

Case No. 2:21-cv-00072-JRG

# **AGIS Software Development, LLC. vs. Uber Technologies, Inc. and Lyft, Inc.**

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Defendants' Claim Construction Arguments

October 21, 2021

# “similarly equipped” Terms

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'728 Patent, Claim 7; '724 Patent, Claims 9, 16;  
'970 Patent, Claims 1, 10

# Exemplary Claims

7. A method of establishing a cellular phone communication network for designated participants, each having a **similarly equipped** cellular phone that includes voice communication, free and operator selected text messages, photograph and video, a CPU, a GPS navigation system and a touch screen display comprising the steps of:

- a) generating one or more symbols on the touch display screen, each representing a different participant that has a cellular phone that includes said voice communication, free and operator selected text messages, photograph and video, a CPU, said GPS system and a touch screen display;
- b) providing and storing in each of the participant cellular phones one or more cellular phone telephone numbers, each cellular phone number of which relates to a different symbol of each of the participants in the communication network;
- c) providing initiating cellular phone calling software in each cellular phone that is activated by touching a symbol on the touch display that automatically initiates a cellular phone call using the stored cellular phone number to the participant represented by the symbol; and
- d) generating a geographical location chart on said display screen to show the geographical location of each of the symbols representing the participants in the communication network by latitude and longitude.

'728 Patent, Claim 7

9. A method for providing a cellular phone communication network for designated participating users, each user having a **similarly equipped** cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

- accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;
- accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;
- accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;
- calling a participating user by touching the symbol on the map display and touching a call switch;
- connecting each of the cell phones to an internet connection;
- exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9

1. A communication system for transmitting, receiving, confirming receipt, and responding to an electronic message, comprising:

- a predetermined network of participants, wherein each participant has a **similarly equipped** PDA/cell phone that includes a CPU and a touch screen display a CPU and memory;

...

'970 Patent, Claim 1

## Claim Constructions

### “similarly equipped” Terms

Terms	AGIS’s Proposed Construction	Defendants’ Proposed Construction
“similarly equipped phone” (’728 Patent, Claim 7, ’724 Patent, Claim 9) “similarly equipped PDA cellular phone” (’724 Patent, Claim 16) “similarly equipped PDA/cell phone” (’970 Patent, Claim 1) “each PDA/cell phone within a predetermined communication network is similarly equipped” (’970 Patent, Claim 11)	Plain and ordinary meaning	Indefinite

### **Issue:**

- Whether the intrinsic record provides objective boundaries for determine whether two cellular phones are “similarly equipped.”



# Are These Two Cellular Phones “Similarly Equipped”?



# Are These Two Cellular Phones “Similarly Equipped”?



## Are These Two Cellular Phones “Similarly Equipped”?



# Are These Two Cellular Phones “Similarly Equipped”?



## The “Similarly Equipped” Claims Are Indefinite

- It is undisputed that there is no established understanding in the art on what it means for two cellular phones to be “similarly equipped.”

“similarly equipped.” Neither is there any established understanding in the art on what it means for two cellular phones (or PDAs) to be “similarly equipped.” As such, a POSITA would be unable to determine the scope of the claims.

Shekhar Decl. ¶ 63, see also McAlexander Decl. ¶¶ 35–38 (not identifying an established meaning of “similarly equipped”)



## AGIS Is Unable to Articulate the Plain and Ordinary Meaning

- AGIS does not ever explain how to determine the scope of “similarly equipped” with any reasonable certainty.

Defendants contend that the intrinsic record of the Asserted Patents “lack[] any guidance that would enable a POSITA to objectively ascertain whether two cellular phones (or PDAs) are ‘similarly equipped.’” To the contrary, the ’728, ’724, and ’970 Patents describe permitting users of cellular phones and PDA cellular phones to “communicate and share information with other users having similarly equipped cellular phones.” Ex. J, McAlexander Decl. ¶¶ 36-38. This is confirmed by AGIS’s expert, Joseph C. McAlexander III, who states that, for example, in the ’728 Patent, “similarly equipped” “pertains to common hardware and software features.” See McAlexander Decl. ¶ 36. Further, the ’728 Patent “describes an exemplary prior art

AGIS’s Opening Br. at 10

## AGIS's Expert Declaration Underscores the Claims' Indefiniteness

- Far from providing any reasonable certainty, AGIS's expert simply replaces one indefinite phrase ("similarly equipped") with another ("common hardware and/or software features").

36. In my opinion, a POSITA would have understand that the '728 Patent describes permitting users of cellular phones to communicate and share information with other users having similarly equipped cellular phones. In the context of the '728 Patent, "similarly equipped" pertains to common hardware and software features. For example, the '728 Patent describes an exemplary

McAlexander Decl. ¶ 36

37. The '724 Patent contains similar disclosures for both similarly equipped cellular phones and PDA cellular phones. '724 Patent at 1:46-48, 2:21-25, 2:48-57, 5:54-58, 8:18-21, 9:31-41, 16:60-65, 17:45-51, Figs. 3-4, Claims 1, 3, 6, 9 and 16. The '970 Patent contains similar disclosures for both phrases "similarly equipped PDA/cell phone" and "each PDA/cell phone within a predetermined communication network is similarly equipped." '970 Patent at 2:7-34, 4:12-59, 5:26-35, 6:13-31, Figs. 1a-1b, Claims 1, 7 and 11. Thus, a POSITA would understand that the above phrases pertain to the disclosed devices having common hardware and/or software features.

McAlexander Decl. ¶ 37

- Neither AGIS nor Mr. McAlexander even attempts to explain *which* or *how many* "hardware and/or software features" need to be "common," nor what level of commonality is required to conclude that any specific "hardware and/or software[]" feature is "similar."



## This Court Decided an Identical Issue in *ACQIS v. Alcatel-Lucent*

### *ACQIS v. Alcatel-Lucent*

#### “similar in design”

- Unclear what aspects of “design” should be compared. *See id.* at \*9
- “ACQIS was unable to articulate any point at which components or circuitry would cease to be ‘similar.’” *Id.* at \*9

### Present Case

#### “similarly equipped”

- Unclear what aspects of “equipped” (*i.e.*, hardware and/or software) should be compared.
- AGIS is unable to articulate any point at which hardware and/or software ceases to be “similar.”

“The term ‘similar in design’ . . . fails to meet the ‘reasonable certainty’ standard and renders those claims indefinite.”

*ACQIS LLC v. Alcatel-Lucent USA Inc.*, No. 6:13-cv-638, 2015 WL 1737853 (E.D. Tex. Apr. 13, 2015)

## Claims Do Not Provide Guidance on Scope of “Similarly Equipped”

7. A method of establishing a cellular phone communication network for designated participants, each having a **similarly equipped** cellular phone that includes voice communication, free and operator selected text messages, photograph and video, a CPU, a GPS navigation system and a touch screen display comprising the steps of:

...

'728 Patent, Claim 7

9. A method for providing a cellular phone communication network for designated participating users, each user having a **similarly equipped** cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

...

'724 Patent, Claim 9

16. A method of providing a cellular phone communication network for designated participating users, each having a **similarly equipped** PDA cellular phone that includes a CPU, a GPS navigational system and a touch screen display comprising:

...

'724 Patent, Claim 16

1. A communication system for transmitting, receiving, confirming receipt, and responding to an electronic message, comprising:

a predetermined network of participants, wherein each participant has a **similarly equipped** PDA/cell phone that includes a CPU and a touch screen display a CPU and memory;

...

'970 Patent, Claim 1

11. The method as in claim 10, wherein each PDA/cell phone within a predetermined communication network is **similarly equipped** and has the forced message alert software application program loaded on it.

