

# EXHIBIT D

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE WILLIAM B. SHUBB, JUDGE

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ICONFIND, INC.,

Plaintiff,

vs.

No. Civ. S-09-00109

YAHOO, INC.,

Defendant.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

DEFENDANT'S MOTION FOR CLAIM CONSTRUCTION

MONDAY, DECEMBER 7, 2009

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Reported by: KATHY L. SWINHART, CSR #10150

1 APPEARANCES

2 For the Plaintiff:

3 NIRO, SCAVONE, HALLER & NIRO  
4 181 West Madison Street, Suite 4600  
5 Chicago, Illinois 60602-4635  
6 BY: BRIAN E. HAAN

7 and

8 WILKE, FLEURY, HOFFELT, GOULD & BIRNEY  
9 400 Capitol Mall, 22nd Floor  
10 Sacramento, California 95814  
11 BY: THOMAS G. REDMON

12 For the Defendant:

13 QUINN EMANUEL  
14 50 California Street, 22nd Floor  
15 San Francisco, California 94111  
16 BY: JENNIFER A. KASH  
17 and KEVIN A. SMITH  
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1 SACRAMENTO, CALIFORNIA

2 MONDAY, DECEMBER 7, 2009, 2:12 P.M.

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4 THE CLERK: Item 7, civil S-09-109, IconFind,  
5 Incorporated versus Yahoo, Incorporated.

6 Counsel, please state your appearances.

7 MS. KASH: Good afternoon, Your Honor. Jennifer Kash  
8 of Quinn Emanuel on behalf of defendant Yahoo.

9 MR. HAAN: Good afternoon, Your Honor. Brian Haan for  
10 plaintiff IconFind, Incorporated. Here with me in the  
11 courtroom is our local counsel, Thomas Redmon.

12 MS. KASH: Your Honor, Kevin Smith of Quinn Emanuel is  
13 also with me.

14 THE COURT: All right. You can either have a seat  
15 while we discuss this preliminarily or you can stand there,  
16 either one.

17 I wanted to find out how you intended to proceed  
18 because I've gotten some what looks like visual aids from you,  
19 and I wanted to find out how you wanted to use them and how  
20 you wanted to present your argument.

21 MR. HAAN: Well, Your Honor, for plaintiff, we just  
22 offered this presentation as kind of a visual. There's no new  
23 material in plaintiff's presentation other than what was  
24 presented in the briefing. But given the complicated nature  
25 of the claims and some of the constructions, I thought it

1 would be easier to have a visual to look at.

2 THE COURT: Okay. That's fine. Everybody has a copy  
3 of it, I assume.

4 So who wanted to proceed first?

5 MR. HAAN: We're happy to proceed first or --

6 MS. KASH: It's up to you, Your Honor. We weren't  
7 sure how much time you had available or how you wanted to  
8 conduct this.

9 THE COURT: Well, I have a fair amount of time  
10 actually this afternoon. There's one other matter after  
11 yours, which are some motions in limine, so I think I have an  
12 hour.

13 MS. KASH: Great.

14 MR. HAAN: Okay.

15 MS. KASH: So maybe perhaps since you are the  
16 plaintiff, you can go first, and then we'll respond and go  
17 from there. If you have any questions, then we can answer  
18 them as they come up.

19 THE COURT: Okay.

20 MR. HAAN: Sure.

21 THE COURT: Why don't you -- do you have an extra copy  
22 of this? Oh, the law clerks have one. They can read along.  
23 Okay.

24 MR. HAAN: One suggestion, Your Honor. There's five  
25 claims that are at issue as well as indefiniteness, and we can

1 address each term and switch off or I could go ahead and  
2 proceed through our whole --

3 THE COURT: How are your exhibits organized, one at a  
4 time or --

5 MS. KASH: I think there's actually three logical  
6 distinctions and there's two terms that go together, and the  
7 indefiniteness argument flows from that, and then there's two  
8 separate terms that go together and then there's one final  
9 term. I think perhaps it would be less confusing for the  
10 Court if we did those together.

11 Otherwise you may forget some of the arguments that  
12 happened a little bit earlier for the terms --

13 THE COURT: All right. I hope that you start at some  
14 point with the description of what your patent covers and --

15 MR. HAAN: Sure.

16 THE COURT: -- what some of the embodiments of this  
17 are.

18 MR. HAAN: Yes.

19 THE COURT: Okay.

20 MR. HAAN: I can do that, sure. And I guess I'll  
21 represent we're happy to proceed as she suggested primarily  
22 with the three specific areas.

23 THE COURT: All right. Go ahead.

24 MR. HAAN: So beginning, Your Honor, with page 2 of  
25 plaintiff's presentation, as you're aware this is an action

1 for infringement of the United States patent 7.181.459. This  
2 patent is disclosed as a method of coding, categorizing and  
3 retrieving network pages and sites. There are two named  
4 inventors. Mr. Lee Grant has spent his career in  
5 telecommunications. Ms. Susan Capizzi has spent her career as  
6 a reference librarian. So they combined their skills together  
7 and saw a need to organize information on the Internet.

8 Turning to page 3, the inventions claimed in the '459  
9 patent generally describe methods for categorizing network  
10 pages.

11 The problem in the context of the Internet was that  
12 there was a lack of a standard categorization system for the  
13 information that's contained on web pages. So the inventors  
14 solved this problem by creating this method for categorizing  
15 network pages based on the material that was on the page. And  
16 these categories include, among other things, whether the page  
17 contains commercial information, non-commercial information  
18 and the copyright status of the material on the page.

19 Turning to page 4, the Federal Circuit has emphasized  
20 that rulings on claim construction should be made with  
21 knowledge of the accused product. And with that knowledge,  
22 then the court can understand exactly why the parties are  
23 discussing certain terms or disputing certain terms.

24 In this case, on page 5, Yahoo's Flickr.com website is  
25 the accused product. IconFind is currently asserting 14 total

1 claims against the website. Flickr is an online photo  
2 management and sharing application, and it enables its users  
3 to upload, manage and share their photographs with other  
4 people online.

5 Yahoo and Flickr provide a list of categories for  
6 these photos including commercial and non-commercial use and a  
7 variety of copyright settings. Then Flickr in turn assigns to  
8 network pages one or more of these categories based on the  
9 user's selection for their content. The resulting web pages  
10 then that are created contain categorization labels that  
11 represent the one or more categories that the pages have been  
12 assigned to.

13 THE COURT: Do their labels appear on the page or is  
14 it buried away?

15 MR. HAAN: Both, Your Honor.

16 THE COURT: What do you mean both?

17 MR. HAAN: There is indication on the page itself as  
18 well as in the URL in some instances and kind of behind the  
19 scenes, if you will, in the -- in the source code for the web  
20 page.

21 THE COURT: Okay. Why is it three places?

22 MR. HAAN: Well, what's visual on the page would allow  
23 a user to see exactly what the page has been assigned to. And  
24 then the label that's in source code allows Yahoo or search  
25 engines, outside search engines to find those pages based --



1 THE COURT: But if it's on the page, the search  
2 engines would find it anyway.

3 MR. HAAN: If the search engines can crawl on the page  
4 and find text, that's correct.

5 THE COURT: Don't all search engines do that? I would  
6 hope so. I usually look for things that are on the page  
7 rather than buried away in the source codes.

8 MR. HAAN: Right, I would think so.

9 THE COURT: So it's just a back up, put it there twice  
10 just to make sure the search engines don't miss it?

11 MR. HAAN: Well, I don't purport to be an expert on  
12 how web pages operate, but --

13 THE COURT: I was hoping you were. Go ahead.

14 MR. HAAN: On page 6 we just have a couple of basic  
15 claim construction principles which we believe are  
16 particularly pertinent.

17 The first one is that claim terms must be construed in  
18 context. We can't just look at one word, we have to look at  
19 the whole sentence, which is a claim. Number two, the  
20 specification is the single best guide to the meaning of a  
21 disputed term. And lastly an inventor need not include all of  
22 the features of his invention in every claim. And that's the  
23 purpose of independent and dependent claims that add  
24 particular features.

25 Turning to page 7, Yahoo contends that certain patent

1 claims are invalid for indefiniteness. Particularly the first  
2 two terms, the category for transacting business and the  
3 category for providing information. These terms appear in  
4 Claims 1 through 30, but not in Claim 31.

5 Patents enjoy a statutory presumption of validity, and  
6 therefore Yahoo bears the burden on proving indefiniteness by  
7 clear and convincing evidence that any disputed claim term  
8 does not satisfy the requirements of Section 112.

9 The Federal Circuit has said that only claim terms  
10 that are not amenable to construction or are insolubly  
11 ambiguous are indefinite.

12 THE COURT: Aren't we getting ahead of ourselves when  
13 we start to talk about whether these claims are valid? We're  
14 talking about claim construction right now.

15 MR. HAAN: Well, that's correct, Your Honor. I  
16 understand some courts will address the issue of  
17 indefiniteness in the context of a claim construction where  
18 some courts will put that off to summary judgment.

19 THE COURT: Well, I would be amenable to doing it any  
20 number of ways, but I don't think we all agreed that we were  
21 going to do it this way, so I think we ought to just focus  
22 ourselves on claim construction at this hearing.

23 MR. HAAN: Sure, absolutely.

24 Turning then to page 9 as the first term, category for  
25 transacting business, on the left we see IconFind's

1 construction includes a category for transacting business as a  
2 category for e-commerce pages which allow users the ability to  
3 conduct purchases online, pages that are involved in  
4 transacting business but do not enable the user to conduct  
5 transactions online, and finally other pages that contain  
6 commercial information.

7 Yahoo has asserted that this term is indefinite but,  
8 in the alternative, has provided a proposed construction.

9 Turning to page 10, IconFind's proposed construction  
10 comes directly from the specification. Down at the bottom we  
11 see it reads web pages involved in transacting business  
12 include e-commerce pages and so on. This is almost verbatim  
13 what IconFind has proposed. We've enumerated it for clarity.

14 THE COURT: I think that the question of how we define  
15 category for transacting business and how we define category  
16 for providing information, those questions are related.

17 MR. HAAN: That's correct, Your Honor.

18 THE COURT: So I think we ought to discuss them  
19 together.

20 MR. HAAN: Sure.

21 THE COURT: And what occurs to me, if I understand  
22 what your client's patent is, what occurs to me is that these  
23 terms ought to be somewhat indefinite. Shouldn't they?  
24 Because it seems to me -- I could be wrong -- that what your  
25 client wants to do is to let the user decide whether they want

1 to categorize their page as one for transacting business or  
2 one for providing information. And if you get too specific,  
3 then you just confuse the user.

4 I mean, the user may think his page provides  
5 information and maybe it doesn't provide any information, but  
6 that's the way he wants people to think about it so that  
7 they'll find it when they do a search for pages providing  
8 information on a certain subject. So -- same thing, same  
9 thing with transacting business. You may get on the page, and  
10 you may have a hard time seeing how this page transacts  
11 business, but that's the way the user wants it to be  
12 considered by people who search the Internet.

