

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

FUNCTION MEDIA, L.L.C.,

Plaintiff,

vs.

GOOGLE, INC. AND YAHOO, INC.,

Defendants.

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Civil Action No. 2007-CV-279

JURY TRIAL DEMANDED

**FUNCTION MEDIA’S REPLY TO GOOGLE’S RESPONSE
TO FUNCTION MEDIA’S MOTION TO EXPEDITE
CONSIDERATION OF MOTION TO
PRECLUDE ADMISSION OF UNTIMELY EVIDENCE**

Google’s opposition to Function Media’s Motion to Expedite fails to establish a basis for slow-rolling Google’s briefing. Google complains about the burden associated with responding quickly to Function Media’s motion. But this burden, such as it is, is of Google’s own making – if Google did not wish to have to brief this motion so quickly, and during the holidays, then it should not have (a) produced 22,000 new computer files on the Saturday before Christmas; and (b) identified Ben Lee as a “will call” witness on the Tuesday before Christmas.

By contrast, the burden on Function Media is substantial in having to prepare for trial for several more weeks, not knowing whether these 22,000 files will be let into evidence and not knowing whether Ben Lee will be permitted to testify. It will require extraordinary amounts of last-minute work for Function Media to fully analyze those 22,000 files (the relevance of which Google has **STILL** not explained to Function Media) and to prepare to cross-examine Ben Lee (without the benefit of his prior, timely deposition or any of the documents from his files).

As such, as between Google and Function Media, the party who should be made to bear the “burden” here is plainly Google. Google should be required to respond to Function Media’s

motion to exclude in such time that the matter can be taken up at the pretrial hearing on January

5.

Respectfully submitted,

/s/ Joseph S. Grinstein

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2009, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Joseph S. Grinstein

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