'970 Patent, Claim 11

## Claims Do Not Provide Guidance on Scope of “Similarly Equipped”

- That certain asserted claims explicitly require certain features (*e.g.*, a CPU, a GPS navigation system, etc.), does not resolve the ambiguity.
- If “similarly equipped” means that each phone has these specific features, the claim would have the same scope with or without the phrase “similarly equipped,” which contradicts established claim construction law. *See Elekta Instrument S.A. v. O.U.R. Sci. Int’l, Inc.*, 214 F.3d 1302, 1307 (Fed. Cir. 2000) (rejecting construction that would render other claim limitations superfluous)

16. A method of providing a cellular phone communication network for designated participating users, each having a similarly equipped PDA cellular phone that includes a CPU, a GPS navigational system and a touch screen display comprising:

selecting an icon that establishes rapid voice call initiation and communication to the users of the cellular telephone PDA/GPS network system by touching their symbol on the phone’s a touch screen;

transmitting high speed internet rapid transmission of operator selected text messages, photographs, voice recordings and video to other cellular phone users using the touch screen;

accessing a server for establishing high speed internet communications between said cellular phone network users and said server; and

generating at the server networks enabling anonymous voice and data communications so that neither the originator of the phone call or data transmission nor the receiver of the phone call or data transmission need to know the other’s phone number, name or other identifier other than a symbol location on a map.

’724 Patent, Claim 16

## The Specifications Provide No Objective Boundaries

- The '728 Patent specification repeats the error of the claims: reciting that phones are “similarly equipped” but providing no guidance to a POSITA on what that means.

utilize a keypad with the telephone functions. U.S. Patent Application No. 2003/0139150 described a wireless communication operating the PDA in a conventional manner. There is no provision for displaying the location of other similarly equipped systems. There is no provision to cause other similarly equipped cellular phone PDA users to transmit their location. There is no provision for entering other

'728 Patent at 2:64–3:3

Also shown on the display screen **16**, specifically the geographical display **16b**, is a pair of different looking symbols **30** and **34**, a small triangle and a small square, which are not labeled. These symbols **30** and **34** can represent communication net cellular phone users in the displayed geographical area that are part of the overall cellular phone communications net used in this invention wherein each of the users has a similar cellular phone to the one shown in FIG. 1. The latitude and longitude of symbol

'728 Patent at 8:35–43



## The Specifications Provide No Objective Boundaries

- The specifications recite several features without indicating which, if any, must be included to make the phones “similarly equipped.”

Referring now to the drawings and, in particular, FIG. 1, the present invention is shown generally at 10 that includes a small handheld cellular phone/PDA communications system in housing 12 that includes an on/off power switch 19, a microphone 38, and an LCD display 16 that is also a touch screen system. The small area 16a is the Navigation Bar that depicts the telephone, GPS and other status data and the active software. With the touch screen system, the screen symbols are entered through GPS inputs or by the operator using a stylus or finger 14 by manipulatively directing the stylus or finger 14 to literally touch display screen 16. The soft switches displayed on the screen are likewise activated by using a stylus or finger 14 and physically and manipulatively directing the stylus or finger to literally touch display screen 16. The display x, y coordinates of the touched point are known by a CPU in the PDA section of the communication system that can coordinate various information contained in the PDA portion relative to the x, y coordinate position on the screen. Inside housing 12 is contained the conventional cellular phone elements including a modem, a CPU for use with a PDA and associated circuitry connected to a speaker 24 and a microphone 38. A

GPS navigational system that can determine the latitude and longitude of the cellular phone can be internal or external to the housing 12. PDA/cellular phone units such as these are currently on sale and sold as a complete unit (or with an external connected GPS) that can be used for cellular telephone calls and sending cellular SMS and TCP/IP or other messages using the PDA's display and computer. The GPS system is capable of determining the latitude and longitude and through SMS, TCP/IP, WiFi or other digital messaging software, to also transmit this latitude and longitude information to other cellular phones via cellular communications, WiFi or radio. The unit includes a pair of cellular phone hardware activating buttons 20 to turn the cellular phone on and 22 to turn the cellular phone off. Navigation Pad actuator 18 is similar to a joy or force stick in that the actuator 18 manually provides movement commands that can be used by the PDA's software to move a cursor. Switches 26 and 28 are designed to quickly select an operator specified software program. Device 24 is the system's speaker. Device 38 is the system's microphone. Switch 19 at the top left of the unit is the power on and power off switch.

'728 Patent at 7:16–60

## The Specifications Provide No Objective Boundaries

- The '724 Patent specification lacks guidance:

with the telephone functions. U.S. Patent Application No. 2003/0139150 described a wireless communication system operating the PDA in a conventional manner. There is no provision for displaying the location of other similarly equipped systems. There is no provision to cause other similarly equipped cellular phone/PDA users to transmit their locations. There is no provision for entering other entities of

'724 Patent at 2:19–25

symbol indicating the transmitter of the message. The point to call network devices are participants and each one has a similar device with the same software for use as a total participant network. Other situations for calling facilities that are

'724 Patent at 8:18–21

- There are *no* disclosures at all in the '970 Patent even mentioning “similarly equipped.”

## Defendants' Expert Confirms the Claims' Indefiniteness

- Dr. Shekhar explains that at the time of the Asserted Patents:

82. Even in looking at features individually, at the time of the '728 patent, there was a broad range of features like CPUs, displays, and modems. Considering touch screens only, as an example, there was a wide range of features available. For example, some were in color while others were black and white, and some required a stylus to touch the screen while others could be operated by fingers alone. The '728 patent provides no guidance regarding which (and how many), if any, of these features, among other features are required before two devices are considered similar.

Shekhar Decl. ¶ 36

- There is **no guidance** in the intrinsic record—and AGIS points to none—on what commonalities in display technology, for example, would be required for two cellular phones to be “similarly equipped.”



## The “Similarly Equipped” Claims Are Indefinite

When a claim includes a term of degree that lacks an established understanding, “the court must determine whether the patent’s specification supplies some standard for measuring the scope of the [term].”

*Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1351 (Fed. Cir. 2005)

“The claims, when read in light of the specification and the prosecution history, must provide objective boundaries for those of skill in the art.”

*Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014)

**“said database including the generation of one or more symbols associated with a particular participating users”**

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'724 Patent, Claim 9

## Exemplary Claim

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

- accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;
- accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;
- accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;
- calling a participating user by touching the symbol on the map display and touching a call switch;
- connecting each of the cell phones to an internet connection;
- exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9

## Claim Constructions

“said database including the generation of one or more symbols associated with a particular participating users” (’724 Patent, Claim 9)

### AGIS’s Proposed Construction

### Defendants’ Proposed Construction

Plain and ordinary meaning

Indefinite

### ***Issues:***

- Would a POSITA have understood how a “database” can “includ[e] the generation of one or more symbols” as required by the claim.

# A Database Is Like a File Cabinet



## Databases Cannot Perform Functions

- Databases are used for persistent storage and do not perform functions, such as generating symbols:

A POSITA would have understood that databases are used for persistent storage—not the act of *generating* symbols representative of users in the network. *See, e.g.,* DEFS-CC\_000059 (defining

...

