

**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 RESPONSE TO GOOGLE’S MOTION FOR JUDGMENT
AS A MATTER OF LAW REGARDING INVALIDITY**

Function Media LLC (“FM”) hereby responds to Google, Inc.’s (“Google”) Motion for Judgment as a Matter of Law Regarding Invalidity. In light of the jury’s January 26, 2009 verdict, this Court should deny Google’s motion as moot. The advisory notes to the 1991 amendment to Rule 50 make clear that a jury verdict for the moving party renders that party’s motion for judgment as a matter of law moot. (“Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue”); *see also EMI Music Marketing v. Avatar Records, Inc.*, 364 F. Supp. 2d 337, 342 (S.D.N.Y. 2005) (holding that moving party’s motion for judgment as a matter of law is rendered moot by jury verdict in moving party’s favor). Accordingly, there are no issues raised in Google’s Motion for Judgment as a Matter of Law Regarding Invalidity that require a decision.¹

¹ To be clear, FM contends that the jury reached its verdict in error. FM will move for a new trial within the time period permitted under Rule 59.

To the extent this Court seeks a response to the issues raised in Google's motion, FM directs this Court to FM's Motion for Judgment as a Matter of Law on Validity.² Dkt. 409. FM explains therein why neither AdForce nor DoubleClick anticipate each and every limitation of the asserted claims of the '025 and '059 Patents. FM further explains why Google cannot demonstrate by clear and convincing evidence that NetGravity rendered the asserted claims obvious. For the reasons stated in FM's Motion for Judgment as a Matter of Law on Validity, Google's motion should be denied.

Respectfully submitted,

/s/ Max L. Tribble, Jr.

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² In contrast to Google's motion, FM's Motion for Judgment as a Matter of Law on Validity has not been mooted by the verdict. FM maintains its position that the issue of validity should not have been presented to the jury given Google's utter failure to demonstrate anticipation and obviousness by clear and convincing evidence. FM's motion should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 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/ Max L. Tribble, Jr.*_____

Max L. Tribble, Jr.