UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

WEB TRACKING SOLUTIONS, LLC. and DANIEL WEXLER, Plaintiffs/Counterclaim Defendants, v. GOOGLE, INC., Defendant/Counterclaim Plaintiff.	Case No. 1:08-cv-03139 (RRM) (RER)

GOOGLE INC.'S RESPONSE BRIEF ON CLAIM CONSTRUCTION

Dated: April 19, 2010

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NOTE ON CITATIONS

1. References to *Plaintiffs Web Tracking Solutions, LLC and Daniel Wexler's Claim Construction Brief for U.S. Patent No. 5,960,409* (dkt. 49) are indicated by the abbreviation "WTS Br.," followed by the page number being cited.

2. References to *Google Inc.'s Opening Brief on Claim Construction* (dkt. 50) are indicated by the abbreviation "Google Br.," followed by the page number being cited.

3. References to Exhibits A through F refer to the Exhibits attached to the Declaration of Edward J. DeFranco dated March 15, 2009 (dkt. 51) ("DeFranco Declaration"). A reference to "Ex. C" refers to Exhibit C to the DeFranco Declaration.

4. The patent-in-suit, U.S. Patent 5,960,409 ("the '409 patent"), is attached to the DeFranco Declaration as Exhibit A. References to the '409 patent are indicated by column and line number. A reference to "Ex. A, 3:15" means column 3, line 15 of the '409 patent.

4. The cited portions of the prosecution history of the '409 patent are attached to the DeFranco Declaration as Exhibit B. Citations to individual pages are indicated using document identification numbers (*e.g.*, WTS000093).

5. Exhibit G is attached to the Declaration of Patrick D. Curran dated April 19, 2010 ("Curran Declaration"). A reference to "Ex. G" refers to Exhibit G to the Curran Declaration.

I. INTRODUCTION

Plaintiffs ignore important facts in their opening claim construction brief. Those omissions, described below, highlight the flaws in Plaintiffs' proposed claim constructions.

First, Plaintiffs' discussion of the '409 patent specification in Section II.A. of their brief sidesteps language important to claim construction, including the two references to "unbiased" accounting. (WTS Br. at 3-6.) Plaintiffs also ignore the patent's figures as well as portions of the specification that describe them. Those detailed figures highlight the manner in which network messages and URLs are exchanged when using the claimed methods, which, as discussed below, support Google's claim constructions for the terms at issue.

Second, Plaintiffs set forth a selective and incomplete summary of the prosecution history. (WTS Br. at 7-8.) Plaintiffs never acknowledge that Mr. Wexler repeatedly urged the Patent Office to allow his claims because they were limited to a financially independent, third-party service akin to the Nielsen Ratings Company. They ignore that in response to each Office Action issued by the Patent Office rejecting his claims, Mr. Wexler used his Nielsen Ratings analogy to convince the Patent Office that his patent claims should ultimately be allowed. (Ex. B, WTS000051-52 (Nov. 13, 1998); *id.*, WTS000070 (May 3, 1999).)

Third, in describing Mr. Wexler's click tracking activities that led to the '409 patent, Plaintiffs fail to explicitly state that he claims to have served as the independent, third-party click-tracking service required by his patent claims. He testified that when he served as the third-party accounting service he had no financial interest in the clicks he tracked: "My company was not, you know, paid by the click and we had no motivation to report things that wouldn't be true." (Ex. G, Wexler Depo. Tr. 287:9-18 .) Mr. Wexler also admits his method claims are intended to provide an "unbiased" viewpoint on click tracking, by a party with no financial interest in the numerical values of the statistics being tracked. (*Id.*, 15:8-16:13.) Google gets paid on a per-click basis and so has a direct financial interest in the click statistics it tracks, in the manner distinguished from the patented invention during prosecution in order to avoid the prior art.

Fourth, in discussing Google's AdSense product, Plaintiffs note that AdSense "allows publishers of Web sites to display advertisements on their Web sites, and to earn revenues from users' clicks on those advertisements." (WTS Br. at 2.) Plaintiffs do not state, however, that just like publishers, Google earns revenue each time Google counts a "click" on an ad that that Google served. Again, that financial interest in the volume of "clicks" by the party performing the accounting is exactly what the claimed methods are supposed to avoid.

In sum, as Google explained in its opening brief, Plaintiffs' proposed constructions gloss over core distinctions between Google's products and the proper constructions for the disputed terms. In particular, Plaintiffs want to erase the core requirement of the claimed invention that the accounting service be a "third party" operating "independent" of the financially-interested parties (the publisher and the advertiser). This is a made-for-litigation position without support in the intrinsic evidence.[1] Google's constructions properly take into consideration the actual disclosures of the '409 Patent and the other relevant evidence, as required by Federal Circuit law, and should be adopted.