13 So why don't you address that because it seems to me  
14 that the more general definition you have, the better it suits  
15 your client's purposes.

16 MR. HAAN: We would agree with that, Your Honor.

17 And --

18 THE COURT: But yet you have the more specific  
19 definition of the two.

20 MR. HAAN: Well, our definition is more delineated,  
21 but I would say that IconFind's constructions for transacting  
22 business and for information are -- are very broad.  
23 Especially the third category for transacting business is  
24 other pages that contain commercial information. I mean, that  
25 is admittedly a very broad kind of catch-all category.

1 THE COURT: I know. But, see, that's my point. Isn't  
2 that what your client wants?

3 The defendant's definition is a category for network  
4 pages that have as a primary purpose transacting business.

5 MR. HAAN: Yes.

6 THE COURT: Now why wouldn't your client be happy, why  
7 wouldn't your client want that to be understood by the users?

8 MR. HAAN: Well, first of all, Your Honor, the patent  
9 specification in a number of places specifically states that a  
10 given page could be -- could be labeled as a page of category  
11 for transacting business and also a category for providing  
12 information.

13 THE COURT: Right. And can't they give it both codes  
14 if they want?

15 MR. HAAN: Well, if they do under Yahoo's proposed  
16 construction, Your Honor, is that the page will be left with  
17 having two primary purposes, which seems illogical and  
18 contrary to the word "primary" to me.

19 They can't have --

20 THE COURT: Well, it says primary purpose as their  
21 definition.

22 MR. HAAN: That's correct. But if a page is assigned  
23 to the category for transacting business, then under Yahoo's  
24 construction it has a primary purpose of transacting  
25 business -- I'm sorry -- a primary purpose of transacting

1 business. But if that same page is also assigned to category  
2 for providing information, then under Yahoo's construction it  
3 would also have a primary purpose of providing information.

4 THE COURT: I see what you're saying. But would your  
5 client -- let me back up a minute.

6 Are there any embodiments of your client's patent  
7 actually out there so that we could see how it works?

8 MR. HAAN: They have a -- they have a software, yes.

9 THE COURT: You have some software. How does that  
10 work? Explain to me -- they have a web page, right?

11 MR. HAAN: They have a web page of --

12 THE COURT: And you go on their web page, and you  
13 download their software?

14 MR. HAAN: I don't believe that the software can be  
15 downloaded from the page.

16 THE COURT: I looked at their page, maybe I shouldn't,  
17 but it looks like you can download it.

18 MR. HAAN: Perhaps you can. I don't want to represent  
19 one way or the other. I'm not sure.

20 THE COURT: All right. Well, what happens -- let's  
21 assume you can either download -- if you can't download their  
22 software, how do you get it?

23 MR. HAAN: Well, you would have to meet with them and  
24 buy CDs.

25 THE COURT: Meet with them?

1 MR. HAAN: Well, the same way that you call up a  
2 company, they have a contact us page with a phone number and  
3 an e-mail.

4 THE COURT: Well, wait. Then I'm not understanding  
5 your client's patent.

6 Don't they want the whole world to know about IconFind  
7 and to put the little codes on their web pages? Wouldn't the  
8 ideal situation be that every person who has a web page out  
9 there, the millions of them, all put the little IconFind code  
10 on them?

11 MR. HAAN: That's correct.

12 THE COURT: So you have to meet with them in order to  
13 do that?

14 MR. HAAN: I'm not sure -- like I said, Your Honor,  
15 you may in fact be able to download the software from the  
16 website. I personally do not know either way so I didn't want  
17 to represent --

18 THE COURT: Well, I wish you knew more about this  
19 because it helps me to understand the embodiment of this  
20 patent in order to understand what it is.

21 MR. HAAN: IconFind's position respectfully, Your  
22 Honor, is that the patent itself covers the invention and not  
23 the commercial embodiment. And, therefore, companies who are  
24 looking to avoid infringement will look only to the patent and  
25 not to commercial embodiment.

1 THE COURT: All right. You're right. So I shouldn't  
2 even be worried about how this thing works. I should just  
3 look in the abstract at the words and not even try to figure  
4 out what it does. Because quite frankly I'd like to know.  
5 But maybe that's wrong, maybe that's not the right way to do  
6 it.

7 MR. HAAN: I wouldn't say it's necessarily wrong, but  
8 if the intrinsic evidence is unambiguous, then we feel there's  
9 no need to go to the commercial embodiment.

10 But the exhibits that were attached from defendant  
11 Yahoo I believe are the web page itself and are not of the  
12 software, which is the commercial embodiment. And for the  
13 purposes of their arguments, they've said that the web page  
14 itself has been labeled with certain labels. And they assume  
15 that that page is a commercial page or they assume that a  
16 white paper is commercial. Those are only assumptions, and  
17 they don't know that the person assigning those particular  
18 pages chose them to be commercial or chose them to be  
19 informational.

20 THE COURT: Now, if I adopt your definition of  
21 category for transacting business or category for providing  
22 information, how does that help you?

23 MR. HAAN: Well, I mean, this is a very admittedly  
24 broad definition, but it needs to be. There is two  
25 categories, commerce and information, and together those two



1 categories need to be able to categorize every page on the  
2 Internet.

3 THE COURT: But it seems to me -- maybe I'm missing  
4 something again. It seems to me that your definition is more  
5 narrow than theirs.

6 I mean, I could imagine a page that I might think was  
7 one for transacting business that didn't fit within your  
8 literal definition here. It seems like you're narrowing the  
9 definition. If the primary purpose is transacting business,  
10 that would seem to cover everything in your definition.  
11 Except you do make a good point that I have to ask counsel on  
12 the other side about, whether it has to be a primary purpose  
13 or a major purpose or some other phrase like that. But that  
14 would seem to cover everything that's in your definition.

15 MR. HAAN: Well, actually the term "primary" in  
16 defendant's definition is really the only term that IconFind  
17 disputes.

18 THE COURT: That you object to. So when I get them up  
19 here I'll ask them if they can use another word instead of  
20 primary. What would you say to some other word besides  
21 primary such as major or significant or something like that?

22 MR. HAAN: I would say that the word should be deleted  
23 and that their construction could be a category for network  
24 pages that have as a purpose transacting business.

25 THE COURT: All right. I'll ask them about that.

1 MR. HAAN: The specification itself does not use the  
2 term "primary." The file history does not use the term  
3 "primary." So there's -- in IconFind's position there's no  
4 support for the term "primary." The specification and the  
5 file history including provisionals talks about the purpose of  
6 pages, but it does not say the primary purpose of a page.

7 THE COURT: All right. I'll ask them about that.

8 Now let's go to the other half of this, categories for  
9 providing information.

10 MR. HAAN: Yes. On page 11, I have both  
11 constructions. On the left here we have a category for pages  
12 that contain articles, journals, publications or other  
13 non-commercial materials. Again, Yahoo has asserted that this  
14 term is indefinite and, in the alternative, has proposed a  
15 construction.

16 On page 12 --

17 THE COURT: I mean, what if I had a web page, and I  
18 just wrote something on it. I just said I'm going to tell you  
19 about a case I had yesterday, and I put a web page out there  
20 and it talks about this case. Now, that's not an article,  
21 it's not a journal, it's not a publication, it's not  
22 materials, it's just a page talking about a case I had  
23 yesterday. Wouldn't that be a category for providing  
24 information?

25 MR. HAAN: Well, quite frankly, I would argue that

1 that is an article about your cases or I would say that that  
2 is non-commercial material. I mean, a single sentence can be  
3 material. Certainly I think that would fall in IconFind's  
4 proposed construction.

5 THE COURT: So what you object to again in defendant's  
6 definition is the use of the word "primary"?

7 MR. HAAN: That's correct, Your Honor.

8 THE COURT: So if they struck primary, you'd have no  
9 problem with either one of these two definitions?

10 MR. HAAN: Well, the specification -- or IconFind's  
11 construction came directly from the specification, and so we  
12 would not want to agree to another construction. We think  
13 that these terms were expressly defined in the specification.  
14 I would say I would have less of a problem with their  
15 construction if it did not include the term "primary," but I  
16 would not want to agree to it.

17 THE COURT: Of course, if I adopted your definition,  
18 then I'd have to have another long definition of what  
19 commercial means.

20 MR. HAAN: We believe commercial and non-commercial  
21 are terms that, you know, the inventors understood, the  
22 examiner understood, people of ordinary skill in the art  
23 understand.

24 THE COURT: You know, when you want to use it in  
25 defining a term, it doesn't need a definition. I will

1 guarantee you without equivocation that if this patent had  
2 used the word "commercial," you'd both be in here telling me  
3 in a Markman hearing that we needed a definition of what's  
4 commercial.

5 MR. HAAN: Well, I think Yahoo has asserted that the  
6 term "non-commercial" or "commercial" is ambiguous. But quite  
7 frankly we think that's a little disingenuous because the  
8 accused product, the Flickr website has a category  
9 non-commercial.

10 THE COURT: Public television tells me they're  
11 non-commercial. Are they commercial or non-commercial?

12 MR. HAAN: Public television, you know, if they have  
13 commercials --

14 THE COURT: No, they say they don't have commercials.  
15 They rely entirely on donations. Actually they do have  
16 commercials, but let's say they didn't have commercials.

17 MR. HAAN: If they're relying on donations, I think  
18 the people that are donating are probably still pushing a  
19 cause. So --

20 THE COURT: But you think you'd want a definition of  
21 commercial, wouldn't you?

22 MR. HAAN: Perhaps.

23 THE COURT: All right. Well, I just feel a lot more  
24 comfortable some of the terms that you're asking me to define  
25 than I do with the term "commercial," so I think we'd have to

1 know what that meant.

2 And, again, I would think that your client wouldn't  
3 want to have any equivocation in their definition of these  
4 terms so that the people that subscribe to their programs  
5 would know whether their web page is commercial or  
6 non-commercial.

7 I guess commercial in your mind means selling  
8 something, right?

9 MR. HAAN: Not necessarily. I mean, under the first  
10 enumeration of transacting business it's e-commerce pages.  
11 They're actually selling something via that website. Under  
12 the second item, the page may include information about  
13 particular items, but the page itself does not allow the user  
14 to conduct the transaction. So, in other words, they need to  
15 call a number to the company or e-mail someone in order to buy  
16 a product.

17 And number three are other pages that contain  
18 commercial information. Perhaps Craigslist could fall into  
19 pages that contain commercial information.

20 THE COURT: What about a page that was rating products  
21 like Consumer Reports, but they're not selling them and they  
22 don't have any interest in the products themselves? Would  
23 that be commercial or non-commercial? Would that be category  
24 for providing information or would that be not?

25 MR. HAAN: I think that could very possibly fall into

1 the -- under the specification it says that a page can be  
2 labeled as providing commercial information and also for  
3 providing information.

