

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DK CROWN HOLDINGS INC.,
Petitioner,

v.

DIOGENES LIMITED,
Patent Owner.

IPR2023-00268
Patent 11,200,779 B2

Before MELISSA A. HAAPALA, *Vice Chief Administrative Patent Judge*,
and LINDA E. HORNER and SCOTT C. MOORE, *Acting Senior Lead
Administrative Patent Judges*.

HORNER, *Acting Senior Lead Administrative Patent Judge*.

DECISION

Granting Petitioner's Request on Rehearing of Decision on Institution,
Vacating the Decision on Institution, and Remanding to Original Panel for
Further Proceedings

I. SUMMARY

The Director delegated a rehearing request in this proceeding to the Delegated Review Panel to determine if the Board’s decision denying institution misapprehended or overlooked an issue. Paper 11. We reviewed Petitioner’s arguments presented in the rehearing request, the Board’s Decision Denying Institution, and the record. We determine that the Board misapprehended the meaning of the claim term “continuously” and misapprehended both the Petitioner’s mapping of the claim to the prior art and the scope and content of the prior art. We vacate the Decision Denying Institution and remand to the original panel to reconsider institution in accordance with this decision.

II. INTRODUCTION

On February 7, 2023, DK Crown Holdings Inc. (“Petitioner”) filed a Petition requesting an *inter partes* review of claims 1–3, 5–10, 16–18, and 21–25 (the “challenged claims”) of U.S. Patent No. 11,200,779 B2 (Ex. 1001, “the ’779 patent”). Paper 2 (“Pet.”). Diogenes Limited (“Patent Owner”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”).

On August 11, 2023, the Board issued a split Decision Denying Institution of *Inter Partes* Review. Paper 9. The Board determined that the information presented in the Petition failed to establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any of the challenged claims. Paper 9, Majority Op. at 2, 21. The Board’s decision turned on the construction of the claim term “continuously” in independent claim 1 and, based on its construction, the Board determined that Petitioner failed to demonstrate a reasonable likelihood that the prior art reference to Scott anticipates or renders obvious the challenged claims. *Id.*

at 14–20. The Dissent disagreed with the Majority’s construction of the “continuously” claim language and expressed the view that Petitioner had shown a reasonable likelihood that Scott discloses or suggests the disputed limitations of claim 1. *Id.*, Dissenting Opinion 2–8 (“Dissenting Op.”).

On September 11, 2023, Petitioner filed a request for rehearing by the Director, seeking Director Review of the Board’s Decision Denying Institution. Paper 10; Ex. 3100. Petitioner raises three issues for Director Review: (1) whether the Board failed to apply the proper plain and ordinary meaning of “continuously” and, instead, misread the ’779 patent’s disclosure to improperly read limitations into the claims; (2) whether the Board erroneously limited the term “continuously” to apply only to “live” events; and (3) whether the Board provided sufficient factual basis for its determination that Scott “waits,” “sits idle,” or “pauses” at certain steps. Paper 10, 7.

On November 7, 2023, the Director issued an order stating that she had considered the request for Director Review and “determine[d] that the Decision warrants review by an independent Delegated Review Panel (‘DRP’),” and “delegate[d] Director Review of the Decision to a DRP to review the case and to determine whether to grant rehearing.” Paper 11, 2. The Director ordered the DRP to “review the Decision and determine whether the record demonstrates that the Decision misapprehended or overlooked any issue raised in the Director Review request,” and to do so “without direction from me.” *Id.* (citing Delegated Rehearing Panel §§ 2.C–D). The Director further explained that, “[i]f the DRP determines that the decision misapprehended or overlooked an issue, the DRP may issue a

decision, or, if appropriate, may remand to the Board for further proceedings.” *Id.* (citing Delegated Rehearing Panel § 2.E).

We have reviewed Petitioner’s request, the Board’s Decision, the relevant papers, and the relevant exhibits of record in this proceeding. Upon review, and based on the present record, we grant rehearing and determine that the Board’s claim construction was in error, and that the Board misapprehended Petitioner’s arguments as to how the “continuously retrieve” limitation maps to the Scott prior art reference and misapprehended certain teachings of Scott. Accordingly, we vacate the Board’s Decision Denying Institution, and remand to the original panel to reconsider institution consistent with this decision.