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[1] Indeed, Plaintiff Web Tracking is itself made-for-litigation; it is a patent holding subsidiary of Acacia Patent Acquisition Corporation, a company whose entire business model is to set up subsidiaries, such as Web Tracking, to acquire patents and bring infringement claims. (Google Br. at 3.) In fact, the day after Google filed its opening brief on claim construction in this case, Judge Rader of the Federal Circuit (sitting by designation in the Eastern District of Texas) granted summary judgment of non-infringement for Google in one of the three other patent suits filed against Google by Acacia subsidiaries. *Performance Pricing, Inc. v. Google Inc. et al.*, No. 2:2007-cv-00503 (E.D. Tex.) (order dated March 18, 2010).

II. GOOGLE DISPUTES WEB TRACKING'S CLAIM CONSTRUCTIONS

Google presents below its responses to Web Tracking's claim construction arguments. For the convenience of the Court, Google reports below in each section the parties' respective claim construction proposals.

A. "Fourth Web site" (Claim 1) / "Fourth Node" (Claim 7)

The parties agree that the dispute regarding the terms "fourth Web site" in claim 1 and "fourth node" in claim 7 is identical to the dispute regarding "first / second / third Web site" in claim 1. (WTS Br. at 19.) Accordingly, Google will not separately discuss the dispute regarding the terms "first / second / third Web site," as it did in its opening brief. (Google Br. at 24-25.)

Google's Construction	Plaintiffs' Construction
Fourth Web site: A Web site owned and operated independently from the first, second and third Web sites, and that performs the function of an unbiased third party accounting and statistical service.	**Fourth Web site**: A Web site that is owned and operated by an entity that is independent from the entity(s) that own and operate the first, second and third Web sites, and that performs the function of a third party accounting and statistical service.
Fourth node: A node owned and operated independently from the first, second and third nodes, and that performs the function of an unbiased third party accounting and statistical service.	**Fourth node**: A node that is owned and operated by an entity that is independent from the entity(s) that own and operate the first, second, and third nodes, and that performs the function of a third party accounting and statistical service.

The parties agree that the terms "fourth Web site" and "fourth node" each refer to the accounting service. Google's opening brief used intrinsic evidence to show that the accounting service must be a "third party" that is "independent" of the publisher and advertiser. In other words, the intrinsic evidence shows that the "third party" must not have an incentive to bias its statistics in favor of the publisher or advertiser. (Google Br. at 18-23.) Plaintiffs ask for a broader construction that only requires the accounting service to be owned by a separate legal entity than the entities that own the publisher and advertiser.

At the outset, Google notes that Plaintiffs divide their discussion of the parties' respective construction into two separate pieces: (1) whether the third party accounting site is owned and operated by an independent entity (Plaintiffs' construction) versus owned and operated independently (Google's construction), and (2) whether the accounting site is unbiased (*i.e.*, financially independent). In contrast, Google does not separate its argument because both pieces are directed to the same issue – the independent nature of the accounting service. Indeed, Plaintiffs admit that the two pieces they discuss separately address the same issue. (*Id*. at 17.)

As explained below, Plaintiffs' broad construction is not consistent with the intrinsic record and would lead to unreasonable results that are divorced from the proper construction and scope of the claims. The argument section of Plaintiffs' brief *never* acknowledges important portions of the intrinsic record addressing the issue of independence; it instead cites isolated sentences in the file history, ignoring the surrounding statements. Moreover, Plaintiffs' construction covers accounting services that are clearly financially aligned with the publisher or the advertiser – the very type of accounting that Mr. Wexler admits he did not claim as his invention.

1. Mr. Wexler's Statements To The Patent Office Limit The Claims To An Accounting Service Whose Financial Incentives Are Independent From The Advertiser And Publisher

Mr. Wexler repeatedly argued to the Patent Office that his claims were different than the prior art because they would eliminate problems created when financially-interested parties collect accounting statistics. On multiple occasions, Mr. Wexler argued that the difference between his "independent" service and the "prior art" accounting systems was the lack of a financial stake in the statistics:

> A disadvantage with Internet accounting systems in the prior art is that the accounting is performed by either the publisher or by the advertiser. And *because*

> *the amount of money paid by the advertiser to the publisher is dependent on the accounting statistics collected, there is, or is perceived to be, the temptation by the one doing the accounting to bias the statistics in its favor*. In other words, advertisers don't completely trust publishers to be honest and publishers don't completely trust advertisers either.

(*Id*., WTS000070 (emphasis added).) To illustrate how a financially-independent accounting service would be different than the prior art, Mr.Wexler used the example of television ratings:

> The situation is analogous to that in television advertising. *Because television advertising fees are based on ratings, television stations don't trust advertisers to tally the ratings and advertisers don't trust television stations*. Therefore, the need existed for <u>an independent entity</u> to tally television ratings, which has been filled by the well-known A.C. Nielson Company.
>
> In the same way that television advertising needed an independent entity to tally ratings, the Internet needs an independent entity to account for the referrals from publishers to advertisers. The present invention enables that independent entity.