96. Databases themselves are not programs, and cannot themselves perform functions.

Shekhar Decl. ¶¶ 95, 96

## Plaintiff Misses the Point

- AGIS does not dispute that databases cannot generate symbols, arguing instead that it would have been within the understanding of a POSITA to **store** pre-generated symbols in a database.

user” with reasonable certainty. This phrase is indefinite because a POSITA would have understood that the claimed database can store generated symbols associated with corresponding users. For example, the ’724 Patent describes storing participants (which are associated with



## The Claim Language Supports Indefiniteness

- AGIS states in its reply: “the claims disclose generation of symbols by both the application program and database.” AGIS Reply Brief at p. 4

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;

accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;

accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;

calling a participating user by touching the symbol on the map display and touching a call switch;

connecting each of the cell phones to an internet connection;

exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9

## Claim Constructions

“said database including the generation of one or more symbols associated with a particular participating users” (’724 Patent, Claim 9)

### AGIS’s Proposed Construction

### Defendants’ Proposed Construction

Plain and ordinary meaning

Indefinite

### ***Issues:***

- Claim 9 is indefinite because a POSITA would not have understood how a “database” can “includ[e] the generation of one or more symbols” as required by the claim.

**“accessing an application program in each cell phone for generating one or more symbols representative of one or more participant users, each of whom have a similarly equipped cellular phone”**

'724 Patent, Claim 9

## Exemplary Claim

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

- accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;
- accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;
- accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;
- calling a participating user by touching the symbol on the map display and touching a call switch;
- connecting each of the cell phones to an internet connection;
- exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9

## Claim Constructions

“accessing an application program in each cell phone for generating one or more symbols representative of one or more participant users, each of whom have a similarly equipped cellular phone” (’724 Patent, Claim 9)

### AGIS’s Proposed Construction

Not subject to § 112, ¶ 6.  
Plain and ordinary meaning.

### Defendants’ Proposed Construction

Indefinite - Governed by § 112, ¶ 6.  
The specification does not disclose a structure/algorithm for providing the “generating one or more symbols representative of one or more participant users, each of who have a similarly equipped cellular phone” function.

### **Issues:**

- Does § 112, ¶ 6 govern?
- Does this term use purely functional language without reciting sufficient structure to perform the function?

## This Term Is Governed by § 112, ¶ 6

- Application program is a nonce word that does not connote sufficient structure:

The *Dyfan* Court found claim terms subject to § 112, ¶ 6 and indefinite while stating that, “[a]lthough the claim recites several components (e.g., ‘broadcast short-range communications unit,’ ‘mobile devices,’ ‘code’ / ‘computer code’ / ‘application,’ and ‘server’), none of these components constitute sufficient structure to perform the recited function”

*Dyfan, LLC v. Target Corp.*, No. 19-179, 2020 WL 8617821, at \*6-7 (W.D. Tex. Nov. 24, 2020)

## The Specification Does Not Disclose an Algorithm

- The portions of the specification identified by AGIS merely repeat the claim language.

Each cellular phone/PDA/GPS user device is identified on the map display of the other participant user phone devices by a display symbol that is generated on each user phone display to indicate each user's identity. Each symbol is placed at the

'724 Patent at 6:44-46

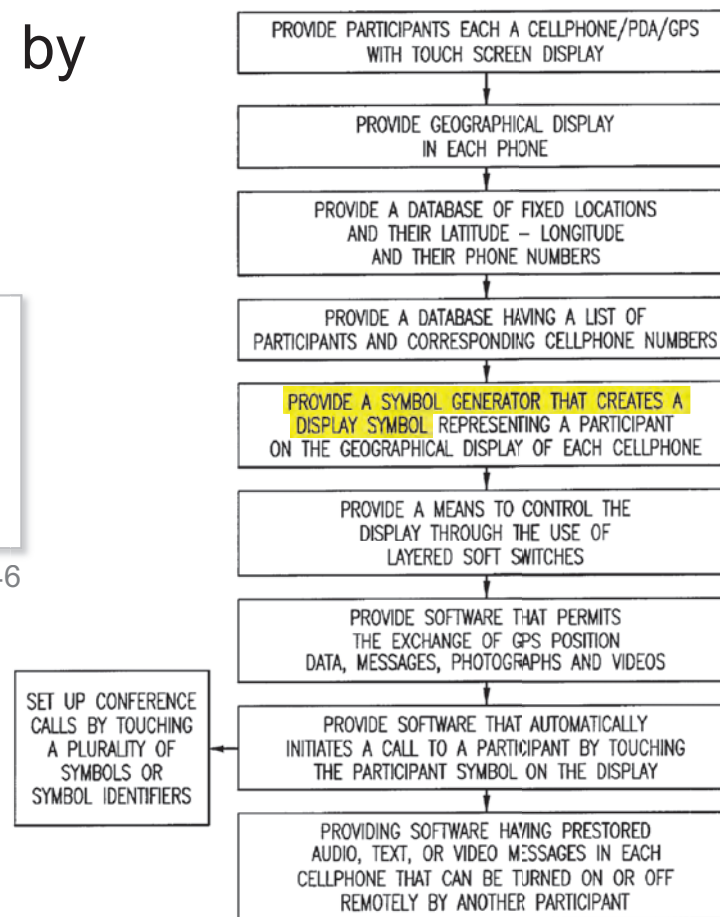


FIG. 3



## Federal Circuit Has Affirmed Indefiniteness for Similar Term In '728

“‘symbol generator’ invokes the application of § 112, ¶ 6 because it fails to describe a sufficient structure and otherwise recites abstract elements for causing actions”

...

“[T]he combination of the terms as used in the context of the relevant claim language suggests that it is simply an abstraction that describes the function being performed (i.e., the generation of symbols).”

*AGIS v. Life360, Inc.*, 830 F.3d 1341, 1347 (Fed. Cir. 2016)

## Comparing the Construed Claim Language to the Term in This Case

3. A communication system to provide a cellular phone network for a group of participants, each of the participants having an individual portable cellular phone that includes voice communication, free and operator selected text messages, photographs and video, a CPU and a GPS navigational system that can accurately determine the location of each cellular phone, each of the cellular phones in the communications net of participants containing:

said CPU and memory;

a touch screen display;

symbol generator in said CPU that can generate symbols that represent each of the participants' cell phones in the communication network on the display screen;

a database that stores the individual telephone numbers related to each of the symbols each of which represents a participant in the communication network;

cellular phone call initiating software in said CPU connected to the telephone number database and the touch screen and the symbols on the touch screen whereby touching an individual symbol will automatically initiate a cellular phone telephone call to the user represented by the symbol that includes said voice communication, free and operator selected text messages, photographs and video; and

said display including databases that display geographical information that includes showing the geographical location of each of the symbols representing participants in the communication network, fixed locations, and entered items of interest.

'728 Patent (Parent to '724), Claim 3

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;

accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;

accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;

calling a participating user by touching the symbol on the map display and touching a call switch;

connecting each of the cell phones to an internet connection;

exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9

## WhatsApp's Statements in IPR Have No Bearing Here

- WhatsApp has settled; Defendants did not join IPR petition.
- Indefiniteness cannot be raised in IPR.

## Claim Constructions

“accessing an application program in each cell phone for generating one or more symbols representative of one or more participant users, each of whom have a similarly equipped cellular phone” (’724 Patent, Claim 9)

### AGIS’s Proposed Construction

Not subject to § 112, ¶ 6.  
Plain and ordinary meaning.

### Defendants’ Proposed Construction

Indefinite - Governed by § 112, ¶ 6.  
The specification does not disclose a structure/algorithm for providing the “generating one or more symbols representative of one or more participant users, each of who have a similarly equipped cellular phone” function.

### ***Issue(s):***

- Section 112, ¶ 6 governs this term.
- Term is indefinite because it uses purely functional language without reciting sufficient structure to perform the function.

