that's what you are saying now.

[simultaneous conversation]Because you acknowledged in the beginning that

this isn't a standard multiplexor, Your Honor, this isn't the way you normally

think of multiplexors. I believe that was where you began your argument.

Miss Nelson: No, I think what I'm saying is that this multiplexor is more sophisticated than

what's in Focsaneanu and what the claim requires [UI simultaneous

conversation]…

JUDGE MOORE: Would an ordinary person assume a multiplexor has to do everything that

you're saying this one has to do [UI] one of skilled in the art, the word

multiplexor.

Miss Nelson: No.

JUDGE MOORE: In an ordinary meaning.

Miss Nelson: It's not, well, [UI simultaneous conversation]…

JUDGE MOORE: Multiplexor takes a bunch of lines in and puts one out, that's all it does, right?

Miss Nelson: Construction of the term multiplexor was not at issue before the board in that

there wasn't an issue and what I'm saying is [UI simultaneous conversation]

JUDGE MOORE: …[UI] an issue. The board decided that the multiplexor as claimed is required

to have an additional functionality above and beyond what the plain meaning

would give it and he said that functionality is an outgrowth of the

specification.

Miss Nelson: No, that functionality is an outgrowth of the claim and the claim is to a

switching apparatus that has [UI simultaneous conversation]…

JUDGE MOORE: Which claim language requires the multiplexor to coordinate with the control

command? Which claim [UI simultaneous conversation]

Miss Nelson: By mere virtue, the independent claim, the independent claims that have 84

and 100 which contain a packet switching network, a line switching network

and this changeover control device that…

JUDGE MOORE: Right.

Miss Nelson: …is able to, able to move between the 2.

JUDGE MOORE: Yes.

Miss Nelson: So once you have that, then you need to have a multiplexor that can operate when changeover is going on.

JUDGE MOORE: I don't understand. The, the claim that adds the multiplexor doesn't say anything about changeover at all. Why couldn't the multiplexor be the bell on the bicycle?

Miss Nelson: But if the bicycle [UI] for a, if the claim was for a particular type of bicycle that had to, did something in particular, which I can't think of exactly, where the bell wouldn't operate properly unless it [UI simultaneous conversation]…

JUDGE MOORE: Why would the multiplexor not operate properly if it's on the tail end of the line switching network?

Miss Nelson: Because the lines are just dropping, could be dropping off and coming back at any time and it needs to be able to operate when that's going on. It needs to be able to account, accommodate, account for that and accommodate that.

JUDGE DYK: Tell us something about why Focsaneanu doesn't show dynamic switching during a telephone call.

Miss Nelson: Yes. Focsaneanu is really what Focsaneanu is about is to monitoring traffic on a network and then based on that traffic, then configuring local access in response to that.

JUDGE DYK: But there is a part of Focsaneanu that, that talks about dynamic switching, right?

Miss Nelson: The one, I think the one section that you're talking about is this description of figure 13, is that what you're referring to?

JUDGE DYK: I think so. What page is that on?

Miss Nelson: On column 11, that's in A3441.

JUDGE DYK: Which volume?

Miss Nelson: Volume 1.

JUDGE DYK: And what's the [UI]

Miss Nelson: 3441.

JUDGE DYK: 3441. Yeah.

Miss Nelson: But I think, is that what you're…

JUDGE DYK: Yeah, it's on column 11, line 7, right?

Miss Nelson: Yeah, and this section is talking about dynamically selecting and, again, it's

                 all about selection, and selecting a different network from the one that's

                 prescribed in the user profile. That doesn't say anything about changing over

                 in the middle of a connection. Now, to the extent it talks about quality of

                 service, well yes, this system will improve quality of service because you're

                 monitoring the network continuously and then you select, based on what's

                 going on in the, in the, what the traffic patterns are doing. So you're looking

                 at the traffic overall and then you're deciding how to select, pre-select the

                 beginning and you see that repeatedly beginning at, in column 4, line 50, it

                 talks about determining routing, appropriate routing prior to interfacing. On

                 column 12 at line 32, it's like allocating bandwidth prior to originating the

                 call. And even in the claim at column 15, claim 1, again, it talks the second

                 step is prior to interfacing, determining allocation. The whole invention is

                 about selecting prior to interfacing and there's nothing in the specification,

                 there's not evidence to suggest otherwise. I mean Cisco's, it was Cisco's

burden to come forward with an S&Q and to provide evidence to show both that Focsaneanu did change over and secondly, that Focsaneanu had a multiplexor that would work in this switching apparatus and if it was so obvious, they certainly could have come in with appropriate evidence, which they have not.

JUDGE DYK: Okay. Thank you, Miss Nelson. So who do we hear from next? Mr. Downs.

Mr. Downs: I'm prepared to go next, Your Honor.

JUDGE DYK: Well, did you make arrangements, have you arranged something different?