(*Id*. (underline in original; italics added)).) Mr. Wexler's analogy is simple and clear. Television advertising rates are based on ratings, and both the advertiser and the publisher have a financial interest in those ratings; thus, television needed an "independent" entity – one without a financial stake in the numbers – to measure ratings. In the same way, Mr. Wexler argued, his claims covered an "independent" entity – one with no financial stake in the numbers – to measure "clicks" on Internet advertising.

By offering these arguments to the Patent Office, Mr. Wexler limited the scope of the claims in the '409 patent. Google's construction reflects this core aspect of what Mr. Wexler characterized as his invention. It requires that the accounting service be an "independent," "third-party," "unbiased" accounting service – *i.e.*, an accounting service that does not have, and is not perceived to have, a temptation to bias its statistics in either party's favor. The Federal Circuit's many decisions supporting Google's position on this point are discussed in Google's brief. (Google Br. at 21-24 & n.12 (collecting cases).) Plaintiffs do not contest this point in their brief.

Plaintiffs admit that in the ‘409 patent “the focus is on the *perception* of bias if either the publisher or the advertiser is the source of the accounting statistics,” and assert that the patent “reduces this perception by disclosing a third party accounting service that both the publisher and advertiser consider to be reliable.” (WTS Br. at 18 (emphasis in original).) But in order to preserve their infringement argument, Plaintiffs fail to acknowledge *why* this accounting service claimed in the patent-in-suit is considered more “reliable” than other financially-interested parties. The answer is clear in the patent and prosecution history – the claimed accounting service is more “reliable” than either the publisher or the advertiser because that service, unlike those parties, has no financial incentive in the number of “clicks” it records. Mr. Wexler explained this to the Patent Office multiple times, using the analogy of the Nielsen Ratings Company. Plaintiffs’ proposed construction simply ignores this requirement of the claims.

2. Plaintiffs’ Construction Fails To Require Financial Independence Of The Accounting Service, Contrary To The Limits Imposed By Mr. Wexler During Prosecution

Plaintiffs do not require the accounting service to *operate* independently from the publisher or advertiser. They only propose that the accounting service is *owned* by someone other than the publisher or the advertiser. In fact, Plaintiffs argue in their opening brief that “[a]s long as [the] accounting functions are performed by an entity that is not either the publisher or the advertiser, the claim term [‘fourth Web site’ or ‘fourth node’] is met.” (WTS Br. at 16.) In other words, rather than require that the “fourth Web site” / “fourth node” be an independent third party with no financial bias, Plaintiffs try to circumvent the plain impact of the undisputed intrinsic evidence by focusing solely on ownership and ignoring financial independence.

Ownership is markedly different than financial independence. An accounting service can be owned separately from the publisher and advertiser, but still not operate independently of those entities. For example, an accounting service could partner with a publisher to share the proceeds from a publisher's pay-per-click ads. (Google Br. at 20-24.) In that situation, the accounting service would have a direct financial incentive in the number of "clicks" the service recorded: every time the accounting service recorded an additional "click" on an ad from the publisher's Web site, the accounting service would increase its own revenues. An advertiser faced with this arrangement would have no reason to trust this accounting service's statistics any more than it would trust the publisher's own statistics. Yet Plaintiffs contend that such an accounting service could qualify as an "independent" "third-party" source of statistics under the patent, as long as the accounting service and its business partner – the publisher – were owned by separate entities.

That is not what the intrinsic evidence requires. Mr. Wexler told the Patent Office that the accounting method described in his claims would be performed by a Web site "owned and operated by an independent entity – one that is not *associated* with either the publisher or the advertiser." Ex. B, WTS000070 (emphasis added). In this context, "independence" refers to *financial* independence. The accounting service, unlike the publisher and the advertiser, must not have any "skin in the game" with respect to the actual volume of "clicks" on an ad. This is an obvious requirement for third-party independent accounting. The accounting Web site, like any third-party accountant, cannot have a financial interest in the outcome of its analysis.

Plaintiffs gloss over this requirement. Their construction is designed to broaden the claims, despite the voluminous intrinsic evidence demonstrating that financially-interested accounting services are not "independent" "unbiased" "third-party" services under the patent. This effort to broaden the claims is exactly what the claim construction process is designed to avoid; plaintiffs cannot gloss over portions of the intrinsic record to broaden their claims for litigation. *See, e.g., Computer Docking Station Corp. v. Dell Inc.*, 519 F.3d 1366, 1378-79 (Fed.

Cir. 2008) (finding that the "*totality* of the prosecution history" informs the claim construction process, and that in that case "the *sum* of the patentees' statements during prosecution would lead a competitor to believe that the patentee had disavowed coverage of laptops") (emphases added).