**“using the IP address previously”**

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'724 Patent, Claim 9

## Exemplary Claim

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

- accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;
- accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;
- accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;
- calling a participating user by touching the symbol on the map display and touching a call switch;
- connecting each of the cell phones to an internet connection;
- exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9



## Claim Constructions

“using the IP address previously” (’724 Patent, Claim 9)

AGIS’s Proposed Construction

Defendants’ Proposed Construction

Plain and ordinary meaning

Indefinite

### ***Issues:***

- What—if any—meaning should be given an incomplete sentence fragment?

## No Way to Determine Which of Multiple Possible Meanings Is Correct

exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

Previously exchanged between and among each of the network participant users?

Previously transmitted to a server?

Previously \_\_\_\_\_?

'724 Patent, Claim 9

## AGIS Points to “exchanging IP addresses”

- This plural term does not provide antecedent basis for “**the** IP address previously.”

### AGIS Contends:

“The term ‘using the IP address previously’ refers to the ‘exchang[ed] IP addresses’ referred to in the beginning of the same limitation.”

AGIS Reply Br. at 5

### Claim Language:

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

**exchanging IP addresses** using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant’s IP address to a server which then transmits data to other network participants using the IP address previously.

’724 Patent, Claim 9

## The IP Address Is Used to Transmit Data to Multiple Participants

exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;

accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;

accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;

calling a participating user by touching the symbol on the map display and touching a call switch;

connecting each of the cell phones to an internet connection;

exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9

## No Way to Determine Which of Multiple Possible Meanings Is Correct

Courts have held claims indefinite because “[w]ith three different IP addresses to choose from, a POSITA faced with the ‘said different IP Address’ limitation is left to wonder which of the different IP addresses is ‘said’ different one”

*See, e.g., Bushnell Hawthorne, LLC v. Cisco Systems, Inc.*, 813 F. App'x 522, 526---527( Fed. Cir. May 14, 2020)



## The Specification and File History Do Not Shed Light on the Meaning

Equally important, the operator of cellular phone “one” can call the police station or any other specific geographical facility displayed on the map, including: (buildings, locations of people, vehicles, facilities, restaurants, etc., (whose cellular phone numbers and, if available, E-mail addresses, IP addresses and their URLs were previously stored in the database) by touching a specific facility location on the map display using the stylus 14 and then touching the cellular phone call switch. As an example, the operator can touch and

'724 Patent at 6:24–32



## The Examiner Added “previously” Without Explanation

exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications ~~can~~ between participants ~~can then be~~ is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants **using the IP address previously** ~~which they have also sent to the server.~~

Ex. 2 at Page 12 (Sept. 21, 2009 Notice of Allowance, '724 Patent Prosecution, App. No. 11/308648)

## Claim Constructions

“using the IP address previously” (’724 Patent, Claim 9)

AGIS’s Proposed Construction

Defendants’ Proposed Construction

Plain and ordinary meaning

Indefinite

### ***Issues:***

- The incomplete sentence fragment is indefinite because it has no definite meaning to a POSITA.

**“map display”**

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'724 Patent, Claim 9

## Exemplary Claim

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

- accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;
- accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;
- accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;
- calling a participating user by touching the symbol on the map display and touching a call switch;
- connecting each of the cell phones to an internet connection;
- exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9

## Claim Constructions

“the map display” (’724 Patent, Claim 9)

### AGIS’s Proposed Construction

Plain and ordinary meaning.

### Defendants’ Proposed Construction

“portion of the display that shows the map”

### ***Issue:***

- Whether the “map display” can include a portion of the display that does **not** show the map.

# The Claim Language Supports Defendants' Construction

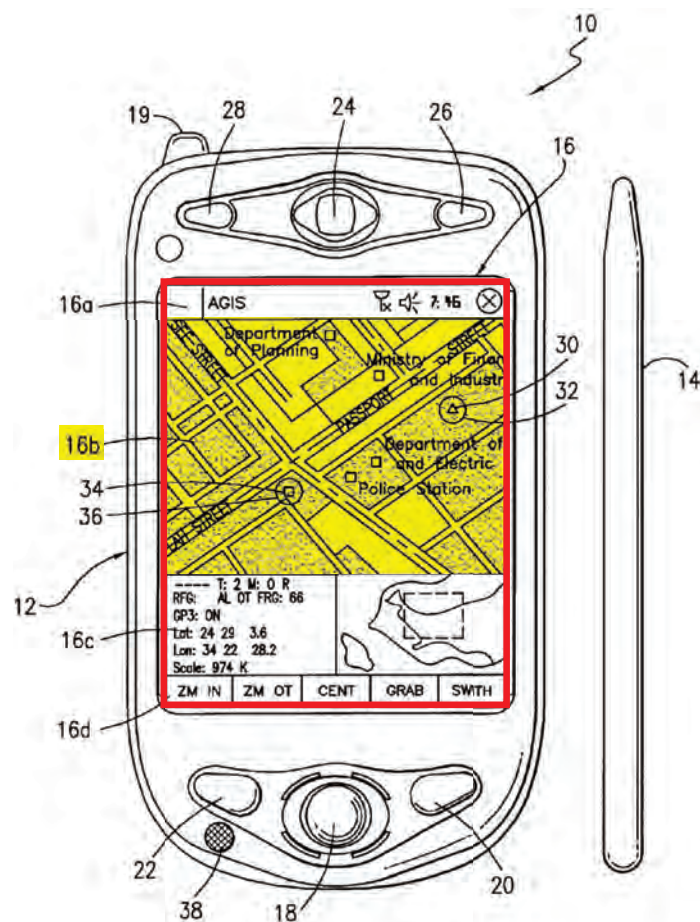


FIG. 1

9. A method for providing a cellular phone communication network for designated participating users, each user having a similarly equipped cellular phone that includes a CPU, GPS navigational system, an interact message transmitter and receiver and a touch screen display comprising:

accessing a database in each cell phone that includes a geographical map of a predetermined area for user viewing on the touch screen display;

accessing an application program in each cell phone for generating one or more symbols representative of one or more participating users, each of whom have a similarly equipped cellular phone;

accessing a database in each cell phone that includes cellular telephone numbers of each of the participating users having similarly equipped cellular phones, said database including the generation of one or more symbols associated with a particular participating user;

calling a participating user by touching the symbol on the map display and touching a call switch;

connecting each of the cell phones to an internet connection;

exchanging IP addresses using SMS or other digital message format between and among each of the network participant users so that communications between participants is established via IP or transmission of a network participant's IP address to a server which then transmits data to other network participants using the IP address previously.