4 THE COURT: Well, you see, but that's the point. I  
5 don't know what commercial means in the definition you've just  
6 given. What about the page from Consumer Reports that rates  
7 various products? Is that a category for providing  
8 information or is that a category for transacting business?

9 MR. HAAN: Well, I would say it's both. But I would  
10 say that it is commercial to the extent that it informs  
11 consumers so that they can buy products.

12 THE COURT: So informing consumers is commercial, but  
13 informing other people is not?

14 MR. HAAN: I think --

15 THE COURT: We're all consumers, aren't we?

16 MR. HAAN: We are all consumers, but sometimes I'm  
17 acting as a consumer and sometimes I'm not.

18 THE COURT: What if I were reviewing movies? Is that  
19 a commercial page or is that an information page?

20 MR. HAAN: If I'm reviewing movies, if a page is  
21 promoting a movie --

22 THE COURT: No, no, I'm a reviewer. In other words,  
23 I'm not even in the business of reviewing. I'm just a guy  
24 that likes movies, and I like to have a web page where I talk  
25 about movies. And I say this is my favorite movie, Casa

1 Blanca. Humphrey Bogart is great in this movie. This other  
2 movie, I don't like that movie. And I'm just a 14-year-old  
3 kid that's got a web page out there talking about movies. Is  
4 that commercial or non-commercial?

5 MR. HAAN: I think for that kid the pages are merely  
6 providing him information. But unfortunately for that kid it  
7 is the person who creates the web page that assigns the  
8 content --

9 THE COURT: No, the kid created the web page in my  
10 hypothetical.

11 MR. HAAN: Okay. Well, then the kid I would say  
12 should I label that page as providing information?

13 THE COURT: But not commercial, not transacting  
14 business.

15 MR. HAAN: That's correct.

16 THE COURT: So does his page contain articles,  
17 journals, publications or other non-commercial materials? You  
18 say no.

19 MR. HAAN: If he's labeling it informational purposes  
20 only reviewing movies, then I would say yes, he's including  
21 articles about a specific movie.

22 THE COURT: But you see what I'm saying here. I think  
23 the term "commercial" then needs to have some definition if  
24 you're saying that that web page that I just hypothesized is  
25 non-commercial, because some people might think that it is.

1 It's in commerce, it's reviewing movies. Somebody can call up  
2 that web page and make a decision whether or not to go to that  
3 movie or whether or not to buy that camera that he's reviewing  
4 or go to that restaurant that he's reviewing.

5 So all I'm saying is if I adopt your definitions, the  
6 next thing that comes up is somebody is going to be asking me  
7 to define what commercial and non-commercial are.

8 MR. HAAN: Well, the same thing could happen if you  
9 adopt Yahoo's construction because --

10 THE COURT: Well, they don't use that word.

11 MR. HAAN: Well, then, I mean, arguably you could say  
12 that you need to construe what transacting business means if  
13 the primary purpose is transacting business.

14 THE COURT: Well, that's what you did ask me to  
15 define. The second one you asked me to define is category for  
16 transacting business. You did ask me to define that, and I'm  
17 going to have to do that.

18 MR. HAAN: That's correct. And we -- our position is  
19 that the specification clearly explains exactly what that is,  
20 these three categories that we propose.

21 THE COURT: All right. Why don't you go on.

22 MR. HAAN: The last slide for these two first terms,  
23 slide No. 13, I think we briefly touched on this. I'd like to  
24 reiterate that Yahoo's constructions illogically require that  
25 a page have two primary purposes. Their construction for



1 category for transacting business is that it has a primary  
2 purpose of transacting business. And for category for  
3 providing information, they propose that it have a primary  
4 purpose of provision of information.

5 There's no intrinsic support for categorizing pages by  
6 a primary purpose. And as I said, the specification expressly  
7 states that if the page is involved in both transacting  
8 business and providing information, then the creator can  
9 assign it to both categories. We think quite frankly that  
10 having two primary purposes is illogical.

11 THE COURT: All right. Now did you want to stop there  
12 and let the other side argue this part of it?

13 MR. HAAN: Sure.

14 THE COURT: Okay.

15 MS. KASH: Good afternoon, Your Honor.

16 Instead of going through each of our slides, I'd like  
17 to focus on some of the questions and points you raised when  
18 the plaintiff was speaking. Because I think you -- if I  
19 understand you correctly, I think you have some of the  
20 concerns at least it sounds like that Yahoo has as well with  
21 the commercial and non-commercial distinction.

22 And that's what we're trying to address with our own  
23 construction and also with our statements about the fact that  
24 this patent, if and only if commercial and non-commercial are  
25 adopted in the definition of these two terms, would be

1 indefinite. Anything could be commercial. There would be no  
2 metes and bounds on what would be commercial or  
3 non-commercial.

4 And you had asked when we were speaking -- you were  
5 speaking before about the embodiment. And I think you're  
6 absolutely right that you should at least look at that for  
7 illustrative purposes as to an example of where the plaintiff  
8 has used its own patent. And the website that they have  
9 actually has the patent number on it. And the testimony of  
10 the inventors in their depositions says this practice is the  
11 patent. And so it's interesting to see how they labeled their  
12 own website with respect to these two terms that you're trying  
13 to define. I think that's very instructive. And if it  
14 weren't something that practiced it, it may be the case that  
15 these -- these terms would be ambiguous.

16 And if you turn to page 12 in the -- of the  
17 presentation that the defendants have provided, you'll see  
18 there that we've actually provided you with a picture of the  
19 actual cover page of the website. And I can represent to you  
20 also that the inventors testified at their deposition that you  
21 can in fact download the software for this program off their  
22 website.

23 THE COURT: How much does it cost?

24 MS. KASH: Actually there's -- the version that's  
25 available is free.

1 THE COURT: So how do they make money?

2 MS. KASH: I don't believe they do.

3 So the -- if you look at the label on this website,  
4 this is the front page of the IconFind website -- and you'll  
5 see there we tried our best to blow up the label that's on the  
6 site. This is an example of a web page where the inventors  
7 themselves have tried to label their website based on the  
8 categories of information that you could find there.

9 And if you look in the middle there, you'll see it has  
10 an IN, which --

11 THE COURT: What page are we on?

12 MS. KASH: You're on page 12. You see there's a  
13 little blow-up --

14 THE COURT: Right. Okay.

15 MS. KASH: You see the little blow-up --

16 THE COURT: Right.

17 MS. KASH: -- of the category label there or however  
18 that eventually gets defined?

19 You'll see there it has an IN in the middle. And that  
20 stands for -- by everybody's own admission that stands for  
21 information. Yet the inventors have testified, and as we've  
22 just discussed here, that there are -- that IconFind is open  
23 for business. I mean, as plaintiff's counsel just stated, you  
24 can call up the inventors and talk to them about getting the  
25 system and the like. And so arguably there is some commercial

1 aspect of this. Maybe there isn't.

2 But the point being here is that their own label  
3 illustrates the ambiguity with going with the definition that  
4 is not more precise.

5 THE COURT: Okay. I obviously have that concern. But  
6 I also have the concern about your use of the word "primary"  
7 in defining both transacting business and providing  
8 information.

9 Why can't you just strike the word "primary"?

10 MS. KASH: Well, Your Honor, what we're trying to do  
11 is -- and I'm -- let me just give you one attempt at trying to  
12 defend this word "primary" for you, and then we can move on to  
13 where in the specification the purpose is delineated.

14 I think that you can obviously have more than one  
15 primary purpose. Why did I go to law school? You know you've  
16 asked yourself that repeatedly probably. I went because of  
17 the fact that I wanted to learn. I went because of the fact  
18 that I wanted to get a job. Those two things might be equal  
19 in terms of my intent.

20 The issue here is that the purpose of something is not  
21 necessarily one greater than the other, and the patent doesn't  
22 ask you to weigh that. The issue is --

23 THE COURT: Well, but your definition -- primary, you  
24 could use another word. If you wanted to define why people go  
25 to law school, you could say -- a lot of words come to mind, a

1 principal purpose, a major purpose. Something could come to  
2 mind other than primary which seems to be related to secondary  
3 and tertiary and suggests that there is an order of things.

4 MS. KASH: Either of those examples that you gave,  
5 Your Honor, would be acceptable to Yahoo.

6 THE COURT: Okay. Then why -- but the next question  
7 is then why have one at all? Why not just say here's your  
8 definition, a category for network pages that have as a  
9 purpose transacting business?

10 MS. KASH: The concern we have with a purpose -- and  
11 it may be the case, Your Honor, that we're willing to agree to  
12 that, and I think we footnoted that in our brief and indicated  
13 as much.

14 I think the issue here is that the concern is the  
15 playing off of one versus the other. So how does a -- and  
16 with all due respect, it is the user of the -- that's  
17 uploading the page who puts the tag on it. But how is  
18 somebody searching, if they want to look for a page that is  
19 commercial in nature or exclude pages that are commercial in  
20 nature or for transacting business, for example, they want  
21 something where they're going to be transacting business, how  
22 do they know what search term to put in?

23 THE COURT: But that's the user's problem. Because if  
24 he wants to make his web page messy and unable to find, that's  
25 his prerogative. In other words, if he's got a strictly

1 commercial web page, all he's doing is selling his product,  
2 but he's got such an ego about it that he thinks I'm just  
3 providing information and he wants to call it an information  
4 product, shouldn't that be his prerogative? That's what I was  
5 asking your opponent here.

6 It would seem to me that if they want their patent to  
7 be easily used, that they would want a very broad definition  
8 so that the user could just make just about anything that he  
9 wants informational or business and let the chips fall where  
10 they may if people find his page or don't find his page.

11 MS. KASH: Your Honor, I certainly agree with that. I  
12 think the issue here is and the reason we tried to delineate  
13 something more narrow than just going with a purpose is  
14 because of this concern with the ambiguity and something being  
15 commercial versus non-commercial and the idea being that there  
16 has to be something there.

17 But I believe that the -- if what I hear you saying is  
18 correct, if we drop out primary and we just have the purpose  
19 being transacting business versus the purpose being for  
20 providing information.

21 And the main reason for this is also so that somebody  
22 who is trying to avoid practicing the invention, right, will  
23 know the metes and bounds of the claim. And so if it is  
24 something where you have a delineation such as the one you're  
25 providing that doesn't have this big catch-all anything that's

1 commercial or anything that's non-commercial, that one of  
2 ordinary skill in the art presumably would not be able to  
3 draft around.

4 THE COURT: Now, just to digress a moment here.

5 MS. KASH: Sure.

6 THE COURT: I may recall this right or not. Didn't  
7 they have a hard time getting a patent until they put this  
8 distinction between transacting business and providing  
9 information into it?

10 MS. KASH: That's exactly right, Your Honor. And we  
11 actually provided you with a slide to give you a little bit of  
12 a background on that.