In this case, the intrinsic evidence confirms the importance of financial independence, and clearly supports Google's construction. The specification states that the patent satisfies the "need . . . for an *unbiased*, readily available source of statistical/accounting information." (Ex. A, 2:31-34 (emphasis added).) Likewise, in the November 1998 narrowing amendment, the April 1999 meeting, and the May 1999 narrowing amendment, Mr. Wexler told the Patent Office that "the present invention" was operated "by an independent entity," which would solve "[a] disadvantage with Internet accounting systems in the prior art" where "*the amount of money paid . . . is dependent on the accounting statistics collected*" and hence "advertisers don't completely trust publishers to be honest and publishers don't completely trust advertisers either." (*Id*. (emphasis added).)

Mr. Wexler himself confirmed during his deposition that his alleged invention was an independent, unbiased third-party service with no financial interest in the statistics it would collect:

> Q. Right. For example, you wanted to make sure that the numbers – the click-through numbers were as accurate as possible, correct?
>
> A. Yes.
>
> Q. And one way to do that was to make sure that parties that had an interest in the number being higher, for example, like the advertiser, were not actually doing the tracking; is that right?
>
> A. Yes.

* * *

> Q. But, on the other hand, it is like having an independent accounting firm or the Nielsen ratings, you want to make sure that it is an unbiased source, so that not even an issue; is that fair?
>
> A. Yes.

(Ex. G, Wexler Depo Tr. 15:4-15, 17:4-9.) Indeed, Mr. Wexler admitted that his accounting service, which he asserts practiced the methods in the claims, operated like the Nielsen Ratings Company and was not paid based on the volume of click statistics:

> Q. And just as Nielsen presumably didn't have a financial interest in the data that it was reporting, neither did your third-party site?
>
> A. ***My company was not***, you know, ***paid by the click*** and we had no motivation to report things that wouldn't be true.

(*Id*., 287:9-18 (objection omitted and emphases added).)

Plaintiffs claim that their construction is nevertheless appropriate because it "is consistent with the definition of 'publisher' upon which the parties have agreed." (WTS Br. at 16.) According to Plaintiffs, "[t]here is simply no logical reason [] for the definition of 'fourth Web site' to utilize different language than the definition of 'publisher' to which the parties have agreed." (*Id*.) This is entirely incorrect. The supposed key point of novelty in the '409 patent is that the accounting service is *fundamentally different* than the publisher. The accounting service, unlike the publisher, is an "independent" entity that the advertiser will trust, and as the inventor himself admits, the accounting service is certainly not paid by the click. (Ex. G, Wexler Depo. Tr. 287:9-18 .) Plaintiffs cannot assert that there is "no logical reason" to define the publisher and the "fourth Web site" differently. The differences between these two parties are the supposed invention.

3. Plaintiffs' Excerpts Of The Prosecution History Omit Important Disclaimers That Limit The Scope Of The Claims

To support their argument that the claims require separate ownership but not independent operation, Plaintiffs cite three sentences from the prosecution history. (WTS Br. at 15-16 (citing WTS000051, WTS000070).) These three sentences are offered as proof that the patent only requires "the performance of the accounting functions by a third party Web site that is owned by neither the publisher nor the advertiser." (WTS Br. at 15.).

Such selective parsing and quotation of the record can be highly misleading. As shown below, Plaintiffs cite these three sentences in isolation in this section of their brief (WTS Br. at 15-16), without acknowledging at all in this section that Mr. Wexler's surrounding statements addressed the need for a financially independent accounting service:

> Second, the present invention enables the accounting site to be owned and operated by an independent entity — one that is not associated with either the publisher or the advertiser. A disadvantage with Internet accounting systems in the prior art is that the accounting is performed by either the publisher or by the advertiser. And because the amount of money paid by the advertiser to the publisher is dependent on the accounting statistics collected, there is, or is perceived to be, the temptation by the one doing the accounting to bias the statistics in its favor. In other words, advertisers don't completely trust publishers to be honest and publishers don't completely trust advertisers either.
>
> For example, it is contemplated that the system of Kirsch is to be operated by a publisher (*e.g.*, Infoseek, Yahoo, *etc.*) and the system of Graber I, Graber II and Graber III is to be operated by the advertiser (*e.g.*, Amazon.com, ebay.com, *etc.*), but the present invention can be operated by an independent entity that is neither the publisher nor the advertiser.
>
> The situation is analogous to that in television advertising. Because television advertising fees are based on ratings, television stations don't trust advertisers to tally the ratings and advertisers don't trust television stations. Therefore, the need existed for an independent entity to tally television ratings, which has been filled by the well-known A.C. Nielson Company.
>
> In the same way that television advertising needed an independent entity to tally ratings, the Internet needs an independent entity to account for the referrals from publishers to advertisers. The present invention enables that independent entity.

Cited by Plaintiffs

Ignored by Plaintiffs

(Ex. B at WTS000070.) Plaintiffs cannot avoid disclaimers by ignoring large portions of the intrinsic record. Google's proposed construction accurately reflects the limiting consequences of Mr. Wexler's statements to the Patent Office.

