

**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. 2:07-CV-279

FILED UNDER SEAL

JURY TRIAL DEMANDED

**JOINT SUBMISSION OF OBJECTIONS TO THE ADMISSION OF
DESIGNATED DEPOSITION TESTIMONY**

Pursuant to the Court's request during the January 5, 2010 evidentiary hearing, Function Media and Google hereby jointly submit objections to the admissibility of designated deposition testimony. For the Court's convenience, the parties have lodged under seal with the Court's clerk hard copies of the relevant excerpts of deposition transcripts with the objected-to testimony highlighted. The deposition transcripts are referred to herein by Exhibit number.

FUNCTION MEDIA'S OBJECTIONS

Function Media's Statement Regarding Deposition Designations

Consistent with this Court's Orders and direction, FM has narrowed its deposition designations. At the present time, FM has designated 6 hours and 35 minutes of testimony for use during its case in chief or rebuttal.¹ FM has further designated approximately 2 hours and 8 minutes of testimony from FM's prosecution attorneys and a former employee for use solely during the hearing of Google's inequitable conduct claims, should such hearing be necessary.

FM's Remaining Objections

FM has resolved or waived all remaining objections with one exception. FM has objected to certain testimony by Henry Croskell, Esq. (FM prosecuting attorney), Kenneth S. Roberts, Esq. (FM prosecuting attorney), and Jared Burke to the extent such testimony relates to FM's Motion in Limine No. 47 regarding copying. This Court granted FM's Motion to Reconsider MIL No. 47. As such, FM maintains that the testimony is inadmissible. Google has informed FM that it will not seek to play the relevant deposition clips without first raising the issue of admissibility with the Court. On the basis of that representation, FM will not present its objections to the Court for resolution at this time.

FM's Responses to Specific Google Objections

¹ This computation of time does not include Google's counter-designations or FM's counter-counter-designations.

In the tables below, FM has provided responses to certain objections raised by Google. FM does not waive its opposition to any remaining Google objections noted below. However, in the interest of time and efficiency, FM asserts that such objections may be resolved by reference to the depositions alone. FM is willing to provide additional argument at this Court's request.

GOOGLE'S OBJECTIONS

Google's General Objections

Google's objections are based upon Function Media's designations of deposition testimony served October 2, 2009 and supplemental designations served December 23, 2009, and Function Media's subsequent agreements to withdraw previously designated testimony during the parties' meet and confer. For the purposes of admissibility of Function Media's deposition designations, Google does not at this time rely on its objections to questions as lying outside the scope of Function Media's Rule 30(b)(6) notices; however, Google reserves its rights to object to any attempt by Function Media to use testimony outside the scope of its 30(b)(6) notices as representative of Google or as binding admissions regarding any issue of fact or law. In addition, in order not to burden the Court with general objections that will likely be resolved by the Court's rulings on pending or carried motions in limine, Google reserves its rights to object to additional specific deposition testimony under those motions in limine after they are resolved by the Court. Because the admissibility of testimony from a witness depends on the context, Google reserves the right to object to any deposition testimony under Rules 402 and 403, depending on the presentation of evidence at trial.

Google's Specific Objections to Function Media's Deposition Designations

For the reasons indicated in the following, Google respectfully requests that the Court preclude Function Media from offering the deposition testimony listed below during trial.

Google's Objections to Designated Testimony from Brian Axe (Transcript at Ex. A).

Name	FM's Designations	Objections	Granted ?
Axe, Brian	149:8-149:10	Subject to Google's MIL 10 regarding acquisitions;	
Axe, Brian	160:3-22; 160:24-162:22; 162:25-163:8; 163:13-163:25; 165:19-166:1;	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions.</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Name	FM's Designations	Objections	Granted ?
Axe, Brian	179:6-181:24	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Google's Objections to Designated Testimony from Mireya Bravomalo (Transcript at Ex. B).