Mr. Downs: No, we did not.

JUDGE DYK: Why don't you go ahead.

Mr. Downs: All right. So if I could just have one last statement about the multiplexor. I, the claim language is simple, it doesn't have any special function for that multiplexor. Whatever the specification says, it's not…

JUDGE MOORE: It's your rebuttal, you don't have to limit yourself to one last statement. You can use it however you want. You want to spend the whole time on the multiplexor.

Mr. Downs: No I don't, I want to address the rest of the case [UI – laughing] and first see if you had any questions.

JUDGE DYK: Well, before you go on to the rest of the case, talk about column 11 of the 910 patent.

Mr. Downs: Column 11 of …

JUDGE DYK: The 910 patent of [UI].

Mr. Downs: Oh, Focsaneanu, all right. So, so you have to understand Focsaneanu. When

                you read it, there's a series of kind of cascading embodiments of increasing

                complexity. And an earlier one does talk about when, when you, when you,

                you dial a number, it goes to the switch and it makes a decision about do I

                route it over, over the packet network or do I route it over the line switching

                network. So you're on the phone, you're waiting, the switch makes a decision

                and tells you where to go. And it also does talk about [UI – noise] the second

                embodiment talks about if in the middle of a call somebody else calls in and,

                and wants to use, or makes another call, the switch can decide to terminate the

                first call and route a new call over the bypass network, either way. But when

                you get to this embodiment, in figure 13 embodiment at column 11, you're

                talking about yet another level of complexity where when you have an

                ongoing packet switch call and a voice telephone call…

JUDGE DYK: How do we know it's referring to an ongoing call cause the, the PTO is

                arguing that it doesn't refer to an ongoing packet?

Mr. Downs: You know, it, it says here that the accesses that column 11, lines 13 through

                16, the access module can packetize voice at [PAD] and route voice traffic on

                a data network. So it can do that. It, it can take a packet, you know, a packet

                call and route it onto a data network and a voice service is maintained by

                continuous monitoring of the transmission delay. So it's talking about

                maintaining the quality of a call and within a call, the only way you can

                maintain that quality if you experience delay is by means of changing over to

                a circuit switch call, which the Focsaneanu switch is capable of doing. There

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is no doubt that it can take a call and change it over. And then further on at column 14, lines 13, the paragraph starting at line 13…

JUDGE MOORE: Why is voice service only able to be maintained if you switch it over?

Mr. Downs: The quality of…

JUDGE MOORE: Yeah.

Mr. Downs: So if you, you've been on a call, Your Honor, I'm sure on a cell phone where your voice quality gets bad, right. You can't, unless you change your connection, you know, it's just a bad connection. The only way you can maintain control, quality of service of an ongoing call is by changing over, and that's, that's kind of what…

JUDGE MOORE: But you're, you're just telling me that. What evidence is there to establish that? The problem is Focsaneanu doesn't say that, it doesn't say and, therefore, you change over. So it doesn't actually have that link. And you're just telling me well this is the only way to do it and, and, you know, your, your testimony is lovely but it's not evidence.

Mr. Downs: Yeah, you know, I, I can't dispute that there's not a sentence in there that says in the middle of a connection we'll change over form one to the other. But that I believe is what a person of ordinary skill in the art would understand is meant by that passage, along with the other portions of the specification I was starting to refer to column 14, where it talks about logical assignments and real time at the access module of services provided for alternate routing among available networks. And dynamic traffic load balancing, alternate routing, you know, all that thing is going on dynamically and that's the

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language you hear in other, other cases or the other prior art. And the, the, at column 13, line 42, it says the access module also has the capability of providing conversion between packetized and voice MPTM to allow for alternate routing. So there you have a packetized voice, it's being converted to PCM, which is the standard telephone line. So it, it's the capability is there. So our, our position below was if it's not anticipated, Focsaneanu is not anticipate cause it has all, everything else from all these claims. If it doesn't anticipate all the claims, then at least it would be obvious to just go that little extra step that's disclosed in Jonas and change over in the middle of the call. I mean and that we know how to do because it's taught in Jonas, it's taught in Yoshdta, it's taught in Matsukawa and Farese, it's a well known technique. And, and so it's, it's ironic that I think you were saying Judge Dyk or I think it was maybe you, Judge Wallach, that, you know, the 2 claims that are not the multiplex are that it, the dependent claims to the multiplexor, the independent claim is already invalid, it's, it's there, it would be really ironic if it's just a standard multiplexor somehow becomes a patentable invention when the old changeover is not. So the, if I then may turn to the…

JUDGE DYK: Oh, I think what the PTO is saying is that the multiplexor has to function when you have this changeover from packet switching to line switching and vice-versa and the multiplexor only works on the line switching network.