13 If you look at slide 16, the original Claim 1 was  
14 drafted said it was a method of categorizing a network page  
15 comprising the steps of providing a list of categories and  
16 providing the opportunity to assign a page to one or more of a  
17 plurality of said categories, which would be essentially  
18 anything. Right? You could assign a page any which way you  
19 want.

20 And the concern that I have and that my client has  
21 with respect to a definition for these two categories which  
22 they had to write into the claim -- and the patent was  
23 rejected I believe it was three times before it was issued or  
24 four times before it issued -- was that they specifically said  
25 in the claim a category for transacting business.

1 THE COURT: Right.

2 MS. KASH: It didn't say a category for commercial  
3 information, for transacting business. And after all that  
4 process at the PTO, we think it's extremely important that  
5 that limitation is observed.

6 THE COURT: See, I know, but transacting business to  
7 me, if you hadn't asked for it, wouldn't need a definition. I  
8 think the average person of ordinary intelligence knows what  
9 transacting business is. On the other hand, treatises have  
10 been written about what is commerce. Commerce is written into  
11 the Constitution, and the Supreme Court has dealt with it for  
12 over 200 years, and they still haven't really to everybody's  
13 satisfaction defined commerce.

14 And so to me if you had a definition -- if the word in  
15 there was commerce, somebody would probably be asking me to  
16 define that as, quote, transacting business. So now you have  
17 the phrase "transacting business" and you come in and ask me  
18 to define it in some other terms.

19 I had a patent case in which we spent a great deal of  
20 time and I ultimately gave a very lengthy definition of what  
21 is meant by a straight line. And so you can really overdo  
22 this idea of defining a word.

23 I'm going to look at what transacting business is, and  
24 I'm going to have to define it. But I'm not sure that the  
25 term "transacting business" can be defined any better than



1 that.

2 MS. KASH: Your Honor, we would propose that the -- if  
3 you look at the specification that the -- that plaintiff  
4 points to, if you look at the first two delineations of  
5 transacting business, that doesn't have this overbroad  
6 definition of commercial.

7 So even if you look at their proposed construction  
8 where it says, you know, number one and two for example, I  
9 think either of those two -- that we've -- those are a  
10 description for preferred embodiment and not a definition.  
11 Something that delineates to one of ordinary skill in the art  
12 or anybody really looking at this patent that the purpose of  
13 the pages designated as commercial is for the transacting of  
14 some type of business, and that can be e-commerce enabling  
15 them to use -- you know, to purchase online or pages that are  
16 involved in transacting business but you don't actually  
17 purchase online.

18 If those two things were the definition of transacting  
19 business, that's fine. The issue and what renders this  
20 definition --

21 THE COURT: But by the time you get through with it,  
22 you've covered everything anyway.

23 Category number one is e-commerce pages. Well, first  
24 of all, if a patent had the words "e-commerce pages" in it, I  
25 am certain somebody would be asking me to define what

1 e-commerce page means. But leave that aside for the moment.

2 The first category is e-commerce pages which provide  
3 users with the ability to conduct online purchases, sales,  
4 leases or other transactions. So you don't need the words  
5 "purchases, sales, leases or other" because financial  
6 transactions includes purchases, leases, sales. So reading  
7 that, it now says e-commerce pages which provide users with  
8 the ability to conduct online financial transactions.

9 And then the second category is pages that may be  
10 involved in transacting business but do not enable the user to  
11 conduct the transaction online. So it includes transactions  
12 online and things that are not transactions online. So you  
13 don't need the part that says provide users with the ability  
14 to conduct online.

15 And then the last category is other pages that contain  
16 commercial information. Well, commercial information again  
17 requires a definition.

18 And when you say category for transacting business, it  
19 seems to me to exclude pages that do nothing but provide  
20 information --

21 MS. KASH: We agree.

22 THE COURT: -- because they don't transact business.

23 So when you get all the way through their definition,  
24 it basically says the same as yours.

25 MS. KASH: Well, the issue here --

1 THE COURT: Except for the word "commercial" --

2 MS. KASH: That's correct.

3 THE COURT: -- which I'd have to define anyway.

4 MS. KASH: The issue here --

5 THE COURT: Which I might define as the transacting of  
6 business.

7 MS. KASH: Your Honor, the point that we're trying to  
8 make -- and this is important when you're looking at the  
9 things that -- for infringement that they're trying to argue,  
10 and some of the statements made earlier concerning our product  
11 were not exactly accurate, but I think that that -- we don't  
12 need to go down that path today.

13 I think the issue here is that they want anything at  
14 all that potentially is related to commercial in, you know,  
15 even four or five steps down the road --

16 THE COURT: What does your product do in terms of  
17 identifying -- first of all, tell me what Flickr is.

18 MS. KASH: Flickr is an online photo sharing site so  
19 that users can go to -- users like you and I who have photos  
20 that we want to share with others can go and upload those  
21 photos so that others can view it.

22 THE COURT: And as I understand your papers, they put  
23 them in a category, either copyrighted, not copyrighted or  
24 this middle ground that is described as what?

25 MS. KASH: Well, there's different statuses of

1 copyright. It can be public domain as well. So you --  
2 there's a thing called creative comments, which is a  
3 nonprofit --

4 THE COURT: Creative comments, that's the one.

5 MS. KASH: Yeah.

6 THE COURT: So it's either copyrighted or it's not  
7 copyrighted, in which case it never was copyrighted to start  
8 with or it's in the public domain, which in my mind is the  
9 same thing. I may be wrong. Or it's common --

10 MS. KASH: Creative comments.

11 THE COURT: Creative comments.

12 MS. KASH: But it's a little bit different than that.

13 So creative comments is a nonprofit organization that provides  
14 the different types of copyright delineations essentially.  
15 They essentially work with Flickr, it's a third party, and for  
16 free they give you sort of the ability to assign a copyright  
17 to a photo.

18 THE COURT: Are they part of Yahoo?

19 MS. KASH: No.

20 THE COURT: They're an independent business?

21 MS. KASH: They're a nonprofit company that provides  
22 online copyrights essentially.

23 THE COURT: I see. So what does Flickr do then with  
24 regard to whether it's transacting business or providing  
25 information?

1 MS. KASH: Flickr does not transact business at all.  
2 They have argued --

3 THE COURT: How do they make money? How does Flickr  
4 make money?

5 MS. KASH: Flickr makes money through users and  
6 advertisements, but not through the sale of any photographs  
7 for example.

8 THE COURT: Well, but their pages have advertisements  
9 on them.

10 MS. KASH: The pages I'm -- the network -- the pages  
11 themselves that are on with the photos that are uploaded, I'm  
12 not sure.

13 Flickr is a sort of side site that is not part of the  
14 whole Yahoo search engine as you know it.

15 THE COURT: I see. Once you get on the page that has  
16 somebody's photos, there are no advertisements. But in order  
17 to get through, you have to go through pages that have  
18 advertisements.

19 MS. KASH: That is potentially correct. Although I  
20 think that when Flickr -- when you go to Flickr directly --  
21 I'm not sure. I think you can go to the Flickr domain  
22 directly, and I'm not sure if there's not some also  
23 advertisements on that site.

24 THE COURT: There has to be. They couldn't make money  
25 otherwise.

1 MS. KASH: But the point is that you don't -- it's not  
2 in the process of, say, selling photographs or selling  
3 anything that you see on the page. You have to --

4 THE COURT: Right, but there is some commercial  
5 product presumably on some of these pages.

6 But the point is do you identify pages or photos by  
7 whether they're for the purpose of transacting business or for  
8 providing information?

9 MS. KASH: No.

10 THE COURT: So that isn't a part of Flickr?

11 MS. KASH: The point here is that we don't -- Flickr  
12 is a photo site, it doesn't have network pages -- it doesn't  
13 categorize its network pages, it categorizes the photographs.  
14 And the photographs are not designated other than the ability  
15 to designate the copyright, creative comments copyright.

16 Now what the plaintiff has argued --

17 THE COURT: Before -- I know, but why do you care then  
18 if your pages aren't categorized by transacting business or  
19 providing information? And if the photos aren't categorized  
20 in such a way, what difference would it make to you how you  
21 define it? It would seem to me that your argument would be  
22 you don't do this under any definition.

23 MS. KASH: There is a window that comes up that offers  
24 a -- for purposes of describing the work itself as to whether  
25 or not it is available for a commercial use as part of a

1 license.

2           So, for example, one of the things -- if you take a  
3 photograph and you post it, and let's say somebody decides  
4 they want to put that on their web page, right, they could  
5 potentially contact you about that particular page. And that  
6 because that delineation is a checkbox that a user when  
7 they're uploading their photo could put commercial or  
8 non-commercial very generally, not having anything to do with  
9 transacting business, plaintiff has captured that screen shot  
10 and put it into infringement contentions.

11           THE COURT: Okay. I see where they would argue that's  
12 doing business.

13           MS. KASH: That's -- well, they may.

14           THE COURT: Right. So that's your interest.

15           All right. So anything else you wanted to say on  
16 these two definitions?

17           MS. KASH: I think the last thing is just -- Your  
18 Honor, is that just in terms of the -- no, actually I think  
19 Your Honor is focused on the issues that Yahoo has raised.  
20 And we submit that the narrower, slightly narrower  
21 construction is more appropriate here so that the -- you know,  
22 one of ordinary skill in the art can know what to do.

23           THE COURT: All right. Thank you.

24           Mr. Haan, was there anything you wanted to say on this  
25 before we go on to the next term?

1 MR. HAAN: Just one thought, Your Honor.

2 I heard Your Honor say that perhaps anyone, a person  
3 of skill or anyone who searches the Internet understands what  
4 transacting business is. It's plaintiff's position that all  
5 of these terms deserve their plain and ordinary meaning as a  
6 person of ordinary skill in the art understands them reading  
7 the patent and the intrinsic evidence.

8 So the motion for claim construction was made by  
9 defendant Yahoo. IconFind asserts that the plain and ordinary  
10 meaning controls, but because they brought the motion we have  
11 in the alternative proposed constructions.

12 THE COURT: Well, with that in mind, let me go back  
13 and look at it. Because -- you know, I understand there's  
14 this mentality out there about Markman hearings, that you have  
15 to have a Markman hearing in every patent case or it isn't a  
16 patent case. But just like patents, the terms of a contract  
17 have to be construed by the court and not the jury. But we  
18 don't have a Markman hearing in every contract case for the  
19 court to define every term that's used in a contract.

20 You asked for this hearing, and you wanted the Court  
21 to define the term "category for transacting business." And  
22 if I take primary out of the definition, your proposed  
23 definition of, quote, category for transacting business is,  
24 quote, a category for network pages that have as a purpose  
25 transacting business. Now that's just the same thing. So why



1 did you even ask for the hearing if that's the way you want to  
2 define category for transacting business?

