

# **EXHIBIT G**

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

--oOo--

FUNCTION MEDIA, LLC., )  
 )  
Plaintiff, )  
 )  
vs. ) 2007-CV-279 (CE)  
 )  
GOOGLE, INC. and YAHOO!, )  
INC., )  
 )  
Defendants. )  
\_\_\_\_\_ )

DEPOSITION OF GENE KINCAID

Tuesday, March 17, 2009

REPORTED BY: DENISE A. FORD, CSR 7525 (3-417852)

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A P P E A R A N C E S

FOR THE PLAINTIFF: SUSMAN GODFREY, 1000 Louisiana Street, Houston, TX 77002, JOSEPH S. GRINSTEIN, ESQ.

FOR YAHOO!: WEIL, GOTSHAL & MANGES, 201 Redwood Shores Parkway, Redwood Shores, CA 94065, MICHAEL LANE, ESQ. and JEFFREY HOMRIG, ESQ.

FOR GOOGLE: FISH & RICHARDSON, 12390 El Camino Real, San Diego, CA 92130, JASON W. WOLFF, ESQ.

ALSO PRESENT: Patricia Guerrero, video operator

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EXAMINATION BY MR. GRINSTEIN

VIDEO OPERATOR: Here begins -- on the record. Today's date is March 17, 2009. The time is 9:09. This marks the beginning of videotape No. 1, Volume I, in the deposition of -- the 30(b)(6) deposition of Yahoo! with corporate designee Gene Kincaid in the case of Function Media, LLC v. Google, Inc. and Yahoo!, Inc. The Case No. is 2007-CV-279 (CE) in the United States District Court Eastern District of Texas, Marshall Division.

This deposition is taking place at the Law Offices of Weil, Gotshal & Manges, 201 Redwood Shores Parkway, Redwood Shores, California.

The videographer today is Patricia Guerrero of Merrill Court Reporting, Houston, Texas located at 315 Capitol Street, Houston, Texas 77002.

The Court Reporter is Denise Ford of Merrill Legal Solutions.

Counsel, will you please voice identify yourselves and state whom you represent?

MR. GRINSTEIN: Joe Grinstein for Function Media.

MR. LANE: Michael Lane and Jeff Homrig, counsel for Yahoo!

MR. WOLFF: Jason Wolff for Google,

1 Inc.  
 2 MR. LANE: I just want to correct  
 3 that. I wanted to correct Gene Kincaid is actually  
 4 an expert on claim construction.  
 5 VIDEO OPERATOR: Would the Court  
 6 Reporter please swear in the witness?  
 7 (Witness sworn.)  
 8 VIDEO OPERATOR: Please begin.  
 9 MR. GRINSTEIN: Q. Good morning,  
 10 Mr. Kincaid.  
 11 A. Good morning.  
 12 Q. Could you just state your name for the  
 13 record?  
 14 A. My name is Gene Kincaid.  
 15 Q. And Mr. Kincaid, have you ever had  
 16 your deposition taken before?  
 17 A. No.  
 18 Q. Let me just lay out a few background  
 19 rules for the depo just so things run more smoothly.  
 20 First of all, to help Denise, our Court  
 21 Reporter here, sometimes we like to say -- give  
 22 nonverbal responses to questions, say "uh-huh" or  
 23 shake our heads, something like that, but  
 24 unfortunately Denise can't pick that up on the  
 25 transcript. So if you have got a "yes" or "no," if

1 need is A-OK.  
 2 Mr. Kincaid, you are appearing here as  
 3 Yahoo!'s expert witness, right?  
 4 A. Correct.  
 5 Q. And for purposes of this case, how  
 6 would you describe your expertise?  
 7 A. Could I get a copy of my report  
 8 because that's where I spell out all of the work I  
 9 have done over the past month or so.  
 10 (Whereupon Exhibit 46 was marked for  
 11 identification.)  
 12 Q. Handing you what has been marked as  
 13 Exhibit 46, that's a copy of your report, right?  
 14 A. Yes, sir.  
 15 Let me check one thing.  
 16 Yes, that's my report.  
 17 Q. And does this help you answer the  
 18 question how you describe your expertise in this  
 19 case?  
 20 A. Yes, it does because, let's see --  
 21 because since this is the first time I have done  
 22 this, I will stumble through this in the beginning,  
 23 but this is -- the report sort of spells out my  
 24 qualifications in the CV, and in addition to that  
 25 includes sort of my experience in internet

1 you can try to remember to verbalize it, I would  
 2 appreciate that.  
 3 The other thing is a lot of times you know  
 4 where I am going with the question while I am in the  
 5 middle of a question, and I know where you are going  
 6 with an answer when you are in the middle of the  
 7 answer. A tendency when you are in a normal  
 8 conversation is to talk over each other because you  
 9 are so excited to ask the next question, but the  
 10 problem, again, is Denise has a hard time picking up  
 11 when two people are talking. So if you wouldn't  
 12 mind, if you can try to wait until I am done with  
 13 the question before answering it, I will try to wait  
 14 until you are done with an answer before asking  
 15 another question.  
 16 A. All right.  
 17 Q. Any time I ask a question that doesn't  
 18 make any sense to you, which I am sure I will do  
 19 throughout the course of the day, please ask me to  
 20 rephrase it, and I would be happy to do that.  
 21 Lastly, this is not an endurance contest of  
 22 any sort. Any time you need a break for whatever  
 23 reason, just ask and we will take a break, as long  
 24 as you try not to do that in the middle of a  
 25 question but after a question is done, any break you

1 advertising and as a web developer.  
 2 Q. If I were to ask you -- you are  
 3 appearing as an expert in this case -- what are you  
 4 an expert in, what would you say you are an expert  
 5 in?  
 6 A. Internet advertising.  
 7 Q. Exhibit 47.  
 8 (Whereupon Exhibit 47 was marked for  
 9 identification.)  
 10 Q. Now I have handed you Exhibit 47.  
 11 Does this appear to be the most up-to-date  
 12 version of your CV?  
 13 A. Yes.  
 14 Q. That's the CV you attached to your  
 15 expert report?  
 16 A. That's correct. It is in the back --  
 17 Appendix A in the back of the report.  
 18 Q. Let me talk to you for a second about  
 19 your educational background.  
 20 A. All right.  
 21 Q. As your CV reflects, you have degrees  
 22 in advertising and marketing, right?  
 23 A. That's correct.  
 24 Q. And you have a master's in advertising  
 25 and a master's in business administration, right?

1 A. Correct.  
 2 Q. You do not have a Ph.D., correct?  
 3 A. No, I do not.  
 4 Q. Have you taken any course work towards  
 5 a Ph.D.?  
 6 A. No.  
 7 Q. Do you have an engineering degree of  
 8 any sort?  
 9 A. No.  
 10 Q. Computer science training, any formal  
 11 education training?  
 12 MR. LANE: Objection.  
 13 THE WITNESS: Not formal training in  
 14 computer science.  
 15 MR. GRINSTEIN: Q. Do you have formal  
 16 training in any technical scientific field?  
 17 A. No.  
 18 Q. Now you have done some computer  
 19 network and some website work since the time you  
 20 received your undergraduate and your master's  
 21 degrees; is that right?  
 22 A. Yes. That's correct.  
 23 Q. And your CV says that you manage the  
 24 creation of some websites; is that right?  
 25 A. Let's see, yes, I do.