III. BACKGROUND

A. The ’779 Patent

The ’779 patent relates to a system that receives a wager on an event from a player, continuously retrieves data in real time related to the progress of the event, recalculates the wager information in real time based on the continually retrieved data, generates a real time offer comprising at least part of an award based on a potential outcome of the event, and transmits that offer to the player. Ex. 1001, 1:54–2:15. Claim 1 of the ’779 patent, which is illustrative of the challenged claims, is reproduced below with emphasis added to highlight the disputed claim language.

1. A system comprising:

a processor operatively coupled to a memory configured to store computer-readable instructions that, when executed by the processor, cause the processor to:

receive, by a trading engine module of a system controller, a wager on a wagering event from one or more input devices

via a communications interface, the wager input via a user interface of the one or more input devices;

store, by the system controller, the wager in a record within a database, the record comprising wager information for one or more wagers associated with one or more participants;

continuously retrieve, by the system controller, data in real time related to a progress of the wagering event;

recalculate, by the system controller, the wager information in real time based on the continuously retrieved data;

continuously evaluate, by the system controller, the recalculated wager information;

determine, by the system controller, that a participant of the one or more participants is eligible to win an award based on one or more of the wager and a potential outcome of the wagering event;

generate, by the system controller, *an option in real time* for the participant to one or more of fully cash out of the wager or partially cash out of the wager prior to a conclusion of the wagering event for at least a portion of the award;

cause, by the system controller, the option to be presented to the participant via the user interface of the one or more input devices;

receive, by the system controller, a selection of the option for the participant from the one or more input devices prior to conclusion of the wagering event; and

cause, by the trading engine module, the at least the portion of the award to be presented to the participant, such that the user interface displays one or more of a confirmation that the option has been selected and a value of the at least the portion of the award.

Ex. 1001, 51:15–54 (emphasis added).

B. The Parties' Arguments and the Decision Denying Institution

The Board denied institution because it concluded that information presented in the Petition failed to establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any of the challenged claims. Paper 9, Majority Op. 2. The Board determined that Petitioner did not demonstrate a reasonable likelihood of prevailing in showing that at least one challenged claim is either anticipated by or obvious in view of Scott. *Id.* at 12–20. Specifically, the Board determined that the disputed issues “turn[] on interpretation of ‘continuously’ as used in the claims of the ’779 patent” and “interpret[ed] ‘continuously’ performing a task to exclude performing that task at discrete time points.” *Id.* at 10.¹

Petitioner argues that Scott discloses the “continuously” limitations because it determines the current cash value “as each individual playing card or slot symbol is revealed.” Pet. 39 (citing Ex. 1006 ¶¶ 67, 83), 47 (citing Ex. 1006 ¶ 67). According to Petitioner, “Scott discloses that the calculation and presentation of the current cash value is ‘continuous[]’ throughout the wagering game in that it ‘may continue with newly presented game symbols until the game is over . . . or until the player accepts a current cash value for his or her set of symbols.’” *Id.* at 39 (quoting Ex. 1006 ¶ 81) (emphasis omitted).

Patent Owner responds that, as used in the ’779 patent claims, “continuously” means “ongoing at all times,” and distinguishes Scott’s process because “the current cash value is only ‘determined’ through data retrieval ‘after each card or other game symbol is dealt to a player’ and is

¹ Neither party proposes an express claim construction for any terms of the ’779 patent, and both parties agree that the claim terms could be afforded their plain and ordinary meaning. Pet. 23; Prelim. Resp. 11.

thus determined in stages and not continuously.” Prelim. Resp. 16, 20 (citing Ex. 2001 ¶¶ 89, 96–97) (quoting Ex. 1006 ¶ 67) (emphasis omitted).

In the Decision Denying Institution, the Board determined that “[t]he ’779 patent distinguishes between continuously performing a task and doing so at discrete time points,” relying on the following disclosure in column 17 of the ’779 patent:

The server system 12 may [determine the appropriate value of a cash out offer] at any time, such as, and without limitation, at certain discrete time points of a wagering event (e.g., halftime of a sporting event) or it may continuously evaluate the wagering event and incoming wagers and make multiple determinations in real time.