3 MS. KASH: Your Honor, I think that the -- excuse me.  
4 Sorry. I want to answer that question.

5 So the issue here is the way in which the plaintiff  
6 has been applying throughout this case its infringement  
7 contention what it means to be transacting business. And what  
8 we contend -- they're using this to be anything commercial,  
9 anything at all that --

10 THE COURT: Okay. But you're the one that asked for  
11 the hearing.

12 MS. KASH: Correct. And --

13 THE COURT: And your proposed definition is almost an  
14 exact statement of the terms itself.

15 MS. KASH: Right. And that's --

16 THE COURT: In other words, what you're saying is  
17 category for transacting business is a category that has as  
18 its purpose transacting business.

19 MS. KASH: Which is why we've asked for in the  
20 alternative a construction that is -- a ruling from the Court  
21 that this term is indefinite.

22 As you've seen from the circular arguments that we've  
23 been having about what constitutes commercial, there's no  
24 metes and bounds on these claims. And the PTO has  
25 specifically rejected the idea that they get to have a patent

1 that covers any category.

2 THE COURT: But that's not -- look, we've had a long  
3 discussion here, and the bottom line that I'm hearing is that  
4 both of you are satisfied with the definition of category for  
5 transacting business as a category for network pages that has  
6 as a purpose transacting business.

7 MS. KASH: That's correct. And I believe --

8 THE COURT: Well, then fine. If that's what you both  
9 want, I don't have a problem with that.

10 Now, the category for providing information, a little  
11 bit more uncertain here. But if I strike what you say after  
12 the words "for example," we'd have the same thing. The  
13 definition of category for providing information would be a  
14 category for network pages that have as a purpose the  
15 provision of information. And I assume that Mr. Haan would  
16 agree with that.

17 MR. HAAN: Well, again, we would disagree with the  
18 term "primary."

19 THE COURT: No, I know. We take primary out. Right?

20 MR. HAAN: Well, like I said --

21 THE COURT: Listen to this. A category for network  
22 pages that have as a purpose the provision of information.

23 MR. HAAN: Once again, we're more comfortable -- you  
24 know, we still assert our construction, which we believe is  
25 right from the specification. But I am much happier with

1 Yahoo's proposed construction that does not include the term  
2 "primary."

3 THE COURT: Okay. But then for example, I don't have  
4 to have examples in there.

5 MS. KASH: Well, the concern we have again, Your  
6 Honor, is that this is not -- this patent, the PTO has said  
7 they can't have it be all page -- any just general categories.  
8 And so what we're trying to say is that providing information,  
9 if it's something that's other than transacting business  
10 specifically -- and transacting business to me requires some  
11 sort of transaction either possible or actual. And so the  
12 distinction here is that they're not allowed to just have two  
13 general catch-all categories that cover everything without any  
14 specificity.

15 So you --

16 THE COURT: But that's what you've proposed.

17 MS. KASH: No, no, no. We've proposed to have as a  
18 purpose transacting business. And specifically --

19 THE COURT: And fine, that's what Mr. Haan says is  
20 fine.

21 MS. KASH: Right. So if that's acceptable to them,  
22 then we're fine with that.

23 THE COURT: Well, that's fine. And then the next one  
24 is a category for network pages that have as a purpose the  
25 provision of information. That's fine with him. He'd like to

1 see his, but he's satisfied with this. You'd be satisfied  
2 with it.

3 MS. KASH: Well, as long as the provision of  
4 information is -- well, if it's limited in some way. I think  
5 that it can't be a catch-all category. But if it's other than  
6 transacting business, then I think that's clear, yes.

7 THE COURT: Well, but even your proposed definition  
8 doesn't say other than transacting business.

9 MS. KASH: No. What we're trying to say -- that's why  
10 we give the examples, so -- which are from the specification.

11 THE COURT: But those are just examples.

12 MS. KASH: Correct.

13 THE COURT: Well, I don't think they'd mind about the  
14 examples because they have the same examples in theirs.

15 MS. KASH: And as long as it doesn't have a category  
16 for -- if it says -- it says for other non-commercial  
17 information. It's this very broad -- it's the broad nature of  
18 the definitions and the position that plaintiff has taken in  
19 this case that brought us to claim construction on these  
20 terms.

21 THE COURT: All right. So, Mr. Haan, are you finished  
22 with this? Can we go on to the next definition then?

23 MR. HAAN: Just other than to point out that, you  
24 know, we've both chosen the same examples because these  
25 examples were directly from the specification.

1 THE COURT: That's fine.

2 Let's go on to categorization label, then.

3 MR. HAAN: Yes. Turning to page 14 of IconFind's  
4 presentation, we have IconFind's proposed construction and  
5 Yahoo's.

6 IconFind's proposed construction here conveys just the  
7 basic function of this term "categorization label." It's a  
8 tag which indicates the category or categories to which a page  
9 is assigned.

10 THE COURT: Isn't tag a term of art in the web page  
11 business?

12 MR. HAAN: A tag or a label in the specification is  
13 used interchangeably. So --

14 THE COURT: What does tag mean?

15 MR. HAAN: A tag is simply a label. It's something  
16 that indicates something or something that can -- yeah, can  
17 indicate any kind of information.

18 THE COURT: The way I've seen the term "tag" used is  
19 that it's something that is in the source code but not visible  
20 on the page itself. In other words, you have meta tags, and  
21 you have tags that are in the little brackets that you can't  
22 see when you go on the web page unless you click on source.  
23 Is that what tag means?

24 MR. HAAN: That can be used as that, yes, Your Honor.  
25 The specification explicitly states that the categorization

1 label can be placed in a meta tag.

2 THE COURT: It can be.

3 MR. HAAN: Correct.

4 THE COURT: But it doesn't have to be.

5 MR. HAAN: That's correct.

6 THE COURT: So wouldn't the use of the word "tag" here  
7 be misleading or overly precise when it can be something  
8 that's either visible or not visible to the person looking at  
9 the web page?

10 MR. HAAN: I think a tag is something that can be on  
11 the page as well.

12 THE COURT: Well, what is the definition? I'd have to  
13 define tag then, because I'm a layperson and I didn't know tag  
14 was something that was actually on the page.

15 MR. HAAN: The specification uses the terms "tag" and  
16 "label" interchangeably. And so --

17 THE COURT: But what's label? What's the term "label"  
18 mean?

19 MR. HAAN: A label again is something that they use to  
20 label something and indicate -- indicate something you're  
21 tagging or labeling a page to indicate something.

22 THE COURT: But if I had a web page, and I just put  
23 your code down at the bottom of it --

24 MR. HAAN: Yes.

25 THE COURT: -- would that be a tag, a label or neither

1 or both?

2 MR. HAAN: Both.

3 THE COURT: Both a tag and a label?

4 MR. HAAN: That's correct.

5 THE COURT: Do you mind if I look up tag in the  
6 dictionary here? Do you mind?

7 MR. HAAN: Not at all.

8 THE COURT: Okay. Let me just take a minute here.

9 MR. HAAN: We think that tag or label is something  
10 that is understandable to a person of ordinary skill in the  
11 art.

12 THE COURT: What art is this, the art of what?

13 MR. HAAN: Well, this is the art of categorizing  
14 network pages. So it would have to be a person who  
15 understands network pages.

16 THE COURT: All right.

17 So you could give the dictionary a code. It provides  
18 information, it's not commercial. And look at all the ads.  
19 They have to make money somehow.

20 MR. HAAN: I guess technically we should be looking to  
21 a dictionary at the time that the patent was filed in 1999.  
22 I'm not sure if the word "tag" has changed meaning since 1999.  
23 Perhaps it has particularly in this art.

24 THE COURT: Well, it has 32 meanings, so this is no  
25 help. Let's see. Some of them are verbs.

1           No, it's useless. A piece of paper; any small hanging  
2 or loosely -- all these other kinds of tags, nothing having to  
3 do with the Internet.

4           But, you see, it says a tag indicating a category or  
5 categories. So I'm looking at all these definitions. I don't  
6 know which one you would say it is.

7           A piece or strip of strong paper; any small hanging or  
8 loosely attached part of a piece; a loop of material sewn on a  
9 garment; a metal or plastic tip at the end of a shoelace; a  
10 license plate for a motor vehicle; a small piece of tinsel  
11 tied to the shank of a hook; the tail end of a concluding part  
12 of such a proceeding; the last words of a speech. Oh,  
13 computers. It says computers sentinel. So if I clicked on  
14 sentinel, I'd get the computer definition of tag.

15           But when you've got 32 definitions, I think somebody  
16 would have to define tag if I was going to use that because  
17 none of these that I've seen so far are what you're talking  
18 about.

19           MR. HAAN: Well, we're proposing that the term "label"  
20 or "tag" is used as its most basic function, something to  
21 indicate something that in the specification uses these terms  
22 interchangeably. And so --

23           THE COURT: Well, but you want to define label as a  
24 tag, and I think -- this is what's all the more annoying about  
25 Markman. The word is label, so you're trying to find label.



1 The average person, not the average person in the industry,  
2 the average person in the world knows what the term "label"  
3 means. I don't know whether they know what the term "tag"  
4 means, but yet you want to define label as a tag. If the  
5 patent had used the word "tag," you would have probably wanted  
6 to define it as a label.

7 MR. HAAN: That's correct, Your Honor. We're simply  
8 offering it as an explanatory tool the same way that the  
9 specification does.

10 THE COURT: Well, how does tag make it any clearer  
11 than label?

12 MR. HAAN: Well, because quite often when you're  
13 trying to explain a word to somebody, you offer a synonym.

14 THE COURT: I can't get through this word here.

15 MR. HAAN: But plaintiff would also --

16 THE COURT: The Internet doesn't last long enough to  
17 find it.

18 MR. HAAN: Okay. Plaintiff would also --

19 THE COURT: But I'm not going to use the word "tag"  
20 unless I have to when I don't understand what it means.

21 MR. HAAN: But plaintiff would also be --

22 THE COURT: What's wrong with using label instead of  
23 tag? The categorization label means a label indicating the  
24 category or categories to which a page is assigned.

25 MR. HAAN: We're perfectly comfortable with that.

1 THE COURT: Okay. Now let's take the last one. I  
2 think there's only one more, isn't there, categorization code?  
3 No, there are a couple more.

4 MR. HAAN: There's a couple of other issues or  
5 remaining categorization labels, and they intertwine with  
6 categorization code.

7 Yahoo has proposed a construction for categorization  
8 label that includes the complete code string and also includes  
9 representing all of the categories. If we turn to page 15, we  
10 see that Claim 1 merely provides or includes providing a  
11 categorization label. Claim 1 does not discuss code and also  
12 does not require that the label represent all the categories.

13 Instead Claim 19 adds further comprising providing a  
14 categorization code. Claim 22 adds wherein the categorization  
15 label includes the indicia for each category.

16 That these dependent claims add these extra functions  
17 gives rise to a presumption that Claim 1 does not include code  
18 or does not require that the categorization label represent  
19 all the categories.