1 Q. There is -- talking about the  
 2 management of the creation of the --  
 3 A. Department's initial public relations  
 4 website and the Texas media website.  
 5 Q. When you say you managed the creation  
 6 of them, did you actually program -- provide  
 7 computer code for them, or did you oversee their  
 8 content?  
 9 A. With respect to the Texas Public  
 10 Relations website and the initial Texas interactive  
 11 website, I did the coding on that, and those are  
 12 obviously generations old.  
 13 Q. So you have written computer code  
 14 before?  
 15 A. Yes.  
 16 Q. What languages have you written it in?  
 17 A. HTML, Hypertext Markup Language.  
 18 Q. Any other programs -- programming  
 19 languages?  
 20 A. Not for these websites.  
 21 Q. Have you worked with other programming  
 22 languages in other contexts?  
 23 A. Many, many years ago, FORTRAN  
 24 programming.  
 25 Q. And I take it your knowledge of how to

1 program is self-taught?  
 2 A. Yes.  
 3 Q. So you say that you are generally  
 4 familiar with HTML; is that right?  
 5 A. Yes.  
 6 Q. Is it correct to say that everything  
 7 you see on a web page is basically the result of the  
 8 use of HTML?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: No.  
 11 MR. GRINSTEIN: Q. What do you see on a  
 12 web page that isn't the result of HTML?  
 13 A. Let's say within the context of today?  
 14 Q. Sure.  
 15 A. Well, there are scripting languages --  
 16 let's see, I am trying to think -- information is  
 17 displayed on websites that is coming out of  
 18 databases that is driven by PHP.  
 19 Q. How does an inter-browser display  
 20 HTML?  
 21 A. It is like a movie script. A browser  
 22 reads a single line at a time, and based on the HTML  
 23 script, the computer display literally what is  
 24 conveyed in that HTML source code.  
 25 Q. Would somebody of ordinary skill of

1 the art with respect to the patents that are  
 2 involved in this case say in the year 2000, would  
 3 that person understand how HTML works?  
 4 MR. LANE: Objection.  
 5 THE WITNESS: Well, let's see, I  
 6 think you have to look at what I put down in the  
 7 report to be kind of precise.  
 8 I think that somebody back in 2000, 1999 who  
 9 had ordinary skill in the art would either have a  
 10 degree in electrical engineering, computer  
 11 engineering, computer science or three to four years  
 12 of experience in computer internet working  
 13 programming, internet advertising or the equivalent  
 14 to that experience.  
 15 MR. GRINSTEIN: Q. And those people that  
 16 you have just described with respect to their ordinary  
 17 skill in the art for these patents, would those people  
 18 understand how HTML works?  
 19 MR. LANE: Objection.  
 20 THE WITNESS: This is going to sound  
 21 odd, but I don't have an answer to that question.  
 22 Can you restate it because you are asking me  
 23 to project what something else would know?  
 24 MR. GRINSTEIN: Q. Well, to have the  
 25 level of skill that is necessary to understand how to

1 implement the inventions that are described in these  
 2 patents, would that level of skill include a knowledge  
 3 of how HTML works?  
 4 A. No.  
 5 Q. So someone could construct a system as  
 6 described in these patents, the Function Media  
 7 patents, without any knowledge of HTML?  
 8 MR. LANE: Objection.  
 9 THE WITNESS: No, that's not correct.  
 10 MR. GRINSTEIN: Q. So to construct a  
 11 system that reflects the inventions of these Function  
 12 Media patents, a person would need to know HTML?  
 13 A. Yes.  
 14 Q. Do you know how raw data like text  
 15 gets formatted in HTML so that it can be displayed  
 16 with a certain appearance?  
 17 A. Yes.  
 18 Q. If you wanted to automate that  
 19 process, how would you do that?  
 20 MR. LANE: Objection.  
 21 THE WITNESS: Let's see, I don't know  
 22 that you can automate that.  
 23 MR. GRINSTEIN: Q. So would that  
 24 process, automating the way that raw data gets formatted  
 25 into HTML to have a certain appearance, that knowledge

1 question?  
 2 Q. I will give it to you again.  
 3 The process I am talking about is formatting  
 4 raw data like text using HTML to give it a certain  
 5 appearance.  
 6 Would it be above the level of ordinary  
 7 skill in the art with respect to these patents in  
 8 the year 2000 for someone to know how to automate  
 9 that process?  
 10 A. Yes.  
 11 Q. Do you know how -- what the process is  
 12 whereby you enter a URL as text and that becomes a  
 13 hyperlink in HTML; do you understand that process?  
 14 A. Yes.  
 15 Q. Are you aware of how someone might  
 16 automate that process with programming?  
 17 MR. LANE: Objection.  
 18 THE WITNESS: No.  
 19 MR. GRINSTEIN: Q. Would that process of  
 20 automating the process of converting a URL entered as  
 21 text into a hyperlink with HTML, would that process be  
 22 above the level of skill of one -- ordinary skill in the  
 23 art in these patents in the year 2000?  
 24 A. Let's see, the reason I am hesitating  
 25 is because I am hung up on the automation part.

1 would be above, in your opinion, the level of ordinary  
 2 skill for someone in these patents in the year 2000?  
 3 A. No.  
 4 Q. So someone in the year 2000 of  
 5 ordinary skill in these patents would be able to  
 6 figure out how to do that?  
 7 MR. LANE: Objection.  
 8 THE WITNESS: They would be able to  
 9 fill out HTML source code in the year 2000, yes.  
 10 MR. GRINSTEIN: Q. Would they be able to  
 11 automate the process of formatting text using HTML to  
 12 have a certain appearance?  
 13 A. Could you repeat that?  
 14 Q. The process --  
 15 A. I want to make sure I get this.  
 16 Q. The process I am talking about is  
 17 using HTML to format raw data like text data so that  
 18 it can be displayed with a certain appearance.  
 19 Are you with me on that?  
 20 A. Yes.  
 21 Q. The process of automating the tasks  
 22 that I have just described, is that something that  
 23 someone of ordinary skill in the art for these  
 24 patents could have done in the year 2000?  
 25 A. Could you repeat that real quick, the

1 Yes, I think that would be above automating  
 2 HTML. Those two words don't go together for me.  
 3 They don't have much meaning. HTML is a scripting  
 4 language.  
 5 Q. Let me talk for a second about your  
 6 career after you received let's say your MBA in  
 7 1974.  
 8 Where did you go to work?  
 9 A. Let's see, I went to work for Church's  
 10 Fried Chicken in San Antonio.  
 11 Q. Doing?  
 12 A. Building a site location model.  
 13 Q. Then from there, where did you go?  
 14 A. That's when I returned back to UT and  
 15 got my degree in -- let's see here. I don't have my  
 16 resume with me, so I will try to piece this  
 17 together.  
 18 After I came back to UT, then I worked for a  
 19 company called Capitol National Bank in Austin for  
 20 about ten years.  
 21 Q. I am sorry, that's after you received  
 22 your MBA -- or I am sorry, your MA in advertising in  
 23 1983?  
 24 A. No. Let's see, that was after I got  
 25 my MBA.

1 Q. In between the MBA and the master's in  
 2 advertising you worked for Capitol Bank for ten  
 3 years?  
 4 A. Capitol National Bank.  
 5 Q. What about after you got your degree  
 6 in advertising in '83?  
 7 A. Let's see, I ran a small business,  
 8 which is what I do, and then I went to work for a  
 9 company called CompuAdd Corporation in Austin.  
 10 Q. What did CompuAdd do?  
 11 A. Manufactured PCs. They were a  
 12 competitors of Dell's.  
 13 Q. About when did you work for CompuAdd?  
 14 A. I would have to look at my resume, to  
 15 tell you the truth, the exact years.  
 16 Q. When did you become affiliated with  
 17 the University of Texas, teaching or administrative  
 18 capacity?  
 19 A. Let's see, I taught probably 1992, the  
 20 summer -- fall of 1992.  
 21 Q. What were you teaching in '92?  
 22 A. Advertising management and advertising  
 23 campaigns.  
 24 Q. And your current title is lecturer at  
 25 UT, right?