Paper 9, Majority Op. 14 (quoting Ex. 1001, 17:52–57) (emphases omitted). According to the Board, the parties’ witnesses interpreted this language in the same manner, with Patent Owner’s witness Dr. Vancura testifying that “the ’779 patent draws a distinct contrast between ‘discrete points’ (e.g., halftime or other stoppage of play) and ‘continuously’ (e.g., real time during live play and thereby extremely time-sensitive),” and Petitioner’s witness Mr. Crevelt “agree[ing] that the ’779 patent distinguishes performing tasks continuously from doing so at discrete times.” Paper 9, Majority Op. 14 (citing Ex. 2001 ¶ 48; Ex. 1007 ¶¶ 122, 137). The Board “agree[d] with this testimony and interpret[ed] ‘continuously’ performing a task to exclude performing that task at discrete time points.” *Id.* at 14–15. According to the Board, one of ordinary skill “understanding that computers work using a clock and by following computer programs, would understand that ‘continuous[]’ data retrieval is limited to the speed at which the computer can operate.” *Id.* at 15 (citation omitted) (citing Dissenting Op. 4 n.6). In construing “continuously,” the Board also determined that claim 1 pertains

only to “‘live’ wagering events (including live poker, slot, and keno games)” and not to “wagering events run and controlled by the same computer that pauses the wagering event to present a cash out offer to the player, as in Scott” because “‘continuous’ data retrieval is required for actions to occur ‘in real time’ only for such live wagering events.” *Id.* at 17.

The Dissent disagreed with the Majority’s claim construction because “it incorporates limitations not found in the claim and takes a specific, narrow example from the specification and turns it into a broad, general prohibition that is not consistent with the claims or specification.” Paper 9, Dissenting Op. 2. The Dissent determined that, based on the claim language, “the computer in claim 1 is repeatedly (continuously) performing a series of discrete steps in which information about the wagering event is gathered and reviewed in order to evaluate the value of the player’s wager in real time.” *Id.* Further, the Dissent explained, “[t]he limitations must be performed ‘continuously’ so that the claimed actions occur ‘in real time.’” *Id.* “In this way,” according to the Dissent, “the specific occurrences in the game that affect the worth of the wager are considered at or near the time in which those occurrences happen.” *Id.* at 2–3.

The Dissent also determined that the ’779 patent specification is consistent with its interpretation of “continuous” because it “equates ‘continuously’ with a frequency that provides evaluation ‘in real time.’” Paper 9, Dissenting Op. 3. The Dissent cited the same portion in column 17 of the ’779 specification as the Majority (reproduced above), and stated that it “appears to be the only instance in the specification that sheds light on what ‘continuously evaluate’ means in the context of claim 1.” *Id.* at 3 (citing Ex. 1001, 17:52–57). However, the Dissent explained, the

specification's statement that "a determination at a discrete time point of an event such as halftime is not a continuous determination in real time" is "not a particularly insightful example" because "waiting to determine a wager's value until halftime of a sporting event such as soccer is clearly not determining a wager value in real time." *Id.* at 3–4. According to the Dissent, "the specification's single example here of a clearly not-in-real-time time point" cannot "be broadened into a blanket prohibition on all discrete time-based evaluations," particularly since the specification "is not precluding all time-based evaluations but rather distinguishing those that do not provide real-time evaluations." *Id.* at 4. This is particularly true, the Dissent stated, in the "context of how a computer system would perform the claims" because "[l]ogically, everything can be broken down into discrete events or discrete time points" and "[a] computer, which runs using a clock and following a pre-defined series of commands, would operate here by checking for specified discrete events at discrete points in time." *Id.* Thus, the Dissent explained, "[e]very action occurs at a discrete point in time," and "the [M]ajority's construction that the claims preclude performing a task at discrete time points seemingly presents an impossibility." *Id.*

In light of the above, the Dissent concluded that "[t]he claims and specification provide a sufficiently clear guide to how to interpret 'continuously'—repeating at a rate that provides for the claimed real-time capabilities." Paper 9, Dissenting Op. 4. The Dissent stated that it saw "no need to exclude the computer from operating at discrete time points (which I maintain must happen anyway), or to add limitations to the claims that would be difficult or impossible to measure, such as requiring the computer to retrieve data at 'the speed at which the computer can operate' or to only

work on ‘live’ wagering events.” *Id.* at 4–5 (citations omitted) (citing Paper 9, Majority Op. 15–17). Accordingly, the Dissent construed the “continuously retrieve . . . data” step to “require[] the computer to repeatedly obtain data related to the progress of the wagering event at a rate sufficient to achieve real time data collection” and the “continuously evaluate” step to “require[] the computer to repeatedly evaluate the recalculated information (which is based on the retrieved data) at a rate sufficient to permit the later step of generating an option for a cash out of the wager in real time.” *Id.* at 5. The Dissent further stated that, “as a corollary to these constructions, a computer need only collect data or update calculations at a speed that performs these steps in real time,” and “what is real time is relative to the speed in which the meaningful events in the wagering event occur.” *Id.* at 5–6. The Dissent disagreed with the Majority’s assertion that the Dissent’s construction would read out the word “continuously” or equate it with “real time” because “[c]ontinuously’ tells us that the claimed action must be repeated, whereas ‘in real time’ tells us about the frequency with which to repeat in order to achieve the desired effect.” *Id.* at 5 n.8 (citing Paper 9, Majority Op. 19).