Moreover, taken in context, the sentences cited by Plaintiffs actually support Google. Mr. Wexler explained that the claimed accounting service is "owned *and operated*" by an entity that is "independent" of the publisher and advertiser. (Ex. B, WTS000051, WTS000070 (emphasis added).) Plaintiffs ignore the operation of the accounting service, and focus solely on its ownership. This reads the words "and operated by an independent entity" out of the prosecution history. Plaintiffs admit that their construction does not require operation in an independent manner: on their construction, "[a]s long as [the] accounting functions are performed by an entity that *is not* either the publisher or the advertiser, the claim term is met." (WTS Br. at 16 (emphasis added).) Plaintiffs are attempting to rewrite the prosecution history by removing words that are inconsistent with their infringement assertions. That is improper. Mr. Wexler's statements to the Patent Office show that the claims are directed to an accounting service not only *owned* separately from, but *operated* independently of, the publisher and advertiser.

B. "The first uniform resource locator is obtained by the first user's Web browser from the first Web site" (Claim 1)

Google's Construction	Plaintiffs' Construction
The first uniform resource locator is part of the Web page generated by the first Web site and downloaded from the first Web site to the first user's Web browser.	The first uniform resource locator is acquired as a result of interaction between the first user's Web browser and the first Web site (for example, as a result of downloading a Web page from the first Web site or as a result of clicking on a link or an advertisement on the first publisher's Web page as displayed in the first user's browser).

Plaintiffs contend that "this portion of the claim term should is to be construed broadly" because "[n]either the claim language nor the intrinsic evidence requires that the first user's Web browser download the first URL directly from the first publisher's Web site." (WTS Br. at 20.) According to Plaintiffs, "the breadth of the claim allows the first user's Web browser to download the first URL *from any source, including a Web site other than the publisher's Web site*, provided that it obtained the first URL as a result of interacting with the first publisher's Web site in the first instance." (*Id*. at 21 (emphasis added).)

This argument confirms that Plaintiffs are rewriting the claim language. The claim very clearly states how the browser obtains the first URL – that URL is received "from the first Web site." Yet Plaintiffs contend that this URL may come "from *any source*." This is an impermissible redrafting of unambiguous claim language. *See Lucent Tech., Inc. v. Gateway, Inc.*, 525 F.3d 1200, 1215 (Fed. Cir. 2008) ("courts may not redraft claims," as doing so would "interfere with the function of claims in putting competitors on notice of the scope of the claimed invention") (quote and cite omitted).

Plaintiffs assert that their construction is appropriate because "'[o]btain' is a much broader term than 'download.'" (WTS Br. at 22.) But Plaintiffs cite no intrinsic evidence to support that assertion. They instead point to outdated dictionary definitions for the words "download" and "obtain." (*Id*.)

This extrinsic evidence as to the meaning of these terms is contrary to the language of the claims and the specification, and is therefore irrelevant. *See Philips v. AWH Corp.*, 415 F.3d 1303, 1318-19 (Fed. Cir. 2005) (extrinsic evidence cannot override intrinsic evidence). As shown in Google's brief, intrinsic evidence – namely, the patent specification – discloses where the first URL comes "from." (Google Br. at 25-28) The specification explains that the publisher's Web page is an HTML file. (Ex. A, 4:47-51.) That HTML file "*includes the URL* pointing to the third party site 13." (*Id*. 4:52-53 (emphasis added).) The user's browser obtains that file, and the URL included in that file, when the browser downloads the file from the publisher's Web site (*id*., Fig. 2, at 11b). This unambiguous disclosure dictates the meaning of the disputed terms. *See Philips*, 415 F.3d at 1315 ("[T]he specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.") (quote omitted).

Plaintiffs ignore the specification's explanation that the HTML file "*includes the URL* pointing to the third party site 13," (*id*. 4:52-53 (emphasis added)), when they assert "[n]or does the specification preclude the hypertext source file, downloaded from the publisher's Web site, from directing the user's Web browser to another entity's server to acquire the actual URL." (WTS Br. at 23.) The specification *squarely contradicts* that assertion. Plaintiffs propose that the HTML file does not include the URL, but the specification says the HTML file "includes the URL pointing to the third party site 13." (Ex. A, 4:52-53.) Likewise, Plaintiffs assert, without elaboration, that "the specification contemplates multiple methods for the first user's Web browser to 'obtain' the first URL." (WTS Br. at 24.) Yet Plaintiffs fail to identify any portion of the specification supporting that claim. This conclusory assertion speaks volumes. The specification explains that the browser obtains the first URL from the publisher's Web site as part of the HTML file the browser downloads from the publisher. (Ex. A, 4:47-53; *id*. Fig. 2 & Fig. 3.) No other method of URL delivery is disclosed in the patent.