Mr. Downs: So, so but that's how it's disclosed in the actual 902 patent. It talks about really just you're taking, you know, multiple communications and putting them on one line. The claim says that the multiplexor is in the line switch

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and, as Judge Moore pointed out, I think you, you've noticed is that the, the actual changeover occurs before it even gets to the multiplexor so that the multiplexor has nothing to do with the changeover, it's just something that happens right before the data goes out into, toward the network. And…

JUDGE DYK: Well I think it has nothing, I think the board was mistaken in suggesting that the line, that the multiplexor has something to do with achieving or supporting, as they put it I think, the changeover but I, I think what the PTO is now saying is something a little different and it has to be able to accommodate the switching.

Mr. Downs: If, I, I, if the, they're suggesting…

JUDGE DYK: That's what you understand them to be saying, right?

Mr. Downs: Oh well, I, I, I understood [UI] it's some kind of special multiplexor, really, and, in fact, and it has something unique about it. And that's not what the claim says. And, and I don't think also that's really what the specification said. The portion she pointed to talked about the multiplexor maybe responding to a control signal. But that's not in the claim. All the claim says is the multiplexor that's attached to the line switching device that takes several communications and puts them on in one network, that's all that's required, that's clearly done in Focsaneanu, regardless of the changeover.

JUDGE DYK: You had more?

Mr. Downs: Well, with respect to the rest of the case, I, I was hoping the government would stand up and say we agree that all the claims were properly rejected by the board and certainly that's our position. You shouldn't…

JUDGE MOORE: I don't think they're disavowing their brief.

Mr. Downs: [UI – laughing] I won't go into it unless you have any questions but I think the claim construction positions they're taking are just adding limitations [UI simultaneous conversation]…

JUDGE DYK: Should we be worried that they didn't [UI]

Mr. Downs: No, I'm not worried so unless you have questions, I will rest.

JUDGE DYK: Okay, thank you.

Mr. Downs: Oh I, there was one thing I did want to correct. There was an error in our brief which I noticed on re-read. It related to we, we said that in the SAP versus Versata case, this Court affirmed the broadest reasonable interpretation but it actually was the, it was the board that, the patent board, not this Court and I just want to correct that error. But you have since corrected, reaffirmed that standard in several other [UI] Thank you.

JUDGE DYK: Don't you hate when that happens?

Mr. Downs: Yes, I do.

Mr. Kaminsky: Oh [UI] First of all, please let me talk about the multiplexor again because we do believe the patent office was correct and that I was not able to fully answer Judge Moore's question but now, now I can. We believe that the claimed invention is about automatically changing over a telephone call without interruption. And in claim 84, which, to which 91 is, is depends, does talk about without interruption and does refer to a switching apparatus. Looking at figure 2, figure 4…figure 4, yes, the 732 is the multiplexor and this figure 4 does show how the multiplexor supports this specific invention. 71 is the

control signal module and 72 is the switch. When there is a control signal to switch over, it is possible for there to be a multiple telephone calls that are switched over from the internet to the line switching, which is the ISDN/POTS [UI] circle on, on the right side. So multiple lines need to be switched at the same time. The changeover is processed by 71 and then all of the switch lines need to be handled by the [mucks] at the same time to achieve the without interruption quality of the switching. And without the multiplexor, the data could not be processed in real time and is this unique multiplexor that…

JUDGE DYK: Your arguments are there's something special about switching over the multiple lines that you have with a multiplexor as opposed to switching a single line?

Mr. Kaminsky: Yes, Your Honor, because they, that's how it supports the changeover.

JUDGE DYK: What in the record to suggest that?

Mr. Kaminsky: That's the same thing, Your Honor. I, I, it, we, we've been arguing that in the briefs before the board and the interviews [simultaneous conversation] and ever since.

JUDGE DYK: What, what is there in the specification that says [UI]

Mr. Kaminsky: Well, the specification, to me, to us, is what is specifically stated in column 11, that lines 6 through 13, Your Honor.

JUDGE DYK: Okay. Anything else?

Mr. Kaminsky: Yes, Your Honor, just talking specifically a little bit more about the other prior art references. Three of the 4 prior art references, as we say in our

briefs, Yoshdta, Farese and Matsukawa talk about ISDN access systems, they do not talk about and do not disclose an internet at all and we believe that that's not correct, that the ISDN is, is, is different, ISDN has voice channels and a D channel and it's the contention of the board that switching over from a, a voice channel to the D channel, which does not stand for data channel, is, it's a control channel, is, is switching and we, we…

JUDGE DYK: This doesn't sound like proper rebuttal. That's not [UI]

Mr. Kaminsky: We, it, it, it goes to the argument as a whole but, but, but, but we did talk about it in our brief. So if you believe that to be improper rebuttal, then I have nothing further, Your Honor.

JUDGE DYK: Thank you Mr. Kaminsky. Case is submitted.

[End of recording]

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