In reaching its decision that Petitioner has not shown adequately how Scott’s processor “continuously” retrieves data related to the progress of a wagering event, the Board determined that after Scott’s system displays to the player a current cash value for the player’s current game symbols, “[t]he system then waits for the player to accept or reject the current cash value (step 432).” Paper 9, Majority Op. 17–18 (citing Ex. 1006 ¶ 75, Fig. 4). The Board explained that Petitioner does not map the input at step 432 to the recited data “related to a progress of the wagering event,” and that “[a]t step

432, Scott’s processor does not retrieve data regarding a triggering event. Instead, it awaits a player’s acceptance or rejection of the current cash value.” *Id.* at 18–19 (citing Ex. 1006 ¶ 75, Fig. 4).

As to Scott, the Dissent determined that “[i]t is immaterial whether the computer spends some time waiting for a person to act—it is continuously checking until it recognizes some discrete event has happened.” Paper 9, Dissenting Op. 7. The Dissent explained that “any computerized system will reduce into discrete steps occurring at discrete points in time; ‘discreteness’ or ‘the speed at which the computer can operate’ is not the way to evaluate ‘continuously.’” *Id.*

C. Petitioner’s Request for Director Review

In its Request for Director Review, Petitioner argues that the Board erred in three ways: (1) by “improperly read[ing] all discrete time points out of the claims”; (2) by “limiting ‘continuously’ to only ‘live’ events”; and (3) by misapprehending Petitioner’s arguments as to how Scott discloses “continuously” retrieving data related to a progress of the wagering event and misconstruing Scott as disclosing “waiting” or “pausing” a wagering event after presenting a cash out offer. Paper 10, 8, 10, 12–15.

With respect to the first argument, Petitioner asserts that, “[a]lthough the ’779 [p]atent contrasts performing a task at ‘certain discrete time points’ and ‘continuously,’ it expressly states that performing a task ‘as each event result occurs’ within the wagering event is ‘continuously’ performing that task.” *Id.* at 8 (citing Ex. 1001, 11:5–10; Ex. 1007 ¶ 96). According to Petitioner, “when the ’779 [p]atent contrasts performing a task at ‘certain discrete time points’ and ‘continuously,’ it does so only as to ‘certain’ discrete ‘time’ points, like the singular and predetermined or scheduled

‘*halftime*’ of a sporting event.” *Id.* (citing Ex. 1001, 17:52–57). Based on these disclosures, Petitioner contends, the Board erred by “exclud[ing] from the claims performance of a task at *any* discrete times, despite that the ’779 [p]atent only excludes ‘*certain* discrete *time* points’ and otherwise describes ‘continuous’ as being performed as ‘each bet is placed and accepted, and as each event result occurs.” *Id.* at 9 (citing Ex. 1001, 11:5–10, 17:52–57).

With respect to the second argument, Petitioner challenges the Board’s limitation of claim 1 to only “live” events, arguing that it “violates basic tenets of patent law by rendering dependent claim 3 broader than its parent claim or, in the alternative, rendering limitations of . . . dependent claim 3 superfluous.” *Id.* at 10. According to Petitioner, claim 3 “expressly recites that wagering events include both ‘live’ events and ‘pre-recorded’ events,” and thus “to read independent claim 1 as limited to ‘live’ events would necessarily require that claim 1 is narrower than dependent claim 3” or render superfluous “claim 3’s separate and unambiguous recitation of ‘live’ events.” *Id.* at 10–11. Petitioner further argues that claim 1 contains no “language limiting the claimed ‘wagering event’ to either” “‘live’ wagering events (*e.g.*, ‘live events’ and ‘real games’)” or “‘electronic’ wagering events (*e.g.*, ‘virtual games’ and ‘pre-recorded events’).” *Id.* at 11.

In the third argument, Petitioner challenges the Board’s finding that Scott discloses “waiting” or “pausing” the wagering event after presenting a cash out offer. Paper 10, 12. Specifically, Petitioner argues that the Board misapprehended the disclosure in Scott relied on in the Decision Denying Institution, and that this disclosure instead describes an embodiment in which the game continues without interruption after presenting a cash out offer. *Id.* at 12–15. Petitioner also argues that the Board misapprehended

the Petition’s mapping of the “continuously retrieve” limitation to the disclosure in Scott. *Id.* at 14–15.