1 Village Elders?  
 2 A. I founded it back in -- my company  
 3 started in 1987, I think, and then I ran that while  
 4 I was in school, and then when I graduated in '92  
 5 and I came back from a stint out here, basically  
 6 started that company back up doing only internet  
 7 work.  
 8 Q. You mentioned that you taught a class  
 9 in UT in 1992, and today 80 to 90 percent of your  
 10 professional life is at UT?  
 11 A. Yes.  
 12 Q. Did there come a point in time in  
 13 which you transitioned between '92 and today into a  
 14 more active role at UT?  
 15 A. No. It has been a full-time position  
 16 since '92. It is a full-time slot, three courses.  
 17 Q. And you teach courses. Do you also  
 18 have administrative responsibilities at UT?  
 19 A. Yes.  
 20 Q. What are those?  
 21 A. I run a lab and then help monitor and  
 22 control the Texas Interactive Sequence inside the  
 23 department.  
 24 Q. What's the Texas Interactive Sequence?  
 25 A. It is a series of four courses that

1 A. Senior lecturer.  
 2 Q. Senior lecturer?  
 3 A. Yes.  
 4 Q. You would not be considered a  
 5 "professor" at UT, would you, in the parlance of UT?  
 6 A. In slang terminology, yes, but I am  
 7 not on the tenure track.  
 8 Q. Of your professional time today, what  
 9 percentage do you devote to UT as opposed to other  
 10 endeavors?  
 11 By "UT" I mean University of Texas.  
 12 A. Probably 80 to 90 percent.  
 13 Q. What's the other 10 to 20 percent  
 14 taken up doing?  
 15 A. I am a small businessman. I run a web  
 16 development firm building websites for clients.  
 17 Q. What's the name of that firm?  
 18 A. Dba is Village Elders Internet  
 19 Advertising.  
 20 Q. What sort of things does Village  
 21 Elders do?  
 22 A. Build websites primarily for very  
 23 small companies and companies that need to have a  
 24 presence on the web.  
 25 Q. How long have you been associated with

1 students can take on top of their normal degree to  
 2 give them background and training in interactive  
 3 advertising.  
 4 Q. What is interactive advertising?  
 5 A. Today it includes everything that has  
 6 a digital component to it, which spans a lot, but  
 7 primarily includes display advertising, e-mail  
 8 marketing, search marketing and SEO and SEM and then  
 9 in some cases web public relations.  
 10 Q. In these courses are you teaching  
 11 programming or is it some other sort of focus?  
 12 A. It is not skills based at all. It is  
 13 strategic thinking.  
 14 Q. Are these courses for undergraduates  
 15 or are they also for graduate students?  
 16 A. Undergraduates, but some graduate  
 17 students take it to fill in their background.  
 18 Q. Have you written any scholarly  
 19 publications in peer reviewed journals?  
 20 A. No.  
 21 Q. Is doing research a part of your job  
 22 description?  
 23 A. No, not at all.  
 24 Q. I see you have got two publications  
 25 from your CV, one in 2008 about how to get jobs in

1 digital media and another one in 2008 about how to  
 2 write a cover letter; is that right?  
 3 A. Not how to write a cover letter. It  
 4 is -- that's the title. The title is Killing the  
 5 Cover Letter rather than how to write a cover  
 6 letter.  
 7 Q. Significant distinction.  
 8 A. There is, and in that book I encourage  
 9 students not to write cover letters.  
 10 Q. So do you have any other publications?  
 11 A. No. Those are the two.  
 12 Q. Would you say that you are familiar  
 13 with the state of the art of internet advertising as  
 14 of the year 2000?  
 15 A. Yes.  
 16 Q. As of the year 2000 can you name any  
 17 internet advertising systems that put a seller who  
 18 wanted to advertise a service together with a  
 19 website that wanted to run an advertisement?  
 20 MR. LANE: Objection.  
 21 THE WITNESS: I can't say the name of  
 22 the specific company, but there were ad networks  
 23 back in the year 2000, 1999, back in there.  
 24 MR. GRINSTEIN: Q. And are you aware of  
 25 any of those ad networks that provided some sort of a

1 mechanism that would format automatically a seller's ads  
 2 to meet the design standards of the websites that were  
 3 going to run those ads?  
 4 MR. LANE: Objection.  
 5 THE WITNESS: No.  
 6 MR. GRINSTEIN: Q. Back in the year 2000  
 7 were you familiar with the product called Aaddzz,  
 8 A-a-d-d-z-z?  
 9 A. No.  
 10 Q. Back in 2000 were you familiar with  
 11 the product called Ad Force?  
 12 A. No.  
 13 Q. Back in 2000 were you familiar with  
 14 the product called Ad Knowledge?  
 15 A. No.  
 16 Q. Back in 2000 were you familiar with  
 17 the product called Ad Manager Pro?  
 18 A. No.  
 19 Q. What about back in 2000, were you  
 20 familiar with the book called Advertising on the  
 21 Internet by Zeff, Z-e-f-f, and Aronson,  
 22 A-r-o-n-s-o-n?  
 23 A. Yes.  
 24 Q. You were familiar with that book?  
 25 A. Yes.

1 Q. Did you use it in your course work?  
 2 A. Yes.  
 3 Q. I take it you have never been an  
 4 expert witness in a lawsuit before; is that right?  
 5 A. No, I never have.  
 6 Q. Before this case did you know anything  
 7 about patents?  
 8 A. Only from going through provisional  
 9 patents for a product that I created a long time  
 10 ago. A little bit.  
 11 Q. What happened to that patent?  
 12 A. Let's see, it was not a patent. It  
 13 was a product that I invented, and it was never  
 14 submitted as a patent.  
 15 Q. Why didn't you submit it?  
 16 A. I think the attorney I talked to  
 17 suggested I not do that for expense.  
 18 Q. What was the product?  
 19 A. It was a little device that goes in a  
 20 cigarette lighter for a car, fills the hole.  
 21 Q. Was the idea to keep the hole filled  
 22 so nothing went in it?  
 23 A. It was designed to encourage sort of a  
 24 protective device for people that don't smoke, so  
 25 they can take the cigarette lighter out and have

1 something -- so coins and things wouldn't fall into  
 2 it.  
 3 Q. Sounds good to me.  
 4 A. It didn't work.  
 5 Q. If I had come to you three years ago  
 6 and said I need your help to construe claims in a  
 7 patent for a Markman hearing, would you have known  
 8 what I was talking about?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: No.  
 11 You said Markman?  
 12 MR. GRINSTEIN: Q. Markman,  
 13 M-a-r-k-m-a-n.  
 14 A. No.  
 15 Q. Do you know today what the Markman  
 16 process is?  
 17 A. No.  
 18 Q. How did you come by your understanding  
 19 of how to construe claims in a patent?  
 20 A. Well, let's see, let me take a look at  
 21 my report if you don't mind.  
 22 Q. Sure.  
 23 A. Everything I have expressed in this  
 24 court is based on my knowledge and experience in  
 25 consideration of both the levels of education and



1 experience of persons of skill working in the field,  
2 the types of problems encountered in the art and in  
3 the prior art patents and publications, activities  
4 of others, the prior art solutions to the problems  
5 encountered by the inventor and sophistication of  
6 the technology and the receptivity in which  
7 inventions, innovations are made.

8 Q. For one thing your report includes a  
9 section of the level of knowledge of a person of  
10 ordinary skill in the art for these patents; is that  
11 right?

12 A. Yes.

13 Q. How did you know that was even  
14 relevant to put in a report about claim  
15 construction?

16 A. This section?

17 Q. Right.

18 A. The ordinary skill in the art?

19 Q. Uh-huh.

20 A. From conversations with Michael Lane.

21 Q. In figuring out what you needed to say  
22 about claim construction in this process that we are  
23 in, you relied on things that the lawyers from Weil,  
24 Gotshal told you; is that right?

25 MR. LANE: Objection.

1 A. Let's see, back in the appendix there  
2 is a listing of materials. If I can get to that  
3 real quick.

4 Q. Actually it -- I have the appendix in  
5 separate documents.

6 Were you provided with some sort of written  
7 materials that you relied upon in forming your  
8 opinions about how the claim construction process  
9 works?

10 A. No.

11 Q. It was verbal communications?

12 A. Yes.

13 Q. When did you first learn about these  
14 patents?

15 A. I think, let's see, Jeffrey Homrig  
16 called me probably a year ago and probably late  
17 January of this year is when he contacted me again,  
18 and Michael Lane provided me with all of the patents  
19 in the file history.

20 Q. How much time have you spent reviewing  
21 patents?

22 A. Probably well over 100 hours.

23 Q. In preparing your report did you meet  
24 with anyone from Yahoo!?

25 A. No.

1 We have a protective order that covers  
2 communications between counsel.

3 MR. GRINSTEIN: I want to get what he  
4 relied on.

5 Q. You relied on things that -- in  
6 forming your analysis, you relied on things that  
7 Weil, Gotshal told you?

8 A. No, I relied on the patents in the  
9 file histories.

10 Q. One thing you do in the report is look  
11 at file histories and the patents?

12 A. Yes.

13 Q. Three years ago before you ever had  
14 any involvement in this case would you have known  
15 that in construing the claims in a patent one thing  
16 that you do is go look at file histories?