Even if extrinsic evidence were appropriate, Plaintiffs' arguments are based on outdated definitions of "download" <u>from 1989</u> that do not reflect the understanding of one of ordinary skill in the art <u>in 1996</u>. The patent application, which was filed in October 1996, explains that the common meaning of Internet-related terms changed between 1991 and 1996: "Until as recently as five years ago, the Internet was used primarily by the scientific and technical community *and was relatively unknown outside of such circles*. And now, *five years hence, knowledge of the Internet, and its use, are ubiquitous*." (Ex. A, 2:9-13 (emphases added).) Extrinsic evidence should not be considered at all, and in any event, non-technical definitions of "download" from 1989 do not accurately reflect that term's meaning by 1996.

C. "Redirecting … to the third Web site in response to the receipt of the first uniform resource locator" (Claim 1)

The parties agree that the dispute regarding the phrase "redirecting … to the third Web site in response to the receipt of the first uniform resource locator" (claim 1) is identical to the dispute regarding the phrase "transmitting, in response to the receipt of the first uniform resource locator, a second uniform resource locator to the first browser" (claim 9). (WTS Br. at 34.) Accordingly, Google will not separately discuss the dispute regarding the "transmitting" phrase as it did in its opening brief. (Google Br. at 32-33.)

Google's Construction	Plaintiffs' Construction
Redirecting to the third Web site as the response to the first browser's request containing the first uniform resource locator.	Either needs no construction, or should be construed according to the plain and ordinary meaning of claim language subject to the term "redirecting."

Plaintiffs assert that this phrase needs no construction, but in their opening brief they concede that in doing so they are attempting to achieve an extremely broad construction. Plaintiffs state that the claim element requiring "redirecting … in response to the receipt of the first uniform resource locator" can be fulfilled by "*[a]ny process* that ultimately redirects the first user's Web browser to the advertiser's Web site, following the receipt of the first URL at the fourth Web site/third party accounting service, meets this claim element." (WTS Br. at 25 (emphasis added).) Plaintiffs actually acknowledge their proposal would lead to the claims covering processes other than the one disclosed by the patent, including multiple redirect messages to multiple Web sites other than the advertiser. (WTS Br. at 26 (noting Plaintiffs' construction covers "intermediate redirects before the first user's browser is ultimately redirected to the advertiser's Web site").)

Plaintiffs' broad construction is contracted by both (1) the intrinsic evidence, which shows that "requests" and "responses" are used in the patent to describe pairs of network messages (Section 1 below); and (2) Plaintiffs' claim differentiation arguments, which are predicated on factual errors (Section 2 below).

1. Plaintiffs Ignore The Patent's Consistent And Repeated Use Of The Terms "Request" And "Response" To Refer To Network Messages

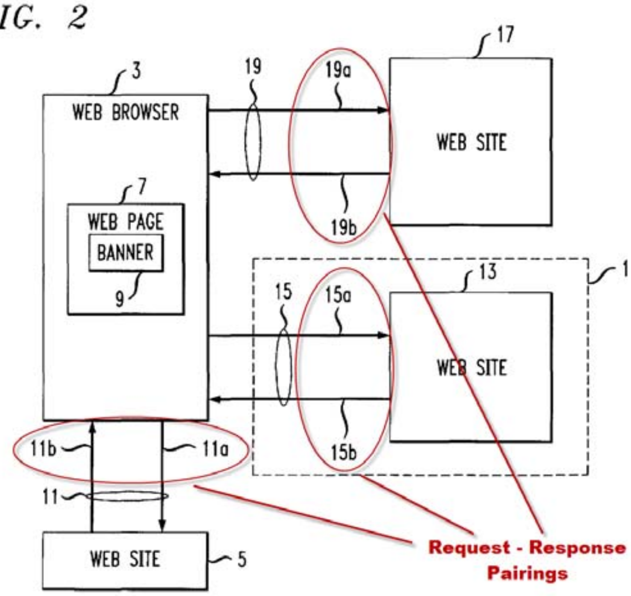
Plaintiffs ignore the fact that the patent uses existing technology to perform the business method described in its claims. That technology includes "a network such as the Internet . . . using *various standard protocols*" that are "known to those skilled in the art." (Ex. A 1:12-22 (emphasis added).) These protocols, referenced throughout the specification, include the "Hypertext Transfer Protocol (HTTP)" protocol. (*Id*. 5:15-16.) That protocol is a set of rules for sending network messages, including "request" messages and "response" messages. (*Id*. 5:15-21.)

The terms "request" and "response" are used consistently in the specification to describe pairs of network messages, in which the "request" message and the "response" message are two halves of a single exchange. For example, the patent discloses configuring a Web server to "issue a '302' redirect *response* when a specific URL is *requested*." (*Id*. 5:15-17 (emphases added).) The specification explains that using the standard network protocols required for the claimed method, each "response" message is paired to a specific "request" message – *i.e.*, a network message from a Web browser that requests access to a network resource. (*Id*. 5:18-21

(“When the specific URL is requested, the *request* itself . . . is recorded, and the redirect [response message] to the intended URL, i.e., the advertiser’s Web site, is issued.”) (emphasis added).)