IV. ANALYSIS

A. Claim Construction

1. The “Continuously” Limitations

The term “continuously” is used in two limitations of claim 1, which recite as follows:

continuously retrieve, by the system controller, data in real time related to a progress of the wagering event;

...

continuously evaluate, by the system controller, the recalculated wager information;

Ex. 1001, 51:28–34 (emphasis added).

The ’779 patent specification uses the term “continuously” in two key passages. The first, in column 11, recites as follows:

The Pool Collations 540 routine calculates and **continuously recalculates the odds as each bet is placed and accepted, and as each event result occurs within the pool**, so as to determine the odds with respect to each remaining active ticket within the pool bet.

Ex. 1001, 11:5–10 (emphasis added). This passage indicates that the recalculation of the odds is “continuous,” as that term is used in the ’779 patent, if it is performed “as each bet is placed and accepted, and as each event result occurs within the pool.”

The second passage using the term “continuously” is in column 17, reproduced below.

The server system 12 may [determine the appropriate value of a cash out offer] at any time, such as, and without limitation, at certain discrete time points of a wagering event (e.g., halftime of a sporting event) or it may **continuously evaluate the**

wagering event and incoming wagers and make multiple determinations in real time.

Ex. 1001, 17:52–57 (emphasis added). This passage distinguishes between (1) determining the appropriate value of a cash out offer at “certain discrete time points” such as “halftime of a sporting event” and (2) “continuously evaluat[ing] the wagering event and incoming wagers and mak[ing] multiple determinations in real time.” This passage seems to indicate that “continuously evaluating” the wagering event and incoming wagers does not include determining an appropriate cash out value at predetermined discrete time points that do not impact the odds of winning, such as halftime of a sporting event. We determine, however, that this example of a non-continuous system does not evidence an intent to exclude from the scope of the claims any system or method that performs calculations at “discrete time points.” This example illustrates only that the claim term “continuous” does not encompass determining cash out value at certain discrete time points, such as halftime or other predetermined time points in the event.

Based on these portions of the ’799 patent specification, on the evidence and arguments presently before us, we construe the phrase “continuously retrieve . . . data . . . related to a progress of the wagering event” to encompass “repeatedly retrieving data related to the progress of the wagering event as developments occur that may affect the odds of the wager.” This construction does not encompass retrieving data on a predetermined time schedule (i.e., discrete time points of the wagering event) that is independent of the occurrence of developments that may affect the odds, such as capturing data at halftime of a sporting event. Similarly, we construe “continuously evaluate . . . the recalculated wager information” to encompass “repeatedly evaluating the recalculated wager information as

developments occur that may affect the odds of the wager.” As before, this construction does not encompass evaluating the recalculated wager information during the wagering event on a predetermined time schedule (i.e., discrete time points of the wagering event) that is independent of the occurrence of developments that may affect the odds, such as at halftime of a sporting event.

This construction is supported by the disclosure in column 11 of the ’779 patent, which indicates that “continuously” recalculating the odds covers recalculating the odds “as each bet is placed and accepted, and as each event result occurs within the pool,” and that placing bets and event results affect “the odds with respect to each remaining active ticket within the pool bet.” *See* Ex. 1001, 11:5–10. This construction is also consistent with the disclosure in column 17 of the ’779 patent, which distinguishes “continuously evaluating the wagering event” from determining cash value “at certain discrete time points” such as “halftime of a sporting event.” *Id.* at 17:52–57. Notably, the specification does not distinguish continuously evaluating from determining cash value at other times, such as when a bet is placed or an event affecting the odds (such as dealing of a card) occurs.

We disagree with the construction of “continuously” performing a task, which “exclude[s] performing that task at discrete time points.” *See* Paper 9, Majority Op. 14–15. This construction does not specify what is meant by “discrete time points,” which may create confusion because, as the Dissent points out, operations performed by a computer necessarily perform tasks at discrete time points based on executing instructions according to the computer’s clock speed. *See* Paper 9, Dissenting Op. 4. Thus, taken literally, the construction that the claims preclude performing a task at

discrete time points would exclude any computer-based system from the scope of the claim, which is at odds with the claim language explaining that the steps are carried out by a processor executing computer-readable instructions. *See* Ex. 1001, 51:16–18 (claim 1).