'724 Patent, Claim 9



# The Specification Supports Defendants' Construction

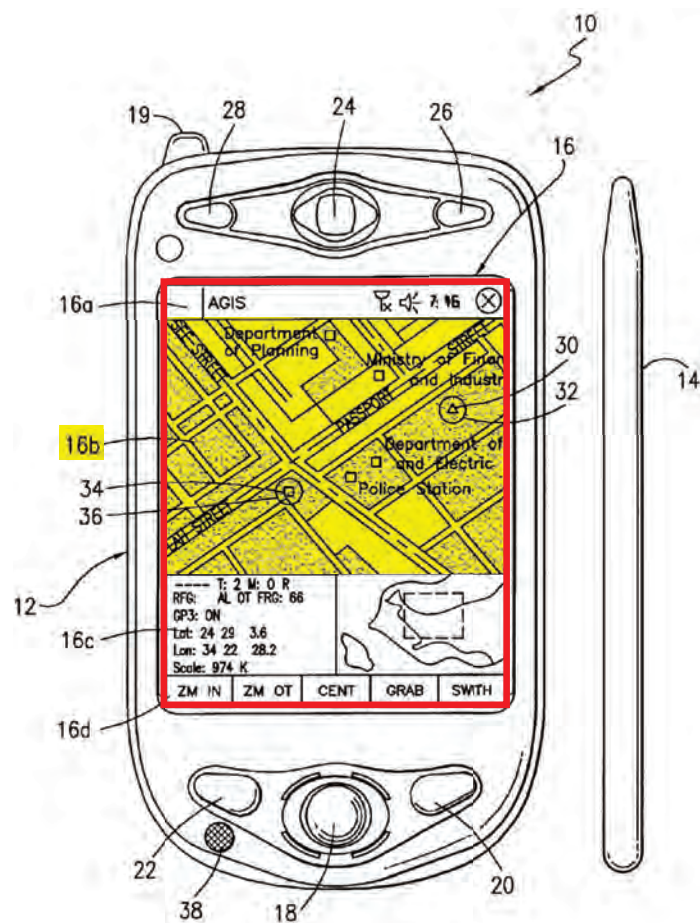


FIG. 1

Also shown on the display screen 16, specifically the geographical display 16b, is a pair of different looking symbols 30 and 34, a small triangle and a small square, which are not labeled. These symbols 30 and 34 can represent communication net participants having cellular phones in the displayed geographical area that are part of the overall cellular phone communications net having the same device 10 used in this invention. The latitude and longitude of symbol 30 is associ-

'724 Patent at 5:51-58

**“free and operator selected  
text messages”**

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'728 Patent, Claim 7

## Exemplary Claim

7. A method of establishing a cellular phone communication network for designated participants, each having a similarly equipped cellular phone that includes voice communication, free and operator selected text messages, photograph and video, a CPU, a GPS navigation system and a touch screen display comprising the steps of:

- a) generating one or more symbols on the touch display screen, each representing a different participant that has a cellular phone that includes said voice communication, free and operator selected text messages, photograph and video, a CPU, said GPS system and a touch screen display;
- b) providing and storing in each of the participant cellular phones one or more cellular phone telephone numbers, each cellular phone number of which relates to a different symbol of each of the participants in the communication network;
- c) providing initiating cellular phone calling software in each cellular phone that is activated by touching a symbol on the touch display that automatically initiates a cellular phone call using the stored cellular phone number to the participant represented by the symbol; and
- d) generating a geographical location chart on said display screen to show the geographical location of each of the symbols representing the participants in the communication network by latitude and longitude.

'728 Patent, Claim 7

## Claim Constructions

“free and operator selected text messages” (’728 Patent, Claim 7)

AGIS’s Proposed Construction

Defendants’ Proposed Construction

“messages comprising free text”

Indefinite

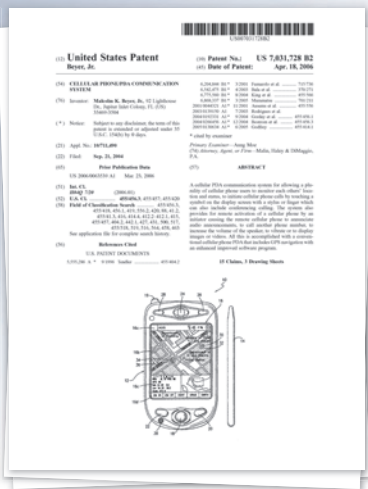
***Issue(s):***

- Whether “free and operator selected text messages” is an indefinite term.





# The Specification Provides No Guidance



'728 Patent

Sending a **text message** to a location, business, home or facility that appears on a PDA map display to another cellular phone can also be a cumbersome process as the PDA operator has to find the phone number on the map display, memorize the phone number, then go to a different display to enter a text message, enter the text message, send the text message and then shift back to the map display program.

'728 Patent, 1:61-67

**switches**. By using these soft switches, and hard switches that are part of the cellular phone, the operator can activate different maps, change map scales, select which fixed entities are desired to be displayed, display the information concerning the symbol the operator has touched, initiate phone voice calls, send **messages (text, photographs and videos)**, enter symbols and information representative of other entities, view the locations and statuses of the other communications net participants, establish conference calls, pre-establish conference sub-nets that, when activated, cause all the phone numbers that are specified to be conferenced for voice, **text** and photograph and video communications, and transmit messages to remote phones which cause the remote phones to make calls, verbal announcements, vibrate, increase sound levels and other functions. To

'728 Patent, 4:25-39

action. This method of conference calling can be also used to send **text messages, photographs and videos.**

'728 Patent, 5:53-54

Each user is able to transmit to all the other users: **text messages, photographs and videos.** Using the present inven-

'728 Patent, 6:20-21

In addition the operator of cellular phone one can address **text messages, photographs and video** for transmission to one or more net participants by either touching their symbols and selecting the appropriate soft switch or selecting the appropriate call net.

'728 Patent, 11:38-42



# “Free” Text Messages?



**The rising cost of texting**

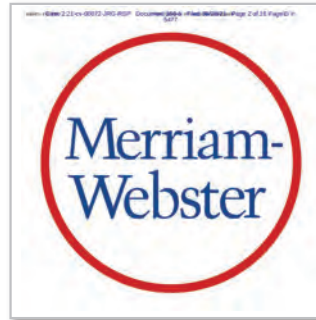
Text message prices have risen as quickly as gas prices at the pump over the past two years. What gives?

Marguerite Reardon July 2, 2008 3:59:47 PM

If you thought gas prices were rising too quickly, check out what's been happening to text messaging.

Since 2005, rates to send and receive text messages on all four major carrier networks have doubled from 10 cents to 20 cents per message. This percentage of increase is on par with similar price hikes at the gas pump as crude oil prices skyrocket. In 2005, Americans paid on average about \$2.27 per gallon for gas compared with more than \$4 a gallon today.

<https://www.cnet.com/news/the-rising-cost-of-texting/>



## Definition of free

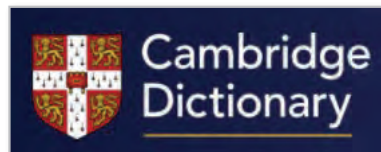
(Entry 1 of 3)

1 : **not costing or charging anything** a free school a free ticket

\*\*\*

- 8a : not obstructed, restricted, or impeded free to leave
- b : not being used or occupied waved with his free hand
- c : not hampered or restricted in its normal operation

Defendants' Exh. 4 (Dkt. 156-5)



## free

*adjective, adverb*

UK /fri:/ US /fri:/

**free adjective, adverb (NOT LIMITED)**

B2

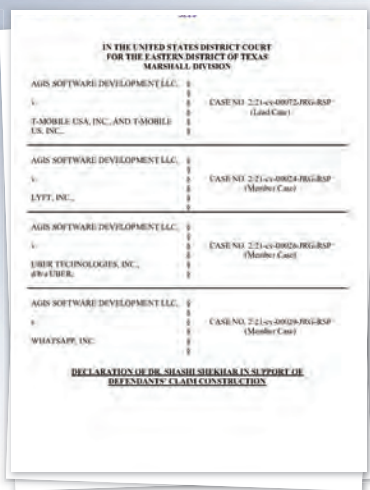
**not limited or controlled:**

\*\*\*

**costing nothing, or not needing to be paid for:**

Defendants' Exh. 5 (Dkt. 156-6)

## Defendants' Expert Identifies the Alternative Definitions of "Free"

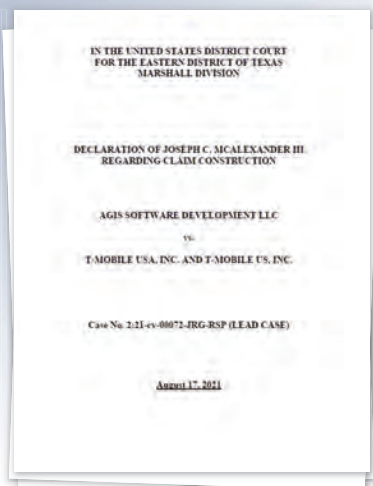


Shekhar Decl.