Name	FM's Designations	Objections	Granted ?
Bravomalo, Mireya	148:24-149:2; 149:4-149:12; 149:14-149:22; 149:24-150:1	Lacks foundation, calls for speculation, argumentative, misstates witness' testimony, hearsay	
Bravomalo, Mireya	167:15-168:2; 168:4-168:10; 168:12-168:12; 169:9-169:14; 169:16-169:25; 170:2-170:3	Lacks foundation, calls for speculation, argumentative, misstates witness' testimony, hearsay	
Bravomalo, Mireya	200:24-201:2; 201:4-201:8; 201:10-201:17	Lacks foundation, calls for speculation, misstates witness' testimony, hearsay	

[Note: Ex. C omitted].

Google's Objections to Designated Testimony from Jeff Dean (Transcript at Ex. D).

Name	FM's Designations	Objections	Granted ?
Dean, Jeff	37:18-38:15; 38:18-39:20; 41:4 "Prior"- 41:22; 41:24-42:4;	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Name	FM's Designations	Objections	Granted ?
Dean, Jeff	161:8-161:15	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	
Dean, Jeff	163:15-164:10; 164:19-164:23; 164:25-165:3; 165:5-165:7	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Google's Objections to Designated Testimony from Roy Fielding (Transcript at Ex. E).

Name	FM's Designations	Objections	Granted ?
Fielding, Roy	72:7-73:11; 73:14-73:19; 72:21	<p>Calls for improper testimony by a lay witness (FRE 701); lacks foundation, incomplete hypothetical, calls for a legal conclusion, improper testimony by a lay witness.</p> <p>FM Response: This testimony relates to the witness's knowledge concerning the prior art and distinguishing features between the patents in suit and the prior art.</p>	
Fielding, Roy	79:18-80:11; 80:13-80:21; 80:23-81:21; 81:23-81:24	<p>Calls for improper testimony by a lay witness (FRE 701); lacks foundation, incomplete hypothetical, calls for a legal conclusion, improper testimony by a lay witness.</p> <p>FM Response: This testimony relates to the witness's knowledge concerning the prior art and distinguishing features between the patents in suit and the prior art.</p>	

Google's Objections to Designated Testimony from Sandi Lee Mathers (Transcript at Ex. F).

Name	FM's Designations	Objections	Granted ?
Mathers, Sandi Lee	73:21-73:25; 74:3-74:12; 74:14-74:15; 74:17	Argumentative and misstates witnesses' testimony	
Mathers, Sandi Lee	101:19-102:9; 102:13-103:10;	Argumentative and misstates witnesses' testimony	

Name	FM's Designations	Objections	Granted ?
Mathers, Sandi Lee	154:9-154:15; 154:17-154:24; 155:1-155:14; 155:17-155:21; 155:23-156:5; 156:7-156:11; 156:13-156:18; 156:20-157:3; 157:24-158:1; 158:3-158:4; 158:24-159:3; 159:5-159:5; 159:7-159:12; 159:14-159:15; 160:10-160:13; 160:15-160:15; 161:7-161:9; 161:11-161:17; 161:19-161:24; 162:1-162:7; 162:9-162:12; 162:17-162:19;	Misstates witness' testimony, and calls for a legal conclusion, also at times argumentative	
Mathers, Sandi Lee	165:15-166:1; 166:3-166:4; 166:6-166:14; 166:16-166:21; 167:12-167:13; 167:15-167:20; 167:22-168:7; 168:9-168:10; 170:24-171:1; 171:3-171:5; 171:7-171:12; 171:14-171:15	Misstates witness' testimony, and calls for a legal conclusion	

Google's Objections to Designated Testimony from Nicolle Pangis (Transcript at Ex. G).

Name	FM's Designations	Objections	Granted ?
Pangis, Nicolle	61:14-61:23; 61:25-61:25; 62:3-62:11; 62:13-62:16; 62:20-62:21;	Lacks foundation and calls for speculation	
Pangis, Nicolle	65:3-66:2	Incomplete hypothetical and lacks foundation	

Google's Objections to Designated Testimony from Stephen Rupp (Transcript at Ex. H).