The Board attempts to clarify its claim construction by explaining that one of ordinary skill “would understand that ‘continuous[]’ data retrieval is limited to the speed at which the computer can operate.” Paper 9, Majority Op. 15. This construction, however, is not supported by the evidence of record. Neither the claim language nor the ’779 patent specification limits the claims to retrieving data at “the speed at which the computer can operate.” Rather, the specification explains that “continuously evaluating” wager information includes recalculating the odds “as each bet is placed and accepted, and as each event result occurs within the pool,” which does not require retrieving and evaluating data at “the speed at which the computer can operate.” *See* Ex. 1001, 11:5–10. Similarly, although the specification distinguishes continuous evaluation from evaluation at “certain discrete time points of a wagering event” such as “halftime of a sporting event,” it does not exclude from the scope of “continuous” all evaluations of events that occur at a speed slower than “the speed at which the computer can operate.” *See id.* at 17:52–57. Further, there was no expert testimony offered in support of the Board’s construction that “continuous” requires retrieving data at the speed at which the computer can operate. *See e.g.*, Exhibit 2001 ¶¶ 89–90 (Patent Owner’s expert Dr. Vancura opining only that Scott’s process is not “continuous” because its data retrieval and/or receipt are conducted on an “as needed” basis and when “another trigger occurs”).

Finally, the testimony of Mr. Crevelt and Dr. Vancura does not support the Board’s construction of the “continuously” limitations. The Board relies on Mr. Crevelt’s testimony that, “similar to the ’779 [p]atent, Scott juxtaposes a real time and continuous evaluation and determination of the current cash value against the ‘alternative[]’ of determining the current cash value at discrete time points during the game, such as ‘at the end of each dealing stage of a game.’” Paper 9, Majority Op. 14 (citing Ex. 1007 ¶¶ 122 (citing Ex. 1006 ¶ 67, Ex. 1001, 17:52–57), 137 (same)). But this testimony merely distinguishes between Scott’s “real time and continuous evaluation” and evaluating at discrete time points according to a predetermined time schedule, such as “at the end of each dealing stage of a game.” Ex. 1007 ¶¶ 122 (citing Ex. 1006 ¶ 67, Ex. 1001, 17:52–57), 137 (same). Therefore, neither Mr. Crevelt’s testimony, nor the passages he relies on in Scott, exclude all determinations at discrete time points (or all determinations slower than the speed at which the computer can operate) from the scope of the “continuously” terms. *Id.* Rather, this testimony is consistent with the construction of those terms we have adopted here. *Id.* Indeed, Mr. Crevelt testifies that “Scott explains that such continuous and real-time determinations are advantageous because, for example, ‘some events that occur during a wagering game may change the odds or other characteristics of a game without changing the game symbols or indicia.’” *Id.* (citing Ex. 1006 ¶ 36) (emphasis omitted). Thus, this testimony supports the determination that Scott’s evaluations, based on events that occur during a wagering game that may change the odds, involve “continuous” determinations.

Turning to Dr. Vancura, the testimony relied on by the Board quotes column 17, lines 52–57 of the '779 patent, and then states as follows:

Thus, the '779 patent discloses that the determination of cash-out value may be at discrete points of a wagering event (such as halftime, end of the 1st period, during a time-out, etc.) *or* it may continuously evaluate the wagering event and make multiple determinations in real time. In other words, the '779 patent draws a distinct **contrast** between “discrete points” (e.g., halftime or other stoppage of play) and “continuously” (e.g., real time during live play and thereby extremely time-sensitive).

Ex. 2001 ¶ 48. Like Mr. Crevelt’s testimony quoted above, Dr. Vancura’s testimony distinguishes between discrete points of a wagering event that occur on a predetermined time schedule, such as halftime, or end of a period, and “continuous” determinations, and is consistent with the construction we adopt here.

2. “*In Real Time*”

As noted above, the Board further determined that claim 1 pertains only to “‘live’ wagering events (including live poker, slot, and keno games)” and not to “wagering events run and controlled by the same computer that pauses the wagering event to present a cash out offer to the player, as in Scott” because “‘continuous’ data retrieval is required for actions to occur ‘in real time’ only for such live wagering events.” Paper 9, Majority Op. 17. As noted above, Petitioner challenges the Board’s limitation of claim 1 to only “live” events.