“free ... text messages” or “operator selected text messages.” To a POSITA, the term “free” is indefinite in that it is susceptible to at least two different meanings, and the scope of the claim will be significantly different depending on which meaning is used. A POSITA is left to guess as to whether the term “free” refers to a user’s cost of sending or receiving a text message (that is, that the user may send or receive the text message free of charge), or that the term “free” refers to the format of the text (that is, that the text is unstructured). Neither one of the meanings is discussed in the specification, and even after reading the entirety of the ’728 Patent, a POSITA is left to guess as to which of these two distinctly different meanings are to be applied to this claim term.

Defendants' Expert at ¶ 45 (Dkt. 156-2)

## AGIS's Expert Ignores Alternative Definitions of "Free"

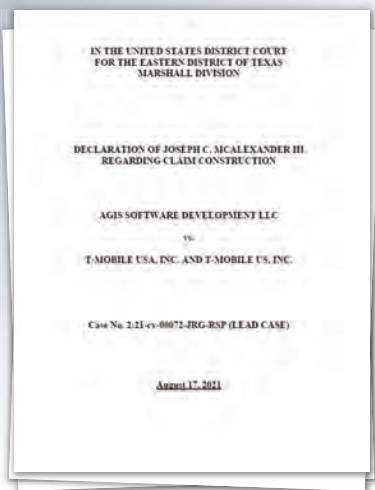


McAlexander Decl.

42, Fig. 3, claims 1, 3, 7, 10, 12. A POSITA would have understood that there are different types of data or text and methods for inputting text messages. For example, a POSITA would have understood that text can be one of various types of characters for text messages, *e.g.*, alphabetical, numeric, or alphanumeric characters. In another example, a POSITA would have understood that text can be free text (also known as free-form text) as opposed to structured text. The term free text is commonly referred to simply as “text” and refers to the unstructured nature of text used in free form for words and sentences. A POSITA would understand that free text can be either

AGIS's Expert at ¶ 32 (Dkt. 145-11)

## AGIS's Expert Conflates "Operator Text" With "Free Text"



McAlexander Decl.

human-generated or machine-generated. In the context of the '728 patent, the disclosure provides support for both free text messages and pre-stored messages. '728 Patent at 4:25-43, 5:21-54, 6:20-28, 6:56-60, 11:38-42, Fig. 3, claims 1, 3, 7, 10, 12. Claim 7 requires that the phone be configured to send messages comprising free text, not just pre-stored messages. Further, in claim 7, the "operator selected" portion of the phrase "free and operator selected text messages" means that the free text is of the kind input by an operator, i.e., via user input.

AGIS's Expert at ¶ 32 (Dkt. 145-11)

These passages do not refer to free or pre-stored messages

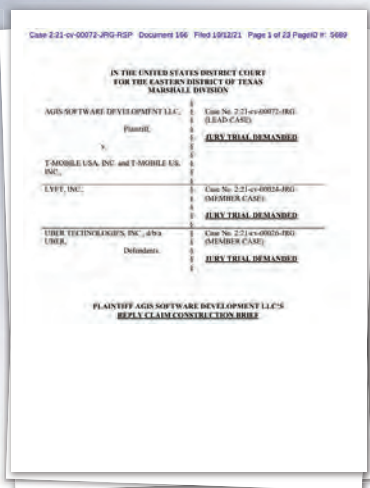
What the difference between:

- Free text?
- Pre-stored text?
- Text input by an operator?

Who is the operator?



# AGIS's Arguments Are Circular



AGIS's Reply Br.

Based on these disclosures a POSITA would understand “there are different types of data or text and methods for inputting text messages.” “text can be free text (also known as free-form text) as opposed to structured text,” and “operator selected” means the free text is “of the kind input by an operator, i.e., via user input.” *Id.* at 18-19. Accordingly, “free and operator selected text messages” should be construed as “messages comprising free text via user input.”

AGIS's Reply Br. at 7 (Dkt. 166)

AGIS: “messages comprising free text”

**“providing initiating cellular phone calling software in each cellular phone that is activated by touching a symbol on the touch display that automatically initiates a cellular phone call using the stored cellular phone number to the participant represented by the symbol”**

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'728 Patent, Claim 7



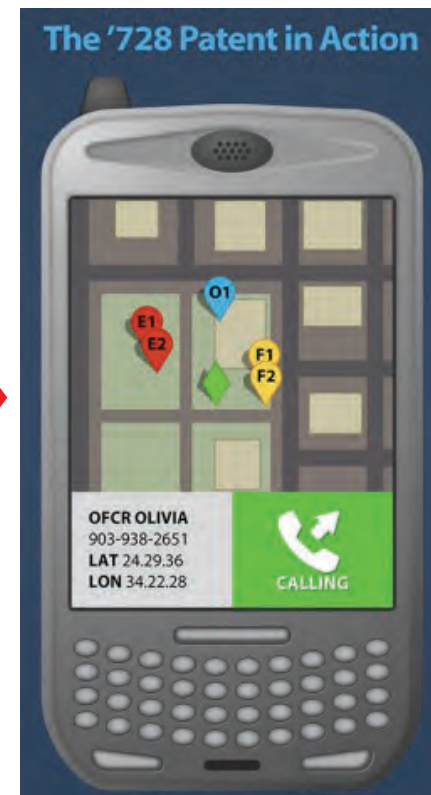
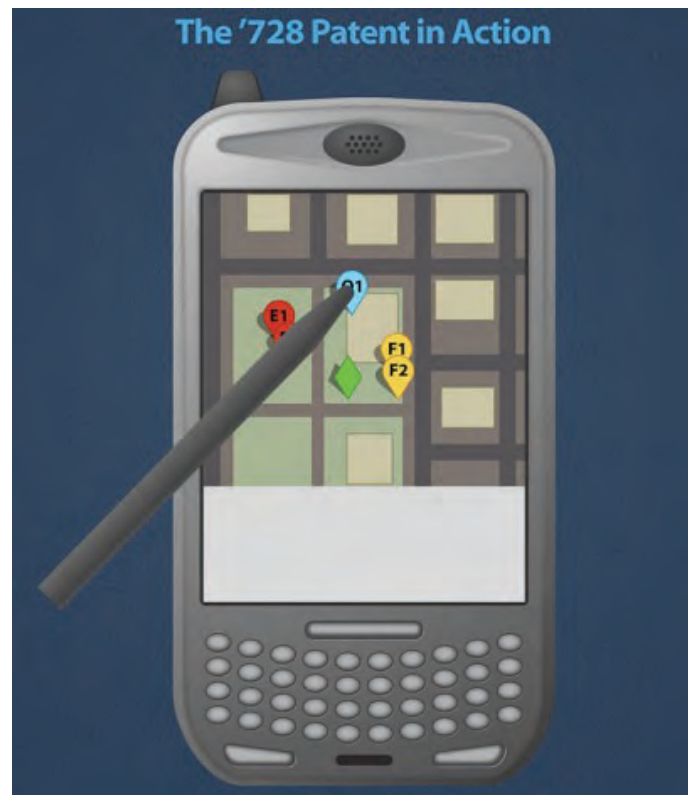
## Asserted Claim

7. A method of establishing a cellular phone communication network for designated participants, each having a similarly equipped cellular phone that includes voice communication, free and operator selected text messages, photograph and video, a CPU, a GPS navigation system and a touch screen display comprising the steps of:

- a) generating one or more symbols on the touch display screen, each representing a different participant that has a cellular phone that includes said voice communication, free and operator selected text messages, photograph and video, a CPU, said GPS system and a touch screen display;
- b) providing and storing in each of the participant cellular phones one or more cellular phone telephone numbers, each cellular phone number of which relates to a different symbol of each of the participants in the communication network;
- c) providing initiating cellular phone calling software in each cellular phone that is activated by touching a symbol on the touch display that automatically initiates a cellular phone call using the stored cellular phone number to the participant represented by the symbol; and
- d) generating a geographical location chart on said display screen to show the geographical location of each of the symbols representing the participants in the communication network by latitude and longitude.