20 If you turn to page 16, you can see that these two  
21 limitations are exemplary limitations from the specification.  
22 The label preferably consists of indicia from all the  
23 categories. An example of a label is a single simple  
24 character string. Yahoo's construction requires that the  
25 label always include code and always represent all the

1 categories. Now these are just simply functions that were  
2 added by dependent limitations.

3 THE COURT: So, for example, on your client's web  
4 page, if you download the software, can you put more than one  
5 categorization label on each page or can you only put one?

6 MR. HAAN: I'm not sure what the -- I couldn't speak  
7 to the functionality of their particular embodiment.

8 But one thing that I would like to point out about it,  
9 to the extent that their web page or the commercial embodiment  
10 includes a label that's made up of code, we don't know  
11 standing here whether the inventors contend that their  
12 embodiment is covered by Claim 19 or Claim 22 or Claim 1. And  
13 so the commercial embodiment doesn't help us solve this  
14 particular dilemma.

15 THE COURT: Well, I thought you started by saying you  
16 could look to the commercial embodiment. Oh, you were telling  
17 me that I could look to Yahoo's embodiment.

18 MR. HAAN: No. I'm saying to the extent we want to  
19 look at IconFind's commercial embodiment, it doesn't help us  
20 solve this particular dilemma because we don't know whether  
21 their embodiment is Claim 19 or Claim 22 or Claim 1.

22 THE COURT: All right.

23 MR. HAAN: There --

24 THE COURT: I'm sorry. You said you didn't know how  
25 their web page works. Do they make money off of it or is it

1 free?

2 MR. HAAN: I couldn't really speak to the finance. I  
3 don't think they've made substantial amounts of money. The  
4 client contacted a number of businesses including, I believe,  
5 people related to the Yahoo company -- I don't know if they  
6 were employed for Yahoo at the time -- and tried to sell their  
7 commercial embodiment and also tried --

8 THE COURT: Why would they sell it if they've got it  
9 on the web and you can download it?

10 MR. HAAN: Well, I mean, certainly they're looking to  
11 expand just the basic idea in any number of ways. But they  
12 also sought venture capital. I mean, they sought funding from  
13 a number of different places. I couldn't really speak to  
14 their -- you know, how successful they've been as a whole.

15 THE COURT: All right. I see what you're saying on  
16 the categorization label and code.

17 MR. HAAN: Turning to categorization code, the only  
18 real difference between IconFind's construction and Yahoo's  
19 construction -- I'm looking here on page 17 -- is that  
20 IconFind's construction comprehensively refers to the whole  
21 code system.

22 In other words, it's our contention that when we say  
23 categorization code, it's like saying Morse code. Morse code  
24 is the whole system, you know, three dots are an S and three  
25 dashes are an O. But Yahoo's construction of categorization

1 codes refers to a single code, a code representing a category.

2 And turning to page 18 --

3 THE COURT: Can you explain what the difference is  
4 between your definition and theirs? Yours is a system of  
5 characters or symbols that represent categories.

6 MR. HAAN: That's correct.

7 THE COURT: Theirs is a code representing a category  
8 to which a network page is or could be assigned. What's the  
9 difference?

10 MR. HAAN: IconFind's construction refers to the whole  
11 system. It's kind of like we're referring to the alphabet.  
12 They're referring to one particular letter, a code  
13 representing a category.

14 And when we look at the claim --

15 THE COURT: Well, if you're referring to the whole  
16 alphabet, I would doubt that they'd give you a patent on that.  
17 In other words, every conceivable combination of letters and  
18 numbers?

19 MR. HAAN: Well, no. I mean this is a specific  
20 categorization code.

21 THE COURT: No. If it's specific, then you'd better  
22 define it. Because what you're telling me is just any system  
23 of characters or symbols that represent categories.

24 MR. HAAN: Well, I mean, like Figure 1 of the patent  
25 has a sample system where particular codes mean particular

1 things.

2 But what is claimed is a system that just covers a  
3 category for transacting business, a category for providing  
4 information and copyright. But whoever implements this  
5 invention doesn't have to necessarily use code, and they don't  
6 have to use IN to represent information and don't --

7 THE COURT: Technically the English language is a  
8 system of characters that represents categories, right? If I  
9 spelled out every category in words, those are letters.  
10 Technically that's -- isn't that a little broad?

11 MR. HAAN: Well, looking in the context of the claims,  
12 the claims require that you can pick any of the codes in the  
13 system in order to make up the categorization label.

14 If we look at Claim 19, we see the method of Claim  
15 1 -- with IconFind's construction, the method of Claim 1  
16 further comprising providing a system of characters or symbols  
17 that represent categories and that can be used to label the  
18 page with a label that indicates categories. The label can  
19 indicate many categories. So the categorization code has to  
20 refer to the whole system of character symbols and the  
21 categories that they represent.

22 If we look at Claim 19 with Yahoo's construction, it  
23 doesn't even make grammatical sense. The method of Claim 1  
24 further providing -- further comprising providing a code  
25 representing a category to which the network page is or could

1 be assigned that can be used to label the page with a label  
2 that indicates categories. How can it indicate multiple  
3 categories if their construction of code is a code  
4 representing a single category?

5 THE COURT: All right. So this is just one term used  
6 in the patent. You're not patenting the idea of having a  
7 categorization code.

8 MR. HAAN: Not at all. I mean, this is one of many  
9 limitations in the patent.

10 THE COURT: All right. I understand.

11 MR. HAAN: On page 19, if we look to the  
12 specification, it also demands IconFind's comprehensive  
13 construction or Yahoo's singular construction. The  
14 specification includes a statement that the characters or  
15 symbols that follow are part of a categorization code system.

16 The next sentence says to use the categorization code,  
17 which we would say is the whole system, the creator selects  
18 indicia from all three tiers in the copyright stats categories  
19 that are relevant. It's selecting multiple indicia, it's not  
20 selecting an individual code.

21 Thus similarly on the right you see --

22 THE COURT: Yeah, I see what you're saying here. If I  
23 was going to adopt Yahoo's version, instead of using the word  
24 "use," you might say in order to apply the categorization  
25 code. Then their definition would make more sense. But

1 you're saying that using the code means using the system.

2 MR. HAAN: I would say that in order to adopt Yahoo's  
3 construction, it would have to say in order to use  
4 categorization codes, the creators --

5 THE COURT: Or in order to apply --

6 MR. HAAN: It doesn't say categorization codes plural,  
7 it says categorization code. So it demands that  
8 categorization code by itself refer to many.

9 Just as on the right where it says the categorization  
10 code is preferably the indicia, it's referring to many  
11 indicia, all the indicia in Figure 1. It's not referring to  
12 any particular singular --

13 THE COURT: Right, I see what you're saying.

14 MR. HAAN: And that concludes --

15 THE COURT: Thank you.

16 MR. HAAN: -- these three terms.

17 MS. KASH: Your Honor, if you could turn to page 20 of  
18 our presentation.

19 THE COURT: Yes.

20 MS. KASH: So if you look here, this is the figure  
21 from the patent that represents the entire categorization  
22 system which is what the plaintiff is attempting to -- or the  
23 inventor has attempted to patent.

24 THE COURT: Who put these words in the squares there,  
25 you?



1 MS. KASH: The words in the squares are ours with the  
2 exception of if you look at the bottom in highlighted yellow  
3 it says categorization label.

4 THE COURT: Right.

5 MS. KASH: Okay.

6 THE COURT: See, but you put categorization codes.

7 MS. KASH: Correct. But I can --

8 THE COURT: And Mr. Haan disagrees with that.

9 MS. KASH: If you could turn to page 25.

10 THE COURT: Yes.

11 MS. KASH: You'll see at the top there, this is also  
12 from the patent, it says -- and you can read that here. Here  
13 is the entire IICS user interface with codes in parentheses.  
14 And if you see the codes are the little letters there  
15 delineating the different types of categories.

16 And before we get into a discussion of categorization  
17 labels and categorization code, I think it's important to  
18 note -- and this court has even said in the Chiron versus  
19 Genentech case, which is 266 F.Supp.2d 1172, you held yourself  
20 that where alternative interpretations exist, the court should  
21 not construe the patent in a way that would render it useless.

22 And here with categorization label in particular,  
23 there's an issue where if you assign a page to categories and  
24 have a categorization label, it needs to have a label that  
25 contains the various categories it's been assigned to or else

1 the label itself is useless. As you identified earlier, you  
2 said what does it have multiple labels on it? It doesn't as  
3 evidenced by the website page that you looked at. It has one  
4 label.

5 And if you look back at the categorization label in  
6 the figure in the patent on slide 20, again you'll see there  
7 that it has all the little codes in the space where the  
8 categorization label is. It has all of the different ones,  
9 one from each of the tiers here including the copyright.

10 And what --

11 THE COURT: I think actually it was Chiron versus  
12 Genentech in which I observed that the same word had different  
13 meanings at different places, and I didn't want to construe  
14 that to invalidate the patent or to make it meaningless. And  
15 so it may well be that code sometimes is used to mean like the  
16 Morse code. But another time when somebody types a word in  
17 Morse code, they refer to that particular word as the code,  
18 you have to understand the code here.

19 And so they may well use code differently sometimes  
20 meaning the particular codification of an item and other times  
21 meaning the system by which it is codified. And the question  
22 then would become in the context of categorization code, two  
23 words together --

24 MS. KASH: If you --

25 THE COURT: -- what does it mean?

1 MS. KASH: If you want to turn to the next slide or  
2 slide 24, Your Honor, we can hopefully provide some -- I agree  
3 with you that the patent is not clear when it's discussing the  
4 system as a whole and the codes themselves, the individual two  
5 letters for each category. And that's a challenge with these  
6 particular terms in terms of how to construe them.

7 But if we try and look at the specification, when it's  
8 meaning a system for the most part it actually refers to the  
9 categorization code system. And when it's referring to, for  
10 example, talking about the label itself, it talks about the  
11 codes and uses the two letters. If you look at the second  
12 example, it says EX code.

13 THE COURT: So that hurts you. Because they're saying  
14 the term "categorization code" means the system, and you're  
15 pointing out right now that when they put the words  
16 "categorization" and "code" together they usually refer to a  
17 system. But when they use the word "code" or "codes," they're  
18 usually referring to the individual codification.

19 MS. KASH: No, it's -- I'm trying to show to you the  
20 inconsistency throughout the patent when it's talking about  
21 this. So when you look at the figures and you look at the --  
22 what would be its useful application in practicing it, it  
23 would necessarily have to be the case that at some point you  
24 would have a delineation for what constitutes the codes used  
25 to be assigned to the various categories, and that that

1 categorization code is going to be referring to the singular  
2 when it's talking categorization code and the plural as the  
3 system as a whole when it's referring to more than one.

4           If you look at slide 28, for example, the provisional  
5 application talks about it, that -- for example, in the  
6 context of talking about the entire system, the entire  
7 interface, slide 28, it's talking about the code. The IICS  
8 copyright code can simply be typed in at the end of the  
9 categorization code. And it's -- you know, it would be  
10 nonsensical there if you had a situation where code was typed  
11 in at the end of a system. That just wouldn't make any sense.