The issue of whether claim 1 is limited to “live” wagering events is intertwined with the construction of the term “in real time.” Claim 1 of the '779 patent uses the term “in real time” in several phrases, as recited below:

continuously retrieve, by the system controller, data **in real time** related to a progress of the wagering event;
recalculate, by the system controller, the wager information **in real time** based on the continuously retrieved data;
...
generate, by the system controller, an option **in real time** for the participant to one or more of fully cash out of the wager or partially cash out of the wager prior to a conclusion of the wagering event for at least a portion of the award;

Ex. 1001, 51:28–32, 51:39–43. This claim language indicates that the term “in real time” relates to the time and frequency of the data retrieval, wager recalculation, and option generation during the wagering event.

We next turn to the ’779 patent specification. Column 17 of the specification uses the term “in real time” in conjunction with continuous evaluation of the wagering event, and contrasts it to determinations made at discrete time points during the wagering event, such as halftime of a sporting event:

The server system 12 may [determine the appropriate value of a cash out offer] at any time, such as, and without limitation, at certain discrete time points of a wagering event (e.g., halftime of a sporting event) or it may continuously evaluate the wagering event and incoming wagers and make multiple determinations *in real time*.

Ex. 1001, 17:52–57 (emphasis added). This passage suggests that determinations “in real time” must be made with sufficient frequency to promptly capture developments that may affect the odds of the event, and cannot cover only discrete determinations, such as the end of a period or halftime during a sporting event.

We next turn to the issue of whether claim 1 requires that the “real time” retrieval of data and recalculation wager information must be

performed during a “live” event, rather than a “pre-recorded” event.

Claim 3 is instructive on this point, because it depends from claim 1 and covers both “live” and “pre-recorded” events:

3. The system of claim 1, wherein *the wagering event comprises one or more of* an entire event, a partial event, a divisible component of an event, multiple independent events occurring sequentially or concurrently, and a compilation of related events, including one or more probabilistic events, sporting events, eSports, e-sports, competitive gaming, electronic sports, fantasy events, real games, virtual games, fantasy games, slot machines, keno, poker, video games, racing, lotteries, *live events, pre-recorded events*, online events, broadcast events, card games, politics, sales, stocks, celebrity gossip, movies, reality TV, football (“soccer”), American football, Australian rules football, baseball, cricket, basketball, golf, hockey, auto racing, legends, rugby, wrestling, surfing, mixed and martial arts.

Ex. 1001, 51:63–52:9 (emphasis added). Based on claim 3, the “wagering event” can include, among other things, “live events” and “pre-recorded events.” Because claim 3 depends on claim 1, this interpretation applies to claim 1 as well.

To the extent the Board found that claim 3 of the ’779 patent pertains only to “‘live’ wagering events (including live poker, slot, and keno games),” we disagree. Paper 9, Majority Op. 17. As discussed above, claim 3 expressly recites that “the wagering event comprises one or more of . . . live events, [and] pre-recorded events,” and this understanding applies to claim 1 as well. *See* Ex. 1001, 51:63–52:9. Additionally, the portions of the ’779 patent that the Board relies on to limit the claims to a “live sporting event” are merely examples that do not limit the claims, particularly in light of claim 3’s language expressly including “pre-recorded events” as examples

of the “wagering event.” *See* Paper 9, Majority Op. 16–17 (citing Ex. 1001, 13:21–26, 22:23–24, 23:5–9).

Consequently, based on the above evidence, we determine that retrieving data and recalculating wager information “in real time” encompass retrieving or recalculating while the wagering event is occurring, and with sufficient frequency to promptly capture developments that may affect the odds of the event. This meaning could include a wagering event that is pre-recorded and later broadcast. In that situation, “in real time” would mean that the retrieval or recalculation action occurs while the wagering event is being broadcast, and with sufficient frequency to promptly capture developments during the broadcast that may affect the odds of the event.

B. The Petition’s mapping of the claims to Scott

We now turn to an argument raised by Petitioner in its rehearing request related to the proper reading of the Petition and how Scott discloses the “continuously retrieve” limitation. We find that the Board misapprehended the Petition’s argument as it relates to an aspect of the disclosure in Scott. The Board explained that “at step 432, Petitioner has not explained adequately how Scott’s processor retrieves data related to the progress of the wagering event.” *Id.* at 18. The Board explained that Petitioner maps “only the player’s current game symbols or indicia” to the recited “data related to a progress of a wagering event” and fails to show how Scott’s processor, at step 432, “continuously retrieves such data.” *Id.* The Board further explained that “[a]t step 432, Scott’s processor does not retrieve data regarding a triggering event. Instead, it awaits a player’s acceptance or rejection of the current cash value.” *Id.* at 18–19 (citing

Ex. 1006 ¶ 75, Fig. 4). Based on this reading of Scott, the Board determined that “[d]uring this ‘waiting’ time of step 432, no data related to a progress of the wagering event is retrieved” such that “it seems . . . Scott does not continuously retrieve such data.” *Id.* at 18.