Name	FM's Designations	Objections	Granted ?
Rupp, Stephen	45:1-45:7; 45:10-45:14; 45:17-45:17	Lacks foundation, calls for speculation, calls for improper testimony from a lay witness (FRE 701)	
Rupp, Stephen	72:7-72:23; 73:1-73:20	Lacks foundation, calls for speculation, calls for improper testimony from a lay witness (FRE 701)	

Google's Objections to Designated Testimony from Tomaz Tunguz-Zawislak (Transcript at Ex. I)..

Name	FM's Designations	Objections	Granted ?
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Name	FM's Designations	Objections	Granted ?
Tunguz-Zawislak, Tomaz	50:9-51:9; 51:11-51:22; 51:24-53:10; 53:18-54:7; 54:9-54:23;	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions, and calls for improper testimony from a lay witness (FRE 701)</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Name	FM's Designations	Objections	Granted ?
Tunguz-Zawislak, Tomaz	59:17-60:7; 61:09-61:23; 61:25-62:14;	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions, and calls for improper testimony from a lay witness (FRE 701)</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Name	FM's Designations	Objections	Granted ?
Tunguz-Zawislak, Tomaz	70:14-71:07	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions, and calls for improper testimony from a lay witness (FRE 701)</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Name	FM's Designations	Objections	Granted ?
Tunguz-Zawislak, Tomaz	75:6-75:16; 75:18-75:18; 76:17-77:24	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions, and calls for improper testimony from a lay witness (FRE 701)</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Name	FM's Designations	Objections	Granted ?
Tunguz-Zawislak, Tomaz	144:20-145:25; 157:08-157:16; 157:18-157:25; 158:2-158:10; 158:16-158:21; 158:23-159:1; 161:11-162:11; 163:10-163:13; 163:15-164:13; 164:25-166:6	<p>Irrelevant and prejudicial because a witness' independent patent prosecution activities, not related to the patents-in suit, would serve to mislead and confuse the jury and lack probative value; lacks foundation, calls for speculation, calls for legal conclusions, and calls for improper testimony from a lay witness (FRE 701)</p> <p>FM Response: Google previously moved in limine to preclude evidence of its own patenting. FM prepared vigorously to rebut this argument. Yet, by agreement between the parties, Google previously withdrew its MIL. Through this objection, Google seeks to re-introduce its meritless argument. Google's patenting activity—as well as that of its employees—is highly relevant to this dispute. It speaks immediately to issues concerning obviousness and the prior art. Further, it relates to Google's and its employees appreciation and awareness of intellectual property rights and similarities between Google patents/applications and the patents in suit. Google's "legal conclusion" objections are equally meritless. By asking an inventor whether his invention is "novel," for example, FM is not seeking a legal opinion. This Court should overrule Google's objections.</p>	

Google's Objections to Designated Testimony from Amin Zoufonoun (Transcript at Ex. J).

Name	FM's Designations	Objections	Granted ?
Zoufonoun, Amin	138:21-139:1; 139:3-139:4	Subject to Google's MIL 10 regarding anti-competitive allegations; lacks foundation, calls for speculation, hearsay, and misstates witness' testimony	
Zoufonoun, Amin	143:24-144:1; 144:3-144:17; 144:19-144:23	Subject to Google's MIL 10 regarding anti-competitive allegations; lacks foundation, calls for speculation, hearsay, and misstates witness' testimony	

Dated: January 14, 2010

Respectfully submitted,
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LOCAL RULE CV-5(7) STATEMENT

The contents of this submission are filed under seal in compliance with the Court's Protective Order in this case. The submission contains information designated as "Confidential Outside Counsel Only."

Date: January 14, 2010

/s/ Amy H. Candido

Amy H. Candido