17 A. No.

18 Q. How did you get the understanding that  
19 that was something you needed to do?

20 A. That was material furnished to me by  
21 Michael Lane.

22 Q. That's something that you relied upon  
23 in forming your analysis in this case?

24 A. Yes.

25 Q. What material was that?

1 Q. What about getting ready for this  
2 deposition, did you meet with anyone from Yahoo!?

3 A. No.

4 Q. When I say "from Yahoo!" I mean not  
5 counsel from Yahoo! but somebody who works there.

6 A. No. I am sorry.

7 Q. In the course of your professional  
8 career have you ever worked professionally with  
9 Yahoo!?

10 A. No.

11 Q. What about Google, have you ever  
12 worked professionally with Google?

13 A. No.

14 Q. Do you know a lawyer named Robert  
15 Cote, C-o-t-e?

16 A. No, sir.

17 Q. Let me just get your appreciation of  
18 your understanding of how this claim construction  
19 process works.

20 Do you know what the preferred embodiment in  
21 a patent is?

22 A. No.

23 Q. Are you familiar with any rules with  
24 respect to how to construe claims being mindful of  
25 the preferred embodiment?

1 MR. LANE: Objection.  
 2 THE WITNESS: Could you repeat that  
 3 question for me to make sure --  
 4 MR. GRINSTEIN: Q. Let me ask it again.  
 5 Are you aware of any rules relating to claim  
 6 construction that have to do with how the preferred  
 7 embodiment impacts how you construe claims?  
 8 A. No.  
 9 Q. Do you understand the difference  
 10 between intrinsic and extrinsic evidence?  
 11 A. No.  
 12 Q. And let me be clearer on that  
 13 question.  
 14 For purposes of the claim construction  
 15 process, do you know the difference between  
 16 intrinsic and extrinsic evidence?  
 17 MR. LANE: Objection.  
 18 THE WITNESS: No.  
 19 MR. GRINSTEIN: Q. Let me ask you some  
 20 questions about the person of ordinary skill in the art  
 21 that you talk about on page 1 of your report.  
 22 A. Okay.  
 23 Q. Which is Exhibit 46.  
 24 You provide two alternatives for that  
 25 person, right?

1 A. Yes.  
 2 Q. First of all, let me ask you, do you  
 3 understand why it is necessary to discuss a person  
 4 of ordinary skill in the art when you are doing a  
 5 claim construction?  
 6 A. Yes.  
 7 Q. Why is that?  
 8 A. Well, to add meaning to the terms in  
 9 the claim.  
 10 Q. And is the notion that the claims have  
 11 to be construed in light of what somebody of  
 12 ordinary skill in the art would understand them to  
 13 mean?  
 14 A. Yes, at the time that the patent took  
 15 place.  
 16 Q. Like I said, you have two alternatives  
 17 for what that person's skill is that you discuss on  
 18 page 1 of your report; is that right?  
 19 A. Correct.  
 20 Q. The first one is someone with a  
 21 bachelor's degree in electrical engineering,  
 22 computer engineering, or computer science; is that  
 23 right?  
 24 A. That's correct.  
 25 Q. As we discussed, you don't have those

1 degrees, right?  
 2 A. No, I do not.  
 3 Q. You yourself would not satisfy  
 4 alternative 1, right?  
 5 A. Correct.  
 6 Q. The second alternative you list is  
 7 someone with three to four years' experience in  
 8 computer, internet or network programming, internet  
 9 advertising or other equivalent experience.  
 10 Do you see that?  
 11 A. Yes.  
 12 Q. For someone to satisfy alternative 2,  
 13 do they need to have programming experience?  
 14 MR. LANE: Objection.  
 15 THE WITNESS: Can you sort of better  
 16 explain what you call programming experience?  
 17 MR. GRINSTEIN: Q. Sure. Say we have  
 18 got somebody who has worked for three to four years as a  
 19 businessperson at Google and this person is working in  
 20 the internet advertising field but they are running the  
 21 numbers, looking at profits and losses, running the  
 22 business side of the operation. They don't have  
 23 anything to do with the technical side of the operation.  
 24 They have three to four years of experience in internet  
 25 advertising, but their experience does not relate to

1 computer programming.  
 2 Are you with me on that hypothetical?  
 3 A. No, because what you have described is  
 4 not internet advertising. You have described run  
 5 the numbers, and that's not sort of what my  
 6 definition of internet advertising is.  
 7 Q. So that's what I am sort of trying to  
 8 get at. Someone who has the three to four years of  
 9 experience in internet advertising, in your mind  
 10 that's somebody who has three to four years  
 11 experience actually doing the HTML or other coding  
 12 that is necessary for internet advertising?  
 13 A. Well, back in 1999 and 2000 it was --  
 14 it could include a whole range of skills, one of  
 15 which would have been programming, but internet  
 16 advertising back in 2000 and 1999 included  
 17 traditional graphic skills as well as, again here,  
 18 sort of the equivalent experience out of  
 19 advertising.  
 20 Q. In order to have the level of ordinary  
 21 skill necessary to understand the claims and the  
 22 patents we are talking about, would a person need to  
 23 know how to program code?  
 24 A. No.  
 25 Q. How could someone construct a system

1 that reflects the claims in the patents we are  
 2 talking about without knowing how to code?  
 3 MR. LANE: Objection.  
 4 THE WITNESS: Repeat that question  
 5 because I think I misunderstood you.  
 6 MR. GRINSTEIN: Q. The patents are  
 7 talking about inventions, right?  
 8 A. Yes.  
 9 Q. And you generally, having read them,  
 10 over the patents for 100 hours or so, understand the  
 11 inventions that the patents are claiming, correct?  
 12 A. Yes.  
 13 Q. If someone wanted to construct a  
 14 device or a system that implemented the inventions  
 15 of the patents, could they do so if they didn't know  
 16 how to code?  
 17 A. No.  
 18 Q. So knowledge of coding is necessary in  
 19 order to understand how the claims and the patents  
 20 work?  
 21 MR. LANE: Objection.  
 22 THE WITNESS: No. Knowledge of  
 23 internet advertising is what is required to  
 24 understand the patents.  
 25 MR. GRINSTEIN: Q. So you couldn't

1 A. That's correct.  
 2 Q. On the other hand, you say that you  
 3 could understand how the claims in the patents work  
 4 without knowing how to do computer coding; is that  
 5 correct?  
 6 A. That's correct.  
 7 Q. You have got a section in your report  
 8 that talks about some background on the patents and  
 9 technology; is that right?  
 10 A. Yes, sir.  
 11 Q. I think that starts on page 2.  
 12 Is that right?  
 13 A. That's correct.  
 14 Q. Now the '025 and '045 share the same  
 15 specification; isn't that right?  
 16 A. No.  
 17 Q. What's different between the '025 and  
 18 '045 specification?  
 19 A. Well, let's see, I think the best way  
 20 to answer your question is to take a look at the  
 21 abstract from the '045 and the '025. The abstract  
 22 of the '045 describes the invention as a method and  
 23 apparatus that allows competing as well as  
 24 complementing suppliers, vendors, service providers,  
 25 purveyors, and other types of sellers' internal

1 construct a system that reflects the inventions in the  
 2 patents without knowing how to code but you could  
 3 understand the claims in the patents without knowing how  
 4 to code; is that your testimony?  
 5 A. That had two parts to it.  
 6 Could you repeat that? This is important.  
 7 Q. Your testimony is -- it has two parts.  
 8 I just want to make sure my two parts are right.  
 9 You could not construct a system or device  
 10 that reflects the claims in the patents without  
 11 knowing how to code, but you could understand how  
 12 the claims in the patents work without knowing how  
 13 to code; is that your testimony?  
 14 MR. LANE: Objection.  
 15 THE WITNESS: See, I am trying to  
 16 answer your question. Just give me a second here.  
 17 It is important. Not to be bad about this,  
 18 but could you -- I am trying to answer both parts.  
 19 Could you sort of run through your question  
 20 just one more time? I apologize.  
 21 MR. GRINSTEIN: Q. Take your time.  
 22 On the one hand you say that you could not  
 23 construct a system or a device that implements the  
 24 invention that is described in these patents without  
 25 knowing how to do computer coding; is that fair?