Those paired network messages are illustrated in the patent’s Figures 1 and 2. In explaining those figures, the patent references the “request signal 11a” (Ex. A, 3:51), the “request signal 15a” (*id*. 4:57), and the “request 19a” (*id*. 5:8). These “requests” to download information are each paired with specific “responses” providing that information. (*Id*. 3:52-54 (“In response [to download request signal], the Web site 5 downloads information, indicated by the reference numeral 11b, to the users Web browser 3”); *id*. 4:32-34 (same).) These “request-response” pairings are shown below:

FIG. 2



(Ex. A, Fig. 2.)

Despite this important intrinsic evidence, Plaintiffs fail to account for these portions of the specification and figures illustrating “request-response” pairings. The repeated and consistent uses of these terms in the specification and figures defines the meaning of the terms in the claims. *See, e.g., Computer Docking Station*, 519 F.3d at 1374 (Fed. Cir. 2008) ("repeated and definitive remarks in the written description" define a term's meaning in the claims); *Bell Atl. Network Servs. Inc. v. Covad Commc'n Group, Inc.*, 262 F.3d 1258, 1271 (Fed. Cir. 2001) ("when a patentee uses a claim term throughout the entire patent specification, in a manner consistent with only a single meaning, he has defined that term by implication").

Plaintiffs' reference to a supposedly broad "plain and ordinary meaning" of these terms is also inconsistent with the patent specification's statements regarding persons of ordinary skill in the art. The patent acknowledges that it does not involve new hardware or software; it uses "various standard protocols" for sending network request and response messages, protocols that were already "known to those skilled in the art" (*id*. 1:12-22). Where terms have specialized meanings in a field, those specialized meanings are incorporated into the claims. *See, e.g., Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319 (Fed. Cir. 2005) ("absent some particular reason to do otherwise, the claim terms must be interpreted *as would one of ordinary skill in the art*") (emphasis added). Thus, Plaintiffs' efforts to employ a broad "plain and ordinary meaning" for network-related terms such as "request" and "response" should be rejected.

2. Plaintiffs' Claim Differentiation Arguments Are Factually Incorrect

Plaintiffs assert that the "principle of claim differentiation provides further support that this claim term is to be construed in broad fashion." (WTS Br. at 27.) According to Plaintiffs, the differences between Claim 1 and Claim 5 support their construction:

> **Claim 1**: … redirecting, at the fourth Web site, the first user's Web browser to the third Web site in response to the receipt of the first uniform resource locator …
>
> **Claim 5**: The method of claim 1 further comprising configuring a Hypertext Transfer Protocol server program at the fourth Web site to issue a 302 redirect response when the first uniform resource locator is received.

Claim differentiation is a canon of construction in patent cases. It refers to the general rule that independent claims are broader than their dependent claims. *See, e.g.*, *AK Steel Corp. v. Sollac and Ugine*, 344 F.3d 1234, 1242 (Fed. Cir. 2003) ("dependent claims are presumed to be of narrower scope than the independent claims from which they depend"). Thus, a dependent claim must narrow the claim from which it depends, by adding at least one new limitation.

Plaintiffs' application of the claim differentiation canon is based on a faulty premise. Plaintiffs conflate two separate issues: (1) the *type* of redirect response message used to perform the redirection, and (2) the *number* of redirect response messages. As shown below, Claims 1 and 5 each require the same number of redirect response messages (specifically, one response message) – but Claim 5 is narrower than Claim 1 because it requires that the redirect message be a specific *type* of response message.

<u>Type of redirect message</u>. As Plaintiffs note, Claim 5 of the '409 patent limits Claim 1 by adding a new requirement: "configuring a Hypertext Transfer Protocol server program at the fourth Web site to issue a 302 redirect response when the first uniform resource locator is received." Plaintiffs correctly acknowledge that a "302 redirect response" is one type of redirect response message included in the HTTP protocol. (*Id*. at 28 ("A 302 redirect response is one of several methods of redirecting.").) But as noted in Google's brief, the HTTP protocol also includes other forms of redirect response messages – including a "301 redirect response," a "303 redirect response," and a "307 redirect response." (Google Br. at 32 & n.14.) Google does not contend that the redirect response message in Claim 1 must be a "302 redirect response" message. The response required by Claim 1 could be any type of redirect response message, including a "301 redirect response," a "303 redirect response," a "307 redirect response," or some other redirect response message recognized by a non-HTTP network protocol. Claim 5

narrows the scope of Claim 1 by requiring that this redirect message be a “302 redirect response” rather than some other form of redirect response.