'728 Patent, Claim 7

# One-Touch Calling



## Claim Constructions

“providing initiating cellular phone calling software in each cellular phone that is activated by touching a symbol on the touch display that automatically initiates a cellular phone call using the stored cellular phone number to the participant represented by the symbol” ('728 Patent, Claim 7)

### AGIS's Proposed Construction

Plain and ordinary meaning.

### Defendants' Proposed Construction

providing software in each cellular phone that automatically initiates a cellular phone call by touching **the symbol generated on the touch display that represents the location of a participant,** using the stored cellular phone number of the network participant represented by the touched symbol”

### ***Issue:***

- Whether “touching a symbol on the touch display” means touching a symbol that represents the participant on the map to be called.

## The Claim Language Supports Defendants' Construction

The claim recites “generating one or more symbols on the touch display,” where:

- a) each symbol represents a different participant,
- b) each symbol relates to a cellular phone number of each participant,
- d) each symbol appears on a geographical location chart on the display to show the location of each participant, and
- c) touching a symbol on the display automatically initiates a call to the cellular phone number of the participant represented by the symbol.

***AGIS never addresses the claim language***

7. A method of establishing a cellular phone communication network for designated participants, each having a similarly equipped cellular phone that includes voice communication, free and operator selected text messages, photograph and video, a CPU, a GPS navigation system and a touch screen display comprising the steps of:

- a) generating one or more symbols on the touch display screen, each representing a different participant that has a cellular phone that includes said voice communication, free and operator selected text messages, photograph and video, a CPU, said GPS system and a touch screen display;
- b) providing and storing in each of the participant cellular phones one or more cellular phone telephone numbers, each cellular phone number of which relates to a different symbol of each of the participants in the communication network;
- c) providing initiating cellular phone calling software in each cellular phone that is activated by touching a symbol on the touch display that automatically initiates a cellular phone call using the stored cellular phone number to the participant represented by the symbol; and
- d) generating a geographical location chart on said display screen to show the geographical location of each of the symbols representing the participants in the communication network by latitude and longitude.

'728 Patent, Claim 7



## The Claim Language Supports Defendants' Construction

- AGIS ignores the antecedent bases for the symbol terms.
- If “the symbol” or “the symbols” are to be given any meaning, they must refer to those terms that they derive their antecedent basis from.
- The “symbol” touched to initiate the cellular phone call represents the symbol at the location of the participant.

7. A method of establishing a cellular phone communication network for designated participants, each having a similarly equipped cellular phone that includes voice communication, free and operator selected text messages, photograph and video, a CPU, a GPS navigation system and a touch screen display comprising the steps of:

- a) generating one or more symbols on the touch display screen, each representing a different participant that has a cellular phone that includes said voice communication, free and operator selected text messages, photograph and video, a CPU, said GPS system and a touch screen display;
- b) providing and storing in each of the participant cellular phones one or more cellular phone telephone numbers, each cellular phone number of which relates to a different symbol of each of the participants in the communication network;
- c) providing initiating cellular phone calling software in each cellular phone that is activated by touching a symbol on the touch display that automatically initiates a cellular phone call using the stored cellular phone number to the participant represented by the symbol; and
- d) generating a geographical location chart on said display screen to show the geographical location of each of the symbols representing the participants in the communication network by latitude and longitude.

'728 Patent, Claim 7

# Touching the Symbol to Call

Also shown on the display screen 16, specifically the geographical display 16b, is a pair of different looking symbols 30 and 34, a small triangle and a small square, which are not labeled. These symbols 30 and 34 can represent communication net cellular phone users in the displayed geographical area that are part of the overall cellular phone communications net used in this invention wherein each of the users has a similar cellular phone to the one shown in FIG. 1. The latitude and longitude of symbol 30 is associated within a database along with a specific phone number. The screen display 16b, which is a touch

'728 Patent at 8:35-45

entity's symbol as being the one closest to that point. In order to initiate a telephone call to the cellular phone user represented by symbol (triangle) 30 at a specific GPS provided latitude and longitude which has been sent to the cellular phone shown in FIG. 1, the operator or initiator of what we call cellular phone one in FIG. 1 can take the stylus or finger 14, touch the triangle 30 with the stylus or finger, and then touch a "call" software switch from a matrix of displayed switches that will overlay the display area 16c and immediately the cellular phone one will initiate a cellular phone telephone call to the cellular phone user at the location shown that represents symbol 30. A second cellular