1 inventory control management as well as control  
 2 design and publication of presentations for external  
 3 near real-time interactive access to buyer-centered  
 4 presentations, sales, distribution and confirmation  
 5 systems as well as other traditional media  
 6 advertising and outreach. That's the '045.  
 7 The '025 abstract describes the invention as  
 8 an internet advertising system and method that  
 9 provides the seller self-serve control for creation,  
 10 publication, and display of advertisements on  
 11 internet media venues owned or controlled by  
 12 entities other than the seller in a form  
 13 automatically modified to comply with the media  
 14 venues' presentation rules, which may include  
 15 designer or style standards for look and feel,  
 16 editorial standards, and distribution factors.  
 17 Self-serve, menu-driven interfaces are provided for  
 18 sellers to target internet media venues, and for  
 19 internet media venues to enter their presentation  
 20 rules.  
 21 Those are two. They are not the same.  
 22 Q. Do you understand that a patent  
 23 specification is that portion of the patent that is  
 24 in between the abstract and the claims?  
 25 A. Yes, all the narrative description.

1 Q. And is all of that description the  
 2 same in the '025 and '045 patents?  
 3 A. No.  
 4 Q. Look down at your own footnote 1. It  
 5 says, "Other than in their abstracts and claims, the  
 6 '025 and '045 patent specifications are essentially  
 7 identical."  
 8 Do you disagree with that statement?  
 9 A. No.  
 10 Q. So the '025 and '045 patent  
 11 specifications are the same, right?  
 12 A. No. They are -- I mean, the language  
 13 I use in the footnote is correct. Other than the  
 14 abstracts in the claims, the '025 and '045 patents,  
 15 the specifications are essentially identical.  
 16 Q. Other than the abstract in the claims,  
 17 tell me the differences between the '025  
 18 specification and the '045 specification?  
 19 A. Given the length of both of the  
 20 patents, that would take quite a while.  
 21 Q. When you --  
 22 A. I am not sure that I can sort of do  
 23 that right here right now.  
 24 Q. When you wrote the words "essentially  
 25 identical," did you have some difference in mind?

1 drawback?  
 2 A. Yes, in 1999 and 2000 that is a  
 3 drawback that both patents are trying to address.  
 4 Q. Now do you agree that under the system  
 5 that is disclosed in the '025 patent the seller does  
 6 not need to know what the media venue's guidelines  
 7 are?  
 8 MR. LANE: Objection.  
 9 THE WITNESS: No.  
 10 MR. GRINSTEIN: Q. You think the seller  
 11 does need to know what the media venue's guidelines are?  
 12 A. That's correct.  
 13 Q. Do you agree that in the system that  
 14 is disclosed in the '025 patent the seller does not  
 15 need to know how HTML works?  
 16 A. That's correct.  
 17 Q. So the seller need not be able to  
 18 program an HTML porting the system disclosed in the  
 19 '025 patent; is that right?  
 20 A. Yes.  
 21 Q. The system that is described in the  
 22 '025 patent would take care of HTML coding for the  
 23 seller, right?  
 24 MR. LANE: Objection.  
 25 THE WITNESS: I think the seller

1 A. The two patents are different. I  
 2 mean, they are two separate patents, and the  
 3 language is not identical in the specifications for  
 4 '045 and '025. It is not identical.  
 5 Q. Just for simplicity's sake today, when  
 6 we are talking about specification of the patent, I  
 7 am going to show you the '025 specification. If for  
 8 some reason or another you think that the '045  
 9 specification is different than what I am showing  
 10 you, let me know and we will go look at the '045.  
 11 For simplicity's sake I am going to stick to  
 12 the '025.  
 13 Is that okay?  
 14 A. Yes, sir.  
 15 Q. Now on page 3 of your report down  
 16 towards the bottom -- middle more like it, you say  
 17 that, according to the '025 and '045 patents, a  
 18 drawback to these systems -- you are referring to  
 19 electronic advertising systems -- was that sellers  
 20 had to contract and interact individually with each  
 21 media venue to place a presentation.  
 22 Do you see that?  
 23 A. Yes, I see that.  
 24 Q. Do you agree that as to the prior art  
 25 systems that existed as of 2000 that was in fact a

1 inputs all of their information into the seller  
 2 interface, and that's how they control presentation.  
 3 MR. GRINSTEIN: Q. But the -- does  
 4 the -- what process is undertaken to convert the  
 5 information that is input into the interface into HTML?  
 6 A. That's never specified.  
 7 Q. Is it a process that the patent -- or  
 8 that the '025 patent suggests that the seller  
 9 undertakes?  
 10 A. By that -- could you repeat that?  
 11 Q. The process of converting the seller's  
 12 information into HTML, does the '025 patent suggest  
 13 that the seller is undertaking that process his or  
 14 herself?  
 15 A. No.  
 16 Q. Does the -- in the invention disclosed  
 17 in the '025 patent, does the seller apply the media  
 18 venue's guidelines or does the system apply the  
 19 media venue's guidelines?  
 20 MR. LANE: Objection.  
 21 THE WITNESS: Let's see.  
 22 Could you repeat that question real quick so  
 23 I can find my reference in the report because this  
 24 is pretty important?  
 25 MR. GRINSTEIN: Q. I understand. The

1 invention disclosed in the '025 patent, pursuant to that  
2 invention does the seller apply the media venue's  
3 guidelines or does the computer system apply the media  
4 venue's guidelines?

5 A. One more time, if you can repeat the  
6 question, so I can get it right.

7 Q. With respect to the invention that is  
8 disclosed in the '025 patent, does the seller apply  
9 the media venue's guidelines or does the computer  
10 systems of the invention apply the media venue's  
11 guidelines?

12 A. Let me see if I can find the exact.  
13 Sorry, one more time if you don't mind.

14 Q. The invention disclosed in the '025  
15 patent, pursuant to that invention, does the seller  
16 apply media venue's guidelines or does the computer  
17 system of the invention apply media venue's  
18 guidelines?

19 A. The seller applies the internet media  
20 venue's guidelines at the seller interface.

21 Q. How can the seller apply the  
22 guidelines if the seller does not necessarily  
23 know -- need to know how to program a HTML?

24 A. Well, let's see, I think that sort of  
25 strikes the self-serve, the mention of the invention

1 by the sellers is going to need to have HTML markup  
2 or some other scripting markup applied to it; isn't  
3 that right?

4 A. Nowhere in the patents does it get  
5 that specific. I mean, I can't think of -- I don't  
6 know how to answer your question any other way.

7 Q. You agreed with me earlier the  
8 patents -- the system contemplated by the '025  
9 patent does not require the seller to need to know  
10 how to program an HTML?

11 A. Right.

12 Q. Say internet media venue's guidelines  
13 are "I want my text ads in blue." Let's say that's  
14 the guidelines for the internet media venue, "I want  
15 blue."

16 The seller inputs an ad "Eat at Joe's." If  
17 the seller doesn't know how -- doesn't need to know  
18 how to do the HTML markup to turn "Eat at Joe's"  
19 into blue text, where does that markup get done?

20 A. Well, let's see, that takes place at  
21 the seller interface.

22 Q. So there is some process operating at  
23 the seller interface that converts the text entry  
24 "Eat at Joe's" into blue text to be sent to the  
25 internet media venue; is that your testimony?

1 itself. Let me drop -- so I can be precise on this.  
2 My response in the report on page 33 which  
3 talks about self-serve interface, back in 2000  
4 anybody of sort of ordinary skill in the art would  
5 have understood that self-serve interface is where  
6 that takes place.

7 Q. You would agree with me that internet  
8 advertisement that's displayed on a website is  
9 likely to have a bunch of HTML markup in it, right?

10 MR. LANE: Objection.

11 THE WITNESS: That's not necessarily  
12 true.

13 MR. GRINSTEIN: Q. So you think this  
14 invention is directed at having internet advertisements  
15 at media websites with simple text files?

16 A. No.

17 Q. There is going to be programming  
18 markup, scripting markup, that needs to be applied  
19 to the information input by the sellers according to  
20 the invention disclosed in the '025 patent; isn't  
21 that right?