Number of redirect messages. According to Plaintiffs, “Claim 1 is not limited to any single method of redirecting such as is claimed in Claim 5,” and therefore “Claim 1 covers any method of redirecting, including multiple intermediate redirects.” (WTS Br. at 28.) But this assertion is not supported by Claim 5. If multiple redirect messages are allowed in Claim 1, they are also allowed in Claim 5, because nothing in Claim 5 purports to reduce the number of redirect messages that could be issued. Claim 5 states that it reduces the scope of Claim 1 by requiring a specific type of redirect – a “302 redirect response” message that confirms with the HTTP protocol. Claim 5 does not state whether there may be “multiple intermediate redirects” after the accounting service issues one “302 redirect response.” Thus, with respect to the *number* of redirect messages used, Claim 5 is no narrower than Claim 1.

The reason that only one redirect message can be sent is found not in Claim 5, but in Claim 1 itself, which uses the word “response” – a word that the patent implicitly defines, and that persons of ordinary skill in the art would understand as a network message. Claim 1’s use of the specialized term “response” incorporates the “request-response” protocols discussed at length in the patent’s specification, including Figures 1 and 2. (Google Br. at 29-32.) Plaintiffs simply fail to acknowledge the patent’s many consistent uses of the term “response” as a specific, singular form of network message.

D. “Banner” (Claim 2, 8, and 11)

Google’s Construction	Plaintiffs’ Construction
An area of a Web page used to display logos or other graphical images.	An area of a Web page that can be used to display logos, advertisements or other content to potentially entice a user to obtain further information pertaining to the banner or to connect to an advertiser’s Web site.

The term “banner” is used in dependent claims 2, 8, and 11 to further restrict the scope of claims 1, 7, and 9, respectively. The term banner does appear in the independent claims. For example, dependent claim 2 adds to claim 1 the limitation that the advertisement published by the first publisher is a “first banner,” and the advertising published by the second publisher is a “second banner:”

> **Claim 1**: A method for accounting, wherein a first publisher having a first Web site and a second publisher having a second Web site each publish advertising for an advertiser having a third Web site, the method comprising:
>
> receiving, at a fourth Web site, a first uniform resource locator . . . and wherein the first uniform resource locator is associated with advertising for the advertiser . . .
>
> **Claim 2**: The method of claim 1 wherein the advertising published by the first publisher is a first banner that is associated with the first uniform resource locator . . .

As Plaintiffs asserts with respect to other claim terms, under the doctrine of claim differentiation, “each claim in a patent is presumptively different in scope.” *RF Delaware v. Pacific Keystone Technologies, Inc.*, 326 F.3d 1255, 1263-64 (Fed. Cir. 2003). Plaintiffs’ proposed construction of “banner” runs afoul of this doctrine. Plaintiffs’ proposed construction for “banner” is so broad that it would capture any type of advertising content, including both text and image advertisements, and dependent claims 2, 8, and 11 (that use the term “banner”) would improperly have the same scope as independent claims 1, 7, and 9 (that use the broader term “advertisement”).

Plaintiffs’ broad definition of “banner” is also inconsistent with the specification, the inventor testimony and the industry standard at the applicable time period of the filing date of the patent, and should therefore be rejected. *See, e.g., AquaTex Industries, Inc. v. Techniche Solutions*, 419 F.3d 1374, 1382 (Fed. Cir. 2005) (claims should be construed based on “combined teachings within the specification” and “consistent interpretations in the industry publications”). As explained in Google’s opening brief, the specification describes banner advertisements as image advertisements that display graphics, such as corporate logos. (Google Br. at 33-34 (citing Ex. A at 1:49-50, 3:54-58).) This description comports with Mr. Wexler’s testimony, which described banner advertisements as image files. (Ex. C, Wexler Dep. Tr. 242:22-243:3.) It also comports with meaning of “banner” in the industry. (Ex. F, Computer Glossary: Complete Illustrated Dictionary, 9th ed. 2001, defining “banner ad” as “a graphic image used on Web sites to advertise a product or service.”).

Plaintiffs contend that their construction is appropriate because the specification refers to a “reader.” (WTS Br. at 31 (“Reference to the ‘reader’ connotes that the banner includes text as well as graphics.”).) This is incorrect. The “reader” is the person operating the Web browser, who presumably *reads the Web page* – which can include “text, graphics, and even sound.” (Ex. A, 1:23-25.) The person operating the Web browser would of course also “read” a corporate logo, message, or slogan contained in a graphical advertisement. Nothing in the specification suggests that the construction for banner should be broad enough to include any advertisement that includes any written material “read” by the user.

Indeed, Mr. Wexler confirmed in his deposition, he did not intend to refer to text when he used the term “banner” – he intended to refer to image advertisements. (Ex. C, Wexler Dep. Tr. 242:22-243:3.) A person of ordinary skill in the art in 1996 would have understood Mr. Wexler in this way, interpreting “banner” as an image advertisement. (Ex. F.) Thus, the term “banner” restricts claims 2, 8, and 11 to image advertisements.

III. CONCLUSION

Google respectfully requests that the Court adopt Google's claim constructions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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