'728 Patent at 8:50-61

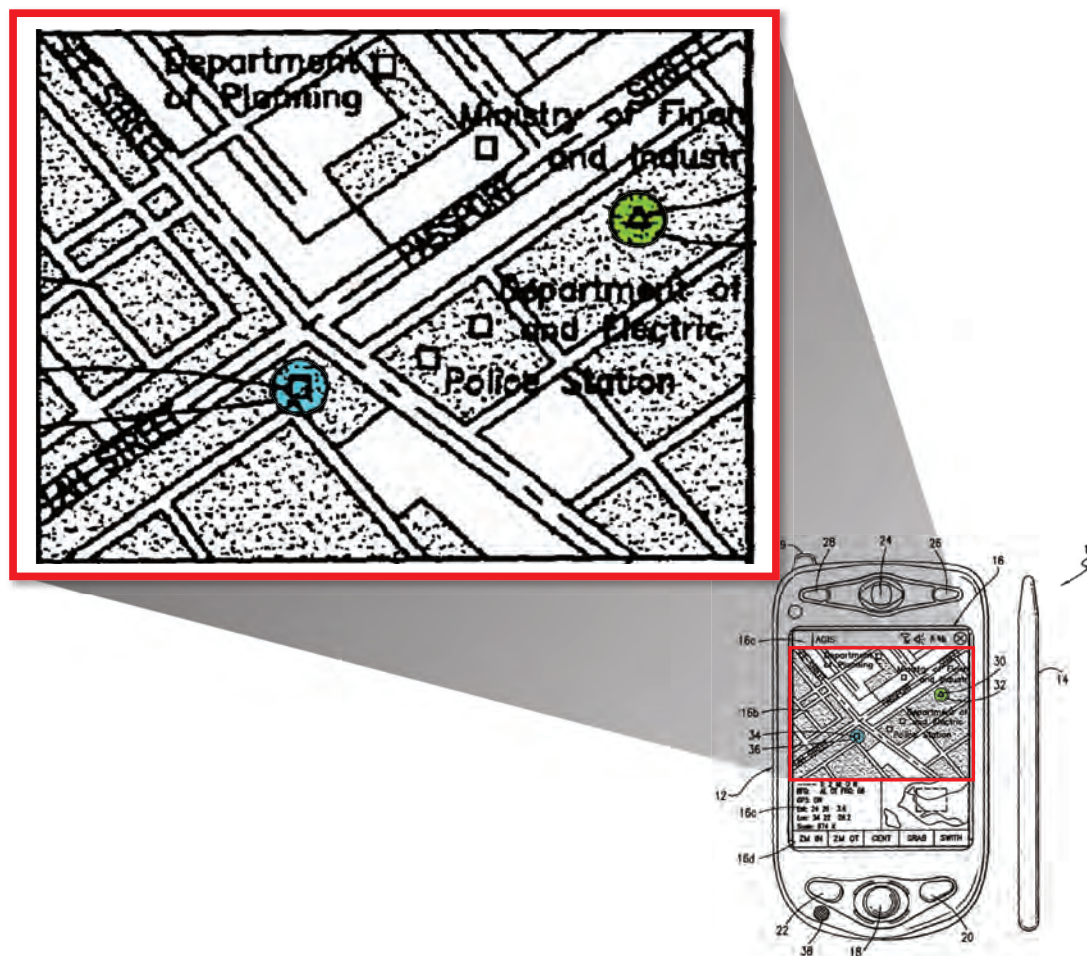


FIG. 1

'728 Patent at Fig. 1



# The Specification Teaches Touching the Symbol to Call

## DESCRIPTION OF RELATED ART

GPS cellular phone. Another implementation permits the cellular phone users to also view the location of other GPS equipped units. A drawback of the current implementation is that these systems are either all on or all off. There is no way to selectively activate participants or to stop the participants from participating in the network. Another drawback of the use of the current combined cellular phone PDA technology is that when using the PDA to display a map (that also may depict georeferenced businesses, homes and other facilities' locations and phone numbers), and the operator wants to place a call, the cellular phone/PDA operator is required to obtain the phone number by touching the display screen at the correct location of that entity on the map to obtain the phone number, then the operator has to memorize the phone number, then go to a different display to enter the phone number, to make the call and then, if desired, go back to the map display. Needless to say, this is a cumbersome process.

'728 Patent at 1:44–60

## SUMMARY OF THE INVENTION

Each cellular phone/PDA/GPS system is identified on the display of the other phone systems by a symbol that is generated to indicate its identity. The symbol is placed at the correct geographical location and is correlated with the map on the display. Each cellular phone/PDA/GPS System may

'728 Patent at 3:44–48

Each cellular phone/PDA/GPS has the communications hardware along with the circuitry in software to initiate a voice telephone call or transmit data messages, photographs, or videos by touching the screen with a stylus or finger at the symbol location displayed on the screen of the desired phone to be called and then selecting the “call” software switch on the display touch screen. The software will then cause the

'728 Patent at 5:9–15

And yet another object of this invention is to provide for initiating a cellular phone telephone call to another phone by touching the other phone's symbol on the screen of the cellular phone, which automatically activates the telephone call.

'728 Patent at 6:47–51

# The Specification Teaches Touching the Symbol to Call

Referring now to FIG. 3, a flow chart is shown of the activities provided by the present invention and the methodology. First, we provide a cellular phone that includes

'728 Patent at 10:32-34

In summary, the present invention provides for expeditious data exchange and cellular phone calls to one or more users by merely touching the display screen location of a remote cellular phone user's symbol to initiate the call.

'728 Patent at 11:56-59

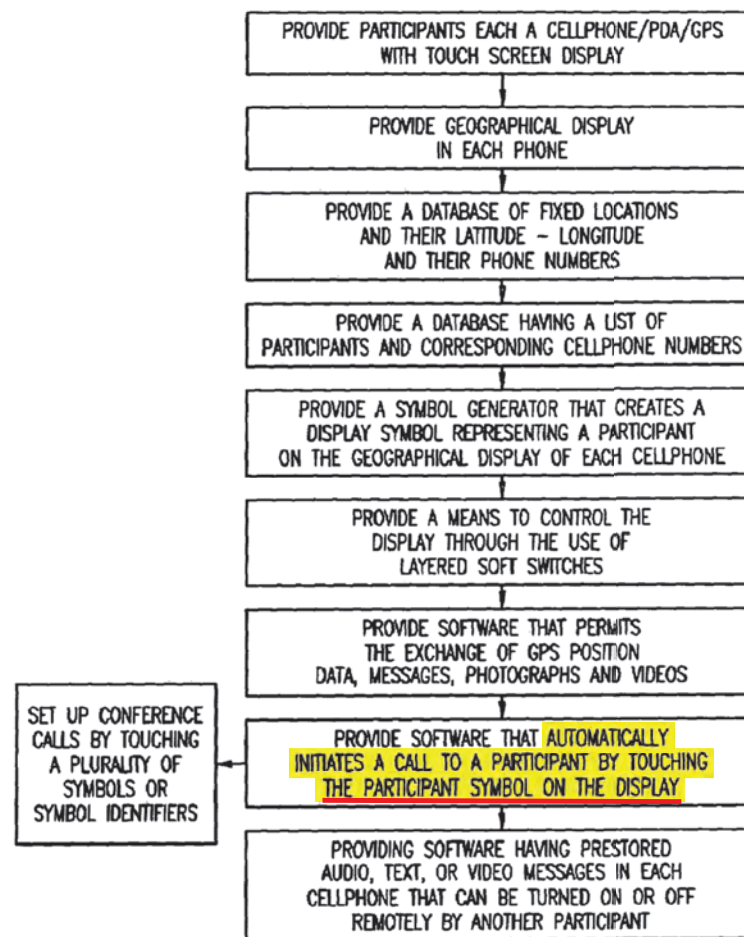


FIG. 3

“When a patent thus describes the features of the ‘present invention’ as a whole, this description limits the scope of the invention.”

*Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1308 (Fed. Cir. 2007)

## AGIS's Arguments Are Divorced from the '728 Patent

- Defendants do *not* attempt to limit the claim to a preferred embodiment.
  - Defendants construe the claim based on the patent's description of the alleged invention.
- Defendants do *not* repeat or render superfluous other phrases within the limitation.
  - Defendants construe the claim to give meaning to all phrases and limitations within the whole claim.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION	
AGIS SOFTWARE DEVELOPMENT LLC,	§ Case No. 2:21-cv-00072-JRG (LEAD CASE)
Plaintiff,	§ <b><u>JURY TRIAL DEMANDED</u></b>
v.	§
T-MOBILE USA, INC. and T-MOBILE US, INC.,	§
LYFT, INC.,	§ Case No. 2:21-cv-00024-JRG (MEMBER CASE)
UBER TECHNOLOGIES, INC., d/b/a UBER,	§ Case No. 2:21-cv-00026-JRG (MEMBER CASE)
WHATSAPP, INC.,	§ Case No. 2:21-cv-00029-JRG (MEMBER CASE)
Defendants.	§ <b><u>JURY TRIAL DEMANDED</u></b>
PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S <b><u>OPENING CLAIM CONSTRUCTION BRIEF</u></b>	
Defendants.	§ <b><u>JURY TRIAL DEMANDED</u></b>
PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S <b><u>REPLY CLAIM CONSTRUCTION BRIEF</u></b>	

**“a forced message alert software application / a forced message alert software application program”**

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'970 Patent, Claims 1, 2, 10, 11, 12



## Exemplary Claim

1. A communication system for transmitting, receiving, confirming receipt, and responding to an electronic message, comprising:

a predetermined network of participants, wherein each participant has a similarly equipped PDA/cell phone that includes a CPU and a touch screen display a CPU and memory;

a data transmission means that facilitates the transmission of electronic files between said PDA/cell phones in different locations;

a sender PDA/cell phone and at least one recipient PDA/cell phone for each electronic message;

a forced message alert software application program including a list of required possible responses to be selected by a participant recipient of a forced message response loaded on each participating PDA/cell phone;

...

'970 Patent, Claim 1