22 A. Say that one more time because it is a  
23 real precise question.

24 Q. The invention disclosed in the '025  
25 patent would contemplate that the information input

1 A. Well, the seller meets the media  
2 venue's guidelines, and that takes place at the  
3 seller interface.

4 Q. But what I am asking you is how does  
5 the seller convert -- he has typed into a box "Eat  
6 at Joe's."

7 How does the seller convert that into blue  
8 text --

9 MR. LANE: Objection.

10 MR. GRINSTEIN: Q. -- in my example?

11 A. The question is how does the seller  
12 turn it into blue text?

13 Q. The internet media venue's guideline  
14 is I only want blue text. The seller has an ad,  
15 "Eat at Joe's." Types "Eat at Joe's" text into the  
16 seller interface.

17 How does the seller then convert "Eat at  
18 Joe's" into blue text to comply with the media  
19 venue's guidelines?

20 A. That's the purpose of the seller  
21 interface.

22 Q. Can you name a program or an  
23 identified piece of the seller interface that  
24 accomplishes that task?

25 A. Let's see, let me take the time to

1 look through here and give you the right answer.  
 2 Q. Would it be helpful if I showed you  
 3 the patent?  
 4 A. No. Everything I need is in here.  
 5 One more time, can you repeat your question?  
 6 I am trying to hone in on the right answer.  
 7 Q. You have identified that the seller  
 8 interface will provide HTML markup or add scripting  
 9 to information that is input by the seller, so I am  
 10 asking you which portion of the seller's interface  
 11 that is identified in the patent, which program,  
 12 subroutine, whatever is responsible for doing that?  
 13 A. Well, let's see --  
 14 Q. Let me withdraw the question. Let me  
 15 show you Plaintiff's Exhibit 48.  
 16 (Whereupon Exhibit 48 was marked for  
 17 identification.)  
 18 Q. Plaintiff's Exhibit 48 looks like it  
 19 is the '025 patent, right?  
 20 A. Yes, sir.  
 21 Q. You have reviewed the '025 patent  
 22 before, right?  
 23 A. Yes, I have.  
 24 Q. Turn with me to Figure 2c. Figure 2c  
 25 is labeled Seller Interface, right?

1 computer system through which a seller is prompted  
 2 to input information to select one or more of the  
 3 internet media venues in the claims of the '025  
 4 patent to mean software and hardware at the seller's  
 5 location through which the seller is prompted to  
 6 enter information to a computer system to enable the  
 7 seller to select one or more of the internet media  
 8 venues.  
 9 Q. You can't give me a more specific  
 10 answer to my question at this time?  
 11 MR. LANE: Objection.  
 12 THE WITNESS: I can read this because  
 13 there are two things going on where there is an  
 14 interface and then the seller is being prompted for  
 15 information, and that's the question you are asking,  
 16 I think.  
 17 MR. GRINSTEIN: Q. If I were to read  
 18 through your report, somewhere in your report it would  
 19 tell me which of the designated sections in Figure 2c is  
 20 responsible for adding HTML markup or some other  
 21 scripting language to information input by the seller?  
 22 A. No, because that's not a definite  
 23 thing. I mean, there is no -- the Figure 2c that  
 24 you reference in the patent is on page 18, so we can  
 25 flip over to that.

1 A. Yes, it is.  
 2 Q. My question is, looking at Figure 2c,  
 3 which portion of the seller interface that is  
 4 identified in this figure is responsible for  
 5 formatting with HTML or any other sort of language  
 6 the information that is input by the seller into the  
 7 interface?  
 8 A. I am trying to give you a precise  
 9 answer, so bear with me, please.  
 10 I am looking at my report, and the best  
 11 answer I can give you is what is contained in the  
 12 report on pages 13 through about -- let me make sure  
 13 I get the pages right.  
 14 Best response I can give you is the report  
 15 starts on page 13 and runs through almost -- well,  
 16 runs through 26. It talks about the seller's  
 17 interface and that's a -- let's see, the best answer  
 18 I can say is one of ordinary skill in the art -- my  
 19 response from pages 13 through 26 that describes the  
 20 Figure 2c, that's where I discuss that part of the  
 21 patent.  
 22 And the seller interface is -- let's see  
 23 here -- one of ordinary skill in the art at the time  
 24 the patent application was filed in 2000 would have  
 25 understood the term "a second interface" with the

1 Do you mind?  
 2 Q. Page 18 of your report?  
 3 A. Yes, sir.  
 4 That's the seller's interface which is where  
 5 the seller inputs all of information and selects  
 6 media venues and inputs information that matches up  
 7 with the internet media venue's rules.  
 8 Q. Would you agree with me that there is  
 9 something in the patented system -- something in the  
 10 invention claimed in the '025 patent that is  
 11 formatting the information that is input by the  
 12 seller?  
 13 A. Well, let's see, again, the best  
 14 response I can say is that the seller interface is  
 15 made up of both hardware and software.  
 16 Q. Okay.  
 17 A. I am sorry.  
 18 Q. Let me ask some different questions.  
 19 If you flip with me to Figure 2a of the '025  
 20 patent.  
 21 MR. LANE: Would this be a good time  
 22 for a break?  
 23 VIDEO OPERATOR: Going off the  
 24 record.  
 25 The time is 10:25.

1 (Break taken.)  
 2 VIDEO OPERATOR: We are back on the  
 3 record at 10:27. This is the end of Volume I,  
 4 videotape No. 1, in the deposition of Gene Kincaid.  
 5 We are going off the record.  
 6 The time is 10:27.  
 7 (Break taken.)  
 8 VIDEO OPERATOR: We are back on the  
 9 record. This is the beginning of Volume I,  
 10 videotape 2 in the deposition of Gene Kincaid.  
 11 The time is 10:46.  
 12 MR. GRINSTEIN: Q. Mr. Kincaid, let me  
 13 ask you questions about Figure 2c in the '025 patent.  
 14 A. Let me find that in my report. That  
 15 would be easier for me to reference.  
 16 Q. I am going to be flipping between some  
 17 figures. I think you might want to be in the  
 18 patent.  
 19 A. Let me find it in my report first so I  
 20 can orient myself.  
 21 Q. That's fine.  
 22 A. 2c?  
 23 Q. 2c.  
 24 A. Okay. I am on track with you.  
 25 Q. Figure 2c is the seller interface,

1 Q. And if you compare that with Figure  
 2 4 -- or 2c, excuse me, there is no Presentation  
 3 Generation Program depicted in Figure 2c, the seller  
 4 interface, right?  
 5 A. It is not -- in those exact words, no.  
 6 Let me see, Presentation Generation Program is not  
 7 in 2c.  
 8 Q. And 2c is the seller interface, right?  
 9 A. Yes, sir.  
 10 Q. Flip with me on the '025 patent to  
 11 column 44, and I am interested in line -- starting  
 12 at line 36.  
 13 Are you with me?  
 14 A. Yes.  
 15 Q. It says right there, The Presentation  
 16 Generation Program 1710 -- and that's the same 1710  
 17 that we were just looking at in the central  
 18 controller, right?  
 19 A. Right.  
 20 Q. -- the Presentation Generation Program  
 21 1710, using the information contained within the  
 22 Presentation Rules Database 1650, then formats the  
 23 presentation information for each client outlet,  
 24 channel, resident media or non-resident media  
 25 (blocks 1130, 11294).

1 right?  
 2 A. Yes.  
 3 Q. And that is the interface that people  
 4 who want to -- strike that question.  
 5 The seller interface is a separate component  
 6 of the invention from the central controller and  
 7 presentation processor, right?  
 8 A. That's correct.  
 9 Q. If you look at figure 2a of the  
 10 patent, which is -- I don't think you -- I don't  
 11 think you have shown that in your report, but it is  
 12 two pages ahead in the '025 patent.  
 13 A. Let me check real quick.  
 14 That's correct.  
 15 Q. The central controller presentation  
 16 processor is separate from the seller interface,  
 17 right?  
 18 A. Yes. That's true.  
 19 Q. If you look at the central controller  
 20 and presentation processor as depicted in Figure 2a,  
 21 down on the left side towards the bottom you will  
 22 see a box that says 1710 Presentation Generation  
 23 Program.  
 24 Do you see that?  
 25 A. Yes.