12           And so what we're trying to assess here to make sure  
13 that we are able to present our -- to not infringe the patent  
14 to present our non-infringement argument is to make sure that  
15 when assigning a code to a network web page, which is what the  
16 patent asks you to do, we know what it is we're supposed to be  
17 assigning. And our understanding is, from the patent and from  
18 the specification, that's the two letters that represent the  
19 individual category. And that when you create the label, you  
20 take all of those two letters, and you combine it together,  
21 and that's your label.

22           THE COURT: Could it be that sometimes in the patent  
23 the word "code" is used in the specific sense and sometimes  
24 it's used in more general sense and that we ought to define it  
25 with regard to each time it's used instead of defining it the

1 same way every time it's used?

2 MS. KASH: We would agree that -- well, we would agree  
3 that when it is -- a code is being used to represent a  
4 category to which a network page is assigned, which is what  
5 we've asked for a construction on, in that instance we believe  
6 that it's referring to the specific code corresponding to the  
7 specific category. We've not asked for a construction of the  
8 entire system itself.

9 THE COURT: No, but if I define a word, then it's  
10 going to be understood by the jury to mean the same thing  
11 every time it's used.

12 MS. KASH: Right.

13 THE COURT: And I'm asking you could it be possible  
14 that it was used in some places to mean the broader code  
15 system and in other places to mean the more specific  
16 codification of a particular item?

17 MS. KASH: Yes, that is a possibility. And that's  
18 something that is a -- for the Court where there is, you know,  
19 claim differentiation doctrine which is something that the  
20 plaintiff points to and says, oh, look at these other claims,  
21 that's supposed to be guiding principle for you in terms of  
22 construction. And, in fact, if there's an inconsistency, the  
23 Court can correct that.

24 THE COURT: So maybe what you need to do, and I don't  
25 have this problem with the other items that you've asked to

1 have defined, maybe what you need to do with regard to this  
2 item is go through and pick out each place it's used and then  
3 ask me to define it in connection with each one of those times  
4 it's used. Because if it's used to mean different things in  
5 different places, I'm going to have to define how it's meant  
6 each time it's used.

7 Because Mr. -- why don't you step up here for a  
8 minute, Mr. Haan.

9 MR. HAAN: Yes.

10 THE COURT: She's pointing out places where it means  
11 one thing, and you've pointed out places where you think it  
12 means another thing.

13 MR. HAAN: Yes, Your Honor. And it's our position  
14 that it should be construed as it's used in the claims  
15 themselves. This term "categorization code" appears in Claims  
16 19, 20, and 30. And in each one of those claims the  
17 surrounding claim language demands that -- demands that the  
18 code referred to the whole system and not to one individual  
19 code.

20 THE COURT: Who prepared this exhibit on page 25?

21 MS. KASH: That is us, Your Honor. That's from the  
22 provisional --

23 THE COURT: No, I mean who prepared the little thing  
24 in the square that you're referencing?

25 MS. KASH: That's from the patent, Your Honor.

1 THE COURT: Okay. You see that, Mr. Haan?

2 MR. HAAN: One thing, Your Honor. This is from a  
3 provisional application. This isn't from the patent itself.

4 MS. KASH: I apologize. It's from a provisional  
5 application that they used when they were filing this patent  
6 to support the filing date of this patent.

7 THE COURT: All right. It's not from the patent, but  
8 this is how you got the patent.

9 MR. HAAN: It's one of the applications.

10 THE COURT: And you used the word "codes" in a  
11 different way, in the more specific way than the way you're  
12 now advocating.

13 MR. HAAN: The word "codes" alone, yes. Plural  
14 without the term "categorization," yes.

15 But in the claim language itself and in the  
16 specification, it refers to the whole system.

17 THE COURT: Who prepared this language here in the box  
18 on page 28?

19 MS. KASH: That's again from an additional provisional  
20 application.

21 THE COURT: Okay. But this is the way you were using  
22 it when you were applying for the patent. It says the  
23 copyright code can simply be typed in at the end of the  
24 categorization code. So it sounds to me like your client used  
25 the term "categorization code" in the more narrow sense there,

1 not the sense that you're advocating.

2 MR. HAAN: Well, I think it's referring to the bottom  
3 of the figure where it -- the string there it's calling a  
4 categorization code. And in the patent itself the inventors  
5 used the term "categorization label."

6 THE COURT: Well, wait. But you admit right now that  
7 the string at least in this provisional application was  
8 referred to as a categorization code.

9 MR. HAAN: I would say that it includes many codes.

10 THE COURT: No, no. The word "categorization code"  
11 was used in this application in a different sense than what  
12 you're advocating now. It was used to refer to what you're  
13 now calling the string or the label.

14 MR. HAAN: Well, I'm saying that the categorization  
15 code refers to the system. Yahoo is asserting that code is  
16 the string, yes. I'm sorry.

17 THE COURT: No. You typed this, your client typed  
18 this language on their provisional application. And when they  
19 did, they used the term "categorization code" in the more  
20 narrow sense to refer to what you are now calling the string  
21 or label.

22 MR. HAAN: That's correct.

23 THE COURT: So they used it in a different way.

24 MR. HAAN: The term "categorization label" does not  
25 appear in this provisional application.



1 THE COURT: No, but the term "categorization code"  
2 does.

3 MR. HAAN: It does.

4 THE COURT: And it's used in a different sense.

5 MR. HAAN: Well, according to Phillips versus AWH  
6 Corporation, the prosecution history is an ongoing negotiation  
7 between the inventors and the patent office. And to the  
8 extent the file history is ambiguous, the specification in the  
9 claim language controls.

10 THE COURT: If it's plain, you're right. If it's  
11 plain.

12 All right. With those exceptions and what Ms. --

13 MS. KASH: Kash.

14 THE COURT: -- Kash has pointed out here, it looks  
15 like in the patent itself whenever the term "categorization  
16 code" is used, it's consistent with Mr. Haan's interpretation.

17 Am I right or wrong?

18 MR. HAAN: In the specification or in the claims, yes.

19 THE COURT: Right.

20 MS. KASH: Your Honor, we just -- the point that we  
21 don't understand and we can't -- is how it can be the case  
22 that you would have a categorization code system which is  
23 referred to in the specification as we pointed out on slide 24  
24 and then also have a reference to categorization codes and  
25 then also clearly in the patent have codes which are required.

1 THE COURT: No, they never refer to, quote,  
2 categorization codes in the claims or the specifications.  
3 They only refer to them in these applications. And when you  
4 get down to the patent itself, every time it's used it seems  
5 to be used in a sense that's consistent with what Mr. Haan is  
6 arguing.

7 They're using the term "codes," yes, but not  
8 categorization codes in any other sense within the claims or  
9 the specifications.

10 MS. KASH: Well, then I'm confused by claim -- if you  
11 look at Claim 30, if you look at our slide Exhibit 30 and you  
12 say -- it says providing a categorization code --

13 THE COURT: Right.

14 MS. KASH: -- for labeling the network page --

15 THE COURT: That's right. That's consistent with what  
16 he's arguing.

17 MS. KASH: So you're saying that the categorization  
18 code would be the entire system, and then --

19 THE COURT: Right. In other words, providing the  
20 Morse code for sending communications, you see. That's what  
21 he's saying. The categorization code for labeling the network  
22 page.

23 MR. HAAN: Yes, Your Honor.

24 MS. KASH: And then the label itself --

25 THE COURT: That's different.

1 MS. KASH: -- would be the series of the little  
2 codes --

3 THE COURT: Right.

4 MS. KASH: -- and it would have to be the code string  
5 like what was in the provisional application we just pointed  
6 to.

7 THE COURT: That's right.

8 And so categorization label would be defined along the  
9 lines that you have suggested.

10 MS. KASH: It's on slide 32 if you want to look at it.

11 THE COURT: Well, I'm trying to see if I agree with  
12 that.

13 MS. KASH: Okay.

14 THE COURT: A complete code -- you know, it's a label  
15 indicating the category or categories to which a page is  
16 assigned, isn't it?

17 MS. KASH: Well, we would contend it's not an  
18 individual -- it has to be all of the categories. Otherwise  
19 you would have multiple labels on a page.

20 THE COURT: Well, that's why I added "or categories."  
21 I just don't like this tag.

22 MS. KASH: Right. Which is why --

23 THE COURT: I'm not going to define anything in terms  
24 of a tag unless I have to.

25 MS. KASH: Which is why we say it should be the code

1 string, which is the series --

2 THE COURT: It may not be a string.

3 MS. KASH: Well, it's a series of codes or --

4 THE COURT: I'd have to define string, then.

5 MR. HAAN: Your Honor --

6 THE COURT: Because a string, if I looked up string I  
7 could get a lot of different meanings. Whereas label it's  
8 pretty clear.

9 MS. KASH: The only point that we're trying to make,  
10 Your Honor, is that the little -- if it's IN or if it's oh  
11 four for a copyright status thing, those little indicators  
12 have to -- if there is something that's assigning it to -- a  
13 network page is assigned to one of those categories, those  
14 indicators have to be in the label. Otherwise the label  
15 doesn't make sense.

16 If it's -- if you look at the --

17 THE COURT: But it indicates the category or  
18 categories to which a page is assigned.

19 MR. HAAN: That's correct.

20 THE COURT: So why isn't that enough?

21 MS. KASH: Because they're contending that the label  
22 itself could be assigned to -- if there's more than one  
23 category, it could still only have one of the categories as a  
24 label.

25 What they're arguing, Your Honor, is they're saying

1 that if it's assigned to a page for transacting business and  
2 it's assigned to a copyright code oh four, for example, that  
3 you would potentially only have to provide the copyright code,  
4 you didn't have to provide all the different categories it's  
5 assigned. And what we're saying is if you assign it to a  
6 category, it has to be in the label.

7 MR. HAAN: Your Honor, if --

8 THE COURT: But there could be more than one label.

9 MR. HAAN: Well, also, Your Honor, the specification  
10 in column 6, line 55, says that the creator of the page can  
11 communicate the categories as to which the page is assigned to  
12 a search engine. So not all of the category assignments need  
13 be placed in the label itself. They could be in the database  
14 of the search engine.

15 THE COURT: Well, but --

16 MR. HAAN: So it's not correct to say --

17 THE COURT: You think there could be more than one  
18 label on each page consistent with the patent?

19 MR. HAAN: I think the claim language would not  
20 require more than one --

21 THE COURT: No, but could there be more than one label  
22 on a page and still be consistent with your patent?

23 MR. HAAN: Sure. All of the claims have open-ended  
24 terminology comprising it.

25 THE COURT: Okay. Then if that's true, Ms. Kash, why

1 does the complete code string have to be in every label?

