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

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

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

Counsel, please state your appearances.

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

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

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

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

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

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

would be easier to have a visual to look at.

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

So who wanted to proceed first?

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

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

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

MS. KASH: Great.

MR. HAAN: Okay.

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

THE COURT: Okay.

MR. HAAN: Sure.

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

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

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

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

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

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

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

MR. HAAN: Sure.

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

MR. HAAN: Yes.

THE COURT: Okay.

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

THE COURT: All right. Go ahead.

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

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

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

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

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

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

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

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

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

MR. HAAN: Both, Your Honor.

THE COURT: What do you mean both?

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

THE COURT: Okay. Why is it three places?

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

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

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

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

MR. HAAN: Right, I would think so.

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

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

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

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

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

Turning to page 7, Yahoo contends that certain patent

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

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

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

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

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

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

MR. HAAN: Sure, absolutely.

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

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

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

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

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

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

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

MR. HAAN: Sure.

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

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

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

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

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

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

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

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

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

MR. HAAN: Yes.

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

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

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

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

They can't have --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Meet with them?

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

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

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

MR. HAAN: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On page 12 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HAAN: Perhaps.

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

know what that meant.

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

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

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

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

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

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

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

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

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

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

MR. HAAN: I think --

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

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

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

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

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

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

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

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

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

THE COURT: But not commercial, not transacting business.

MR. HAAN: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HAAN: Sure.

THE COURT: Okay.

MS. KASH: Good afternoon, Your Honor.

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

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

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

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

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

THE COURT: How much does it cost?

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

THE COURT: So how do they make money?

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

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

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

THE COURT: What page are we on?

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

THE COURT: Right. Okay.

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

THE COURT: Right.

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

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

aspect of this. Maybe there isn't.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. KASH: Sure.

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

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

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

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

THE COURT: Right.

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

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

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

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

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

that.

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

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

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

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

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

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

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

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

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

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

MS. KASH: We agree.

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

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

MS. KASH: Well, the issue here --

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

MS. KASH: That's correct.

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

MS. KASH: The issue here --

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

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

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

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

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

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

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

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

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

MS. KASH: Yeah.

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

MS. KASH: Creative comments.

THE COURT: Creative comments.

MS. KASH: But it's a little bit different than that. So creative comments is a nonprofit organization that provides the different types of copyright delineations essentially. They essentially work with Flickr, it's a third party, and for free they give you sort of the ability to assign a copyright to a photo.

THE COURT: Are they part of Yahoo?

MS. KASH: No.

THE COURT: They're an independent business?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. KASH: No.

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

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

Now what the plaintiff has argued --

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

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

license.

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

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

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

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

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

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

THE COURT: All right. Thank you.

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

MR. HAAN: Just one thought, Your Honor.

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

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

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

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

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

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

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

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

MS. KASH: Correct. And --

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

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

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

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

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

that covers any category.

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

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

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

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

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

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

MR. HAAN: Well, like I said --

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

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

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

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

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

So you --

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

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

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

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

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

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

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

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

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

THE COURT: But those are just examples.

MS. KASH: Correct.

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

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

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

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

THE COURT: That's fine.

Let's go on to categorization label, then.

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

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

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

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

THE COURT: What does tag mean?

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

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

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

label can be placed in a meta tag.

THE COURT: It can be.

MR. HAAN: Correct.

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

MR. HAAN: That's correct.

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

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

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

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

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

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

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

MR. HAAN: Yes.

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

or both?

MR. HAAN: Both.

THE COURT: Both a tag and a label?

MR. HAAN: That's correct.

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

MR. HAAN: Not at all.

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

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

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

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

THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HAAN: But plaintiff would also --

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

MR. HAAN: Okay. Plaintiff would also --

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

MR. HAAN: But plaintiff would also be --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right.

MR. HAAN: There --

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

free?

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

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

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

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

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

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

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

And turning to page 18 --

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

MR. HAAN: That's correct.

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

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

And when we look at the claim --

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

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

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

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

things.

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

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

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

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

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

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

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

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

THE COURT: All right. I understand.

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

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

Thus similarly on the right you see --

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

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

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

THE COURT: Or in order to apply --

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

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

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

MR. HAAN: And that concludes --

THE COURT: Thank you.

MR. HAAN: -- these three terms.

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

THE COURT: Yes.

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

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

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

THE COURT: Right.

MS. KASH: Okay.

THE COURT: See, but you put categorization codes.

MS. KASH: Correct. But I can --

THE COURT: And Mr. Haan disagrees with that.

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

THE COURT: Yes.

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

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

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

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

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

And what --

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

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

MS. KASH: If you --

THE COURT: -- what does it mean?

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

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

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

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

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

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

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

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

same way every time it's used?

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

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

MS. KASH: Right.

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

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

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

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

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

MR. HAAN: Yes.

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

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

THE COURT: Who prepared this exhibit on page 25?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

not the sense that you're advocating.

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

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

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

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

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

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

MR. HAAN: That's correct.

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

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

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

MR. HAAN: It does.

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

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

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

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

MS. KASH: Kash.

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

Am I right or wrong?

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

THE COURT: Right.

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

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

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

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

THE COURT: Right.

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

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

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

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

MR. HAAN: Yes, Your Honor.

MS. KASH: And then the label itself --

THE COURT: That's different.

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

THE COURT: Right.

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

THE COURT: That's right.

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

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

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

MS. KASH: Okay.

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

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

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

MS. KASH: Right. Which is why --

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

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

string, which is the series --

THE COURT: It may not be a string.

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

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

MR. HAAN: Your Honor --

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

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

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

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

MR. HAAN: That's correct.

THE COURT: So why isn't that enough?

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

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

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

MR. HAAN: Your Honor, if --

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

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

THE COURT: Well, but --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

going, Your Honor --

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

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

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

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

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

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

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

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

In your example, that would be the case.

THE COURT: What?

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

THE COURT: Right.

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

THE COURT: Separate labels.

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

THE COURT: Right.

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

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

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

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

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

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

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

unless there's something else that --

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

MR. HAAN: Right.

THE COURT: Which is that?

MS. KASH: Network page.

THE COURT: Oh, network page, right.

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

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

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

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

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

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

page?

MR. HAAN: We do not, Your Honor.

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

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

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

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

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

network page.

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

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

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

THE COURT: Right.

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

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

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

MR. HAAN: Right.

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

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

THE COURT: Yeah. Is that your position?

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

THE COURT: All right.

MS. KASH: Thank you.

THE COURT: Okay.

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

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

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

MR. HAAN: Right.

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

MR. HAAN: Right.

THE COURT: Right.

MS. KASH: Thank you, Your Honor.

THE COURT: Okay. Anything else?

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

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

MS. KASH: Thank you, Your Honor.

THE COURT: The matter is taken under submission.

(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