1 Do you see that?  
 2 A. Yes.  
 3 Q. So it is the Presentation Generation  
 4 Program at the central controller which is doing the  
 5 formatting, correct?  
 6 MR. LANE: Objection.  
 7 THE WITNESS: No.  
 8 MR. GRINSTEIN: Q. What's -- how do  
 9 you -- what do you disagree with with respect to the  
 10 sentence I just read you?  
 11 A. I don't disagree with what you just  
 12 read. I just know that in Figure 2c, which is the  
 13 seller interface we were talking about, that's where  
 14 the seller meets the internet media venue's rules,  
 15 and that's where the creation process takes place.  
 16 Q. Read with me the next line in column  
 17 44. This is line starting at 40. We are still  
 18 talking about the Presentation Generation Program,  
 19 right?  
 20 A. Yes.  
 21 Q. "New presentations are created in  
 22 their entirety, while only the portions of existing  
 23 presentations affected by any modifications are  
 24 republished."  
 25 Do you see that?

1 A. I do.  
 2 Q. The Presentation Generation Program is  
 3 responsible for creating the entirety of new  
 4 presentations; isn't that right?  
 5 MR. LANE: Objection.  
 6 THE WITNESS: No, that's not correct.  
 7 MR. GRINSTEIN: Q. Well, tell me why  
 8 that line in the specification is not correct?  
 9 A. Well, if you take this patent as a  
 10 whole, the creation process takes place, as you  
 11 pointed out, in Figure 2c. That's where the seller  
 12 inputs information, and that's where the ads are  
 13 created.  
 14 Q. You agree with me that the  
 15 Presentation Generation Program does not reside at  
 16 Figure 2c, right?  
 17 A. That's correct. It is named  
 18 differently in 2c. It is named the Presentation and  
 19 Configuration Program, which is unclear about what  
 20 that is.  
 21 Q. Your testimony is that the  
 22 Presentation Generation Program is the same thing as  
 23 the Presentation and Configuration Program?  
 24 MR. LANE: Objection.  
 25 THE WITNESS: No, they are not the

1 understand the language you are pointing to. My  
 2 understanding of everything we are talking about,  
 3 the claims -- if you go back to -- let me take a  
 4 look here.  
 5 My understanding of the seller interface  
 6 based on patents and sort of everything that is  
 7 contained in here is that that's where the  
 8 presentations are created.  
 9 MR. GRINSTEIN: Q. Then how could -- is  
 10 it just the inventor of the patent wrote this wrong and  
 11 new presentations are not created in their entirety by  
 12 the Presentation Generation Program?  
 13 MR. LANE: Objection.  
 14 THE WITNESS: I am not sure why they  
 15 wrote that. Obviously it wasn't there, but my  
 16 understanding of the seller's interface is that's  
 17 where the sellers input information, and that's  
 18 where the media internet -- internet media -- IMV's  
 19 rules are applied, and that's the point of ad  
 20 creation -- or the presentation creation, I am  
 21 sorry.  
 22 MR. GRINSTEIN: Q. If presentations are  
 23 created at the seller interface, according to your  
 24 testimony, do you have any explanation as to what it  
 25 means in column 44, line 40, when the patent says "new

1 same.  
 2 MR. GRINSTEIN: Q. Let's go back to  
 3 column 44 then.  
 4 When it says "new presentations are created  
 5 in their entirety," that doesn't leave out the  
 6 possibility that presentations are being created  
 7 anywhere else, does it?  
 8 MR. LANE: Objection.  
 9 THE WITNESS: Say that one more time.  
 10 MR. GRINSTEIN: Q. That was a double  
 11 negative.  
 12 A. I am sorry, I am --  
 13 Q. "New presentations are created in  
 14 their entirety by the Presentation Generation  
 15 Program." That's what it is saying in column 44,  
 16 right?  
 17 A. That's what it says.  
 18 Q. If new presentations are being created  
 19 in their entirety by the Presentation Generation  
 20 Program that does not exist at the seller's  
 21 interface, then it is true the presentations are not  
 22 being created at the seller's interface, right?  
 23 MR. LANE: Objection.  
 24 THE WITNESS: No. The presentations  
 25 are created at the seller interface. I mean, I

1 presentations are created in their entirety by the  
 2 Presentation Generation Program?"  
 3 MR. LANE: Objection.  
 4 THE WITNESS: No.  
 5 MR. GRINSTEIN: Q. What portions of the  
 6 specification lead you to the conclusion that new  
 7 presentations are created at the seller interface?  
 8 A. Well, let's see, let me find -- hang  
 9 on one second.  
 10 Q. Let me withdraw that. I will come at  
 11 it a different way.  
 12 A. I am sorry.  
 13 Q. The line that I just asked you about,  
 14 the "new presentations are created in their  
 15 entirety," do you think that that line is  
 16 inconsistent with the rest of the specification?  
 17 MR. LANE: Objection.  
 18 THE WITNESS: Yes.  
 19 MR. GRINSTEIN: Q. Let me ask you to  
 20 turn to column 17 starting at line 51.  
 21 Are you with me on column 17?  
 22 A. Yes.  
 23 Q. Line 51 starts, "The Presentation  
 24 Database 1640 will have data fields containing  
 25 information that relates to the seller's choice of



1 media or venues as well as the presentation of their  
2 products, goods, or services offered to the buyers.  
3 This information is a majority of the data that,  
4 when combined with portions of the information  
5 within the seller database 1630 and the Presentation  
6 Rules Database 1650 and processed through the  
7 Presentation Generation Program 1710, creates the  
8 presentations that are transmitted to the Central  
9 Presentation and Selection Server 2000 for  
10 presentation to the buyer or to other non-residents  
11 media to be published."

12 Do you see that?

13 A. I do see that.

14 Q. That again is indicating that it is  
15 the Presentation Generation Program 1710 that is  
16 creating the ad, right?

17 MR. LANE: Objection.

18 THE WITNESS: That's the claim.

19 That's the language in the specification.

20 MR. GRINSTEIN: Q. And you think that's  
21 inconsistent with the rest of the specification too,  
22 right?

23 MR. LANE: Objection.

24 THE WITNESS: Let's see, this is --  
25 what you've just read is not correct.

1 media."

2 Do you see that?

3 A. I do see that.

4 Q. Again, that's saying Presentation

5 Generation Program creates the ads, right?

6 MR. LANE: Objection.

7 THE WITNESS: That's not correct.

8 MR. GRINSTEIN: Q. Explain to me how  
9 that line doesn't say that the Presentation Generation  
10 Program is creating the ads?

11 A. That specific line does say that, but  
12 that's not consistent at all with my understanding  
13 of this whole invention.

14 Q. I have just read you three  
15 specification sections that talk about the  
16 Presentation Generation Program creating the ads.

17 In light of what I've read you, are you  
18 reconsidering where the ads are created?

19 MR. LANE: Objection.

20 THE WITNESS: No. The ads are  
21 created at the seller interface.

22 MR. GRINSTEIN: Q. In any of the lines  
23 that I've just read you from the specification from  
24 column 17, from column 18, or from column 44, did any of  
25 them mention the seller interface?

1 MR. GRINSTEIN: Q. I read it incorrectly  
2 or it is describing the invention incorrectly?

3 A. Well, let's see, if you will be a  
4 little more specific when you are talking about the  
5 invention, I am used to dealing with the claims and  
6 trying to define those claims.

7 Q. The specification is describing an  
8 invention, right?

9 A. Yes.

10 Q. Does -- are the lines that I just read  
11 you inconsistent with the invention that is being  
12 described in the specification?

13 MR. LANE: Objection.

14 THE WITNESS: They -- that's not  
15 consistent with my understanding of where the  
16 presentations are created.

17 MR. GRINSTEIN: Q. Let me read you  
18 another line.

19 Column 18, line 24, are you with me?

20 A. Yes.

21 Q. "The Presentation Generation Program  
22 1710 in conjunction with the Presentation Database  
23 1640 then creates the new or updated presentations  
24 for publishing on the Central Presentation and  
25 selection servers or the appropriate non-resident

1 A. No.

2 Q. So how is it that you can say that the  
3 seller interface creates the ads when I've just read  
4 you multiple specification citations that talk about  
5 ad creation and never mention the seller interface?

6 MR. LANE: Objection.

7 THE WITNESS: Can you be a little  
8 more specific in terms of which of the claims you  
9 are pointing to so I can respond to that question?

10 MR. GRINSTEIN: Q. Well, I am not asking  
11 you about claims right now. I am asking you about the  
12 invention that is discussed in the specification.