However, the Board misapprehended Petitioner’s argument as to how Scott discloses “continuously” retrieving the claimed data. First, the Petition proffers that the retrieved information “related to a progress of the wagering event” in Scott includes “information ‘identifying the game symbols or indicia the player currently has, the odds the player will win (or lose), the amount the player has wagered,’ ‘cards or symbols remaining to be dealt, credits remaining, and other information related to a wagering game.’” Pet. 38–39 (citing Ex. 1006 ¶¶ 58, 83) (emphasis omitted). Second, the Petition proffers that Scott discloses retrieving this information continuously because Scott describes using this information to determine a current cash value “as each event occurs during the wagering game, such as ‘as each individual playing card or slot symbol is revealed’ during the wagering game.” *Id.* at 39 (citing Ex. 1006 ¶¶ 83, 67).

Further, the Board misunderstood Scott to disclose a system that generates and displays to the player a current cash value for the player’s game and then waits for the player to accept or reject the current cash value before continuing with the game. Paper 9, Majority Op. 17–18 (citing Ex. 1006 ¶ 75, Fig. 4 (step 432)). Paragraph 75 of Scott describes that a player may decline the current cash value by simply continuing to play the game without accepting:

Once presented, it may be determined at a decision step 432 whether or not the current cash value is accepted by the player. For instance, the player may engage a[n] “accept” button

or the like to indicate the current cash value has been accepted. It is contemplated that the player may decline current cash value for his or her game symbols by simply continuing to play the game without accepting, or by engaging a “decline’ button or the like.

Ex. 1006 ¶ 75. Scott explains that “the process of presenting current cash values for a player’s game symbols may continue with newly presented game symbols until the game is over at decision step 412 or until the player accepts a current cash value for his or her set of symbols at decision step 432.” *Id.* ¶ 81. Although Scott describes an embodiment that includes a decline button such that the player may be required to accept or decline the current cash value before the game will continue, the use of a decline button is optional and the paragraph reproduced above describes another embodiment that does not include a decline button. *Id.* ¶ 75, *see also* Paper 10, 10 (citing Ex. 1006 ¶ 36) (Petitioner arguing that there is no “waiting” in Scott’s example of a keno game because “the numbers are revealed to all participants simultaneously, without regard to whether any particular participant has a cash out offer outstanding”).

Patent Owner’s expert Dr. Vancura states that Figure 4 of Scott requires the player to “have declined the previous cash value” to reach the step of newly presented game symbols. Ex. 2001 ¶ 88. Dr. Vancura does not address, however, the description of Figure 4 provided in paragraph 75 of Scott, that discloses that a player can simply continue playing the game after an offer is presented. Further, Dr. Vancura acknowledges that in one embodiment of Scott, “the value engine will present current cash values and the game may proceed according to its rules, *unless the player engages an ‘accept’ button 108D or the like*”) Ex. 2001 ¶ 90 (emphasis added). As Petitioner argues, Scott explains that “presentation of the current cash value

is ‘dynamic.’” Pet. 39 (quoting Ex. 1006 ¶ 65). For example, Petitioner argues that Scott describes “current cash value may be determined and presented after each card or other game symbol is dealt to a player ... in real time or in substantially real time.” *Id.* (citing Ex. 1006 ¶ 67).

On the present record, we understand the cited portions of Scott to describe an embodiment in which the game presents a current cash offer after each occurrence of an event during the game that affects the odds, such as after each card or game symbol is dealt to the player, and continues the game unless the player accepts the cash out offer.

V. CONCLUSION

We find that the Board: (1) improperly limited the meaning of the “continuously” limitations to exclude all events that occur at discrete time points; (2) improperly limited claims 1 and 3 to be limited to “live” events; and (3) misapprehended Petitioner’s arguments as to how the “continuously retrieve” limitation maps to Scott’s disclosure. Accordingly, we vacate the Decision Denying Institution and remand to the original panel to reconsider institution consistent with this Decision.

VI. ORDER

In consideration of the foregoing, it is hereby
ORDERED that the Decision Denying Institution (Paper 9) is vacated;
and

FURTHER ORDERED that the case is remanded to the original panel to reconsider whether inter partes review should be instituted consistent with this Decision, and for any and all future proceedings.

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