2 MS. KASH: I don't know that there's -- it doesn't say  
3 labels in the patent, it says label.

4 THE COURT: I know, but it doesn't say that there only  
5 can be one label on each page, does it?

6 MS. KASH: Well, it wouldn't -- how would -- if you  
7 were typing in a series of -- if you were typing in the  
8 search -- to search -- I don't understand how it would  
9 operate. And the principles of the construction are that you  
10 don't want to render the patent inoperable.

11 THE COURT: No, it would operate. It would operate.

12 In other words, I've got a page, and I've got -- let's  
13 not make it complicated. Let's not put it hidden, let's just  
14 type it down at the bottom, and let's have a simple code. And  
15 it's fishing equipment commercial or fishing informational,  
16 and that's the code.

17 Now, I can put one label on there that says fishing  
18 equipment commercial because my page offers fishing equipment  
19 for sale, but I could put another label on there that says  
20 fishing information because I'm also talking about how to  
21 fish, both on the same page. And if I put both labels on that  
22 page, a search engine would pick up either one of them, and  
23 that seems to be consistent with their patent. It doesn't  
24 seem to render it useless.

25 MR. HAAN: Well, I think consistent with where you're

1 going, Your Honor --

2 THE COURT: I've been there, I'm finished.

3 MR. HAAN: Claim 1 says providing a categorization  
4 label, and "a" in patent parlance has been construed by the  
5 Federal Circuit many times to mean one or more.

6 MS. KASH: Your Honor, the issue here with respect to  
7 that is that there's -- the method that they have claimed is  
8 for categorizing a network page where you provide at the first  
9 level a decision between a category or categories and then  
10 that decision ultimately after you go through the tiers of the  
11 categories results in a label.

12 And so the concern that we have is that if you have  
13 multiple labels on a page which is not in any of the  
14 embodiments, not in the commercial embodiment that they  
15 utilize, that you would have something that you would not be  
16 able to efficiently create the index that the inventors are  
17 seeking to have.

18 THE COURT: No, but in the example I gave you you  
19 could perfectly create an index, and it would satisfy the  
20 purposes of the person that put those labels on there, and it  
21 would also be useful to the persons who are surfing the  
22 Internet. Somebody that wants to find out about fishing would  
23 end up on that page, and somebody that wanted to buy some  
24 fishing equipment would also end up on that page.

25 MS. KASH: But even -- IconFind's own construction,

1       however, indicates that the label itself indicates the  
2       categories to which the page is assigned. And to me it seems  
3       that there is a label that's being discussed singular that  
4       delineates what the pages are assigned. If it's one or more  
5       label, that's not as much of a concern to me as long as the  
6       labels for the page, if it's going to be plural, would have  
7       all the categories.

8                Meaning that if you have a -- if you're going to be  
9       assigning a page, a network page to any category, you have a  
10      label on that page for all the categories to which it's  
11      assigned whether it's one or more. Meaning you don't have  
12      amorphous categories that aren't part of any of the labeling  
13      that's happening on the page.

14               In your example, that would be the case.

15               THE COURT: What?

16               MS. KASH: It would be -- your example would be you've  
17      assigned it to fishing commercial and fishing information. So  
18      you've chosen to have two categories.

19               THE COURT: Right.

20               MS. KASH: Right? And both of those categories you've  
21      labeled your page with, correct?

22               THE COURT: Separate labels.

23               MS. KASH: That's fine. That's fine. But your page  
24      has category labels for every category that you have assigned  
25      your page to.



1 THE COURT: Right.

2 MS. KASH: That's why it would work.

3 What they would propose is that there could be a  
4 label, and then you could have assigned your page to other  
5 stuff amorphously without the label by sending it to the  
6 search engine or by doing something behind the scenes or  
7 whatever.

8 All we're saying is the categorization label -- if you  
9 want to do it in four labels, you can do it in four labels,  
10 but the label has to have all the categories --

11 THE COURT: They may be suggesting that behind the  
12 scenes here, but when I read their definition, if I substitute  
13 label for tag it would be label indicating the category or  
14 categories to which a page is assigned. That doesn't say that  
15 there's some other categories hidden away. It says label  
16 indicating --

17 MS. KASH: So if it said indicating the categories --  
18 if said the tag indicating -- or a label indicating all the  
19 category or categories to which a page is assigned, and it  
20 could be label or labels indicating the category or categories  
21 to which a page is assigned, that would address the concern.

22 THE COURT: No, but what I'm defining is  
23 categorization label, so I'm defining the singular.

24 Okay. I understand what you're saying. I'm going to  
25 look at this again, but I'm ready to take it under submission

1 unless there's something else that --

2 MS. KASH: There is one more term that we could  
3 probably go through quickly.

4 MR. HAAN: Right.

5 THE COURT: Which is that?

6 MS. KASH: Network page.

7 THE COURT: Oh, network page, right.

8 MR. HAAN: Your Honor, if I could --

9 THE COURT: A page which is part of a network.

10 MR. HAAN: Your Honor, if I could make one more point  
11 about categorization label.

12 Once again, the specification says that category  
13 assignments can be sent to a search engine. So the invention  
14 does not have to include all the category assignments in the  
15 label in order to operate.

16 Yahoo's position was that the label itself must  
17 expressly indicate every category in order for the invention  
18 to operate. But if category assignments are communicated to a  
19 search engine as is discussed at column 6 and line 55, then  
20 the search engine already has those category assignments in  
21 its database. And if someone uses the search engine to find a  
22 particular page, it can use that information that the search  
23 engine has, and then it can use whatever category assignments  
24 are expressly included in the label.

25 THE COURT: Why do you think the Court needs to define

1 page?

2 MR. HAAN: We do not, Your Honor.

3 THE COURT: You do not. Why does Yahoo think the  
4 Court needs to define page?

5 MR. HAAN: One thing I wanted to point out, Your  
6 Honor, was that Yahoo has changed its position halfway through  
7 the briefing on this term. In its opening brief, if we turn  
8 to page 20, it has offered its construction for the whole term  
9 "network page" including both words. In its response brief it  
10 offered its construction only for the term "page" and said  
11 that it agreed with IconFind's construction of the term  
12 "network."

13 It did not inform IconFind of this change in its  
14 position. Quite frankly we think it's unfair and also  
15 implicates new claims because the term "network page" together  
16 shows up in Claims 1, 30 and 31, and the term "page" by itself  
17 shows up in Claims 19, 22 and 28.

18 THE COURT: Okay. So, Ms. Kash, why do you think the  
19 Court needs to define page?

20 MS. KASH: Well, Your Honor, we think that you need to  
21 define page because the manner in which the plaintiff is  
22 asserting its patent against Yahoo, who uploads and assigns to  
23 the extent any categories are assigned to photographs, and  
24 Flickr as we discussed earlier today only applies user  
25 selected settings to uploaded photographs, not to an entire

1 network page.

2 And we did not seek to redefine page in and of itself.  
3 We were simply stating in our reply brief that we don't  
4 disagree as to what constitutes a network. We can all agree  
5 on what's a network. The issue here is what are you talking  
6 about when you say page? Because what the plaintiff wants to  
7 have happen is to expand this patent to cover things, simply a  
8 photograph, where a network page is what the categories this  
9 whole patent are being assigned to.

10 THE COURT: Did I get this backwards? Because it  
11 looks like you're the one asking to define as files, data and  
12 information presented when a network address is accessed  
13 including any text, audio, advertising, images, files,  
14 graphics or graphical user interface. Wouldn't that confuse  
15 the jury into thinking that an audio, an advertisement, an  
16 image or a graphic could be a page?

17 MS. KASH: What it is is anything that is -- there's a  
18 difference in this patent between the fact that -- there's  
19 very clear language that when something is being -- a category  
20 is assigned to the network page versus a category assigned to  
21 material on the page.

22 THE COURT: Right.

23 MS. KASH: They're arguing that the photograph itself,  
24 in and of itself constitutes -- can constitute a network page.  
25 And we're saying no, no, no, the network page is the whole

1 thing. Everything that's found in an IP address, everything  
2 that's located on that, that is the page and that that is not  
3 something -- so that when you -- Yahoo does not categorize the  
4 IP address itself. It doesn't do that. It doesn't categorize  
5 all the stuff that's found at a network page or a web page,  
6 however you want to define it in common Internet usage.

7 THE COURT: Okay. Let me ask you then, Mr. Haan, the  
8 patent uses the term "material on a page."

9 MR. HAAN: Right.

10 THE COURT: Is it your position that page could be an  
11 image which is found on a web page?

12 MR. HAAN: That the image itself constitutes a network  
13 page?

14 THE COURT: Yeah. Is that your position?

15 MR. HAAN: No, that's not our position.

16 THE COURT: Okay.

17 MR. HAAN: Our position is you assign the page based  
18 on the material that's on the page, but that doesn't  
19 necessarily include all files, data and information. If you  
20 look at a website, it may have the logo of a company. And if  
21 we include Yahoo's proposed construction and you look at it in  
22 the context of the claims, it says assigning said network  
23 page.

24 THE COURT: Well, we can get to the question of  
25 whether this is an infringement or not later on. But for

1 right now it seems that you're both in agreement that the  
2 image that's on a page is not a, quote, page, unquote. It's  
3 material on a page. And so we should simply define -- page  
4 doesn't need to be defined. It seems that we should just  
5 define network page in order to define what a network is.  
6 Network page is a page on the Internet, a private corporate  
7 network, intranet, local area network or other network.

8 MR. HAAN: Yes. That's our position, Your Honor.

9 THE COURT: What's wrong with that since nobody is  
10 going to take the position that an image on a page is a page  
11 in and of itself?

12 MS. KASH: If that is an admission that we have from  
13 plaintiff and Your Honor is accepting of it, then network page  
14 is fine.

15 THE COURT: All right. Well, if you want to just --  
16 we can put it on the record. You do not claim that an image  
17 which is on a page is a, quote, page, unquote, itself.

18 MR. HAAN: An image itself, in and of itself the image  
19 file is not a page.

20 THE COURT: All right.

21 MS. KASH: Thank you.

22 THE COURT: Okay.

23 MR. HAAN: So I guess I don't understand what the  
24 construction of this term is. There is no construction?

25 THE COURT: No, there will be a construction. But I

1 don't think we need to define the word "page" because  
2 everybody understands what it means. It doesn't mean an  
3 image, it means a page.

4 MR. HAAN: Right.

5 THE COURT: It's got a common definition, a web page  
6 or a network page.

7 MR. HAAN: Right.

8 THE COURT: Right.

9 MS. KASH: Thank you, Your Honor.

10 THE COURT: Okay. Anything else?

11 MR. HAAN: Not unless Your Honor has any further  
12 questions.

13 THE COURT: No. This is interesting. I've enjoyed  
14 the discussion.

15 MS. KASH: Thank you, Your Honor.

16 THE COURT: The matter is taken under submission.

17 (Proceedings were concluded at 3:56 p.m.)

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

/s/ Kathy L. Swinhart  
KATHY L. SWINHART, CSR #10150