13 You have read the specification, correct?

14 A. Yes, I have.

15 MR. LANE: Objection.

16 MR. GRINSTEIN: Q. How is it -- how can  
17 it be, in your view, that the seller interface creates  
18 the presentations when I have just read to you multiple  
19 citations from the specification that talk about the  
20 Presentation Generation Program creating the ads or the  
21 presentations and never mention the seller interface?

22 How can that be?

23 A. Well, let's see, again, this goes back  
24 to, I think, the notion of the seller interface, and  
25 that's the section in my report that talks about

1 pages -- let me get this right, let me find the  
2 section in my report that addresses that issue, if  
3 you don't mind.

4 To respond to your question, I think if you  
5 look on page 51 of my report, I am going back to the  
6 claim that in simple language discloses that -- what  
7 we are talking about. If you look at the section  
8 that is highlighted just below E, it talks about  
9 whereby the seller may select one or more of the  
10 media venues, create a presentation that complies  
11 with the said guidelines, the media venues selected  
12 and transmit the presentation to the selected media  
13 venue's publication.

14 That's the best response I can give you.  
15 The seller is where the creation process takes  
16 place.

17 Q. That line you just read doesn't say  
18 the seller interface creates the ads, does it?

19 MR. LANE: Objection.

20 THE WITNESS: No, it is the seller  
21 through the seller interface.

22 MR. GRINSTEIN: Q. Where does it say  
23 through the seller interface?

24 A. Let's see, I think you have to go back  
25 to -- let me find it real quick.

1 Q. Well, actually, let me withdraw the  
2 question and ask it clearly. Perhaps you did not  
3 understand.

4 Where does it say in claim 1 of the '025  
5 that the seller interface creates the ads?

6 MR. LANE: Objection.

7 MR. GRINSTEIN: I am asking you about  
8 the claim language in claim 1 of the '025, which you  
9 were just pointing to.

10 MR. LANE: Objection.

11 THE WITNESS: Let's see, the seller  
12 interface doesn't create the ad. The seller  
13 creates -- the interface is how the seller interacts  
14 with the system.

15 MR. LANE: Joe, he was pointing to  
16 claim 1 of the '045.

17 MR. GRINSTEIN: I am sorry, claim 1  
18 of the '045.

19 Q. Can you tell me where in claim 1 of  
20 the '045 it says that the seller interface creates  
21 the ad?

22 A. Well, the plain language -- the  
23 interface doesn't create the ad. The seller through  
24 the interface creates the ad.

25 Q. Isn't the seller through the

1 Presentation Generation Program creating the ad?

2 MR. LANE: Objection.

3 THE WITNESS: No. The seller through  
4 the seller's interface is where the ad is created.

5 MR. GRINSTEIN: Q. The seller interface  
6 is where the seller inputs information that is then used  
7 to create the ad, right?

8 MR. LANE: Objection.

9 THE WITNESS: That's where the seller  
10 inputs information that is matched up to the IMV's  
11 presentation rules.

12 MR. GRINSTEIN: Q. And what portion of  
13 the invention matches -- does the matching?

14 It is the Presentation Generation Program,  
15 right?

16 MR. LANE: Objection.

17 THE WITNESS: It is the entire seller  
18 interface that does that, and it is made up of two  
19 parts, software and hardware.

20 MR. GRINSTEIN: Q. You have had a chance  
21 to look through your report. Tell me one place in the  
22 specification where it says the seller interface does  
23 the matching between the information that is input by  
24 the seller and the internet media guidelines.

25 MR. LANE: Objection.

1 THE WITNESS: Well, let's see, you  
2 can take a look at page 49 of my report where it  
3 talks about the means for applying corresponding  
4 guidelines.

5 MR. GRINSTEIN: Q. Yes.

6 A. It talks about -- my report says --  
7 and this is true on the ordinary -- "one of ordinary  
8 skill in the art at the time the '045 patent was  
9 filed in 2000 would have understood that the  
10 structure corresponding to that function is set  
11 forth in the specification at Figure 2c and the '025  
12 patent at 25:12-27, 25:34-36, 26:49-60, and  
13 27:1-34."

14 Those portions of the specifications  
15 describe the structure as the seller interface using  
16 the central processor, operating system, ROM, RAM,  
17 clock, communication port, video driver, video  
18 monitor, input devices (e.g., standard keyboard,  
19 mouse, or other replacement items), modem, network  
20 interface, data storage device, a presentation  
21 database including the information related to the  
22 seller's choice of media or venues as well as the  
23 presentation of their products, goods, or services,  
24 and the seller database, a presentation rules  
25 database including the information from the media

1 venue to control and limit the style and editing of  
2 the presentations, and then the Presentation and  
3 Configuration Program which didn't really have any  
4 structural description.

5 Q. Does the Presentation Generation  
6 program create ads, "yes" or "no"?

7 MR. LANE: Objection.

8 THE WITNESS: The seller's interface  
9 creates the ads.

10 MR. GRINSTEIN: Q. Let me ask the  
11 question again.

12 Does the Presentation Generation Program  
13 create ads or presentations?

14 We can use either.

15 Does it create ads or presentations?

16 MR. LANE: Objection.

17 THE WITNESS: Let's see, can you be a  
18 little more specific in sort of the claim you are  
19 looking at because I am looking at claim 1 of the  
20 '045, and that's my reading and my understanding of  
21 the entire patent clearly indicates that that seller  
22 interface is where the creation process takes place.

23 MR. GRINSTEIN: Q. With respect to any  
24 of the claims that have been asserted in this case by  
25 Function Media, any of them, does the Presentation

1 Generation Program create presentations?

2 MR. LANE: Objection.

3 THE WITNESS: No.

4 MR. GRINSTEIN: Q. Then why do you think  
5 the specification, all those citations I just read to  
6 you, say the Presentation Generation Program creates  
7 presentations?

8 MR. LANE: Objection.

9 THE WITNESS: I am not sure why they  
10 would say that. I really don't know. I honestly  
11 don't.

12 MR. GRINSTEIN: Q. I want to talk to you  
13 about some of constructions that you wrote a report  
14 about.

15 What I am going to do is put in front of you  
16 Exhibit B from your report, which will be  
17 Exhibit 49.

18 (Whereupon Exhibit 49 was marked for  
19 identification.)

20 Q. I am handing you what has been marked  
21 as Plaintiff's Exhibit 49 which is Exhibit B from  
22 the parties' joint claim construction statement.

23 A. Okay.

24 MR. LANE: Actually as amended on  
25 February 27.

1 MR. GRINSTEIN: Fair enough, as  
2 amended on February 27, 2009.

3 Q. Have you seen Exhibit B before?

4 A. Yes. Let me -- I will make sure it is  
5 all there.

6 Yes, except for color and format, I have  
7 seen it before.

8 Q. Just so we are clear, what this is for  
9 all the claims terms that are in dispute in this  
10 case, at least as far as you know, Exhibit B lays  
11 out what Function Media says that claim term should  
12 mean and it lays out what Google or Yahoo! claim --  
13 say that that claim term means, right?

14 A. That's the purpose of the document.

15 Q. I am going to ask you a lot of  
16 questions about different claim terms in this case,  
17 so we are going to keep Exhibit B or Exhibit 49,  
18 however you want to call it, out in front of you so  
19 we can refer back to it so you know what each side  
20 is talking about.

21 The first one I want to ask you about is in  
22 the '025 patent, and it is reference No. 27. If you  
23 see on the left side of Exhibit B, there are  
24 reference numbers.

25 A. Yes.

1 Q. Go to 27. The term in dispute is  
2 "publish the advertisement to the internet media  
3 venue."

4 Do you see that?

5 A. Yes.

6 Q. And you understand there is a dispute  
7 between the parties as to that claim term, right?

8 A. Yes.

9 Q. And in fact you wrote a section of  
10 your report discussing that claim term, right?

11 A. Yes.

12 Q. And one of the disputes between the  
13 parties as to this claim term focuses on the meaning  
14 of the word "publish," right?

15 A. Yes.

16 Q. Function Media says that "publish"  
17 means placing or making available, whereas Yahoo!  
18 says "publishing" means placing.

19 Do you see that?

20 MR. LANE: Objection.

21 THE WITNESS: Well, let's see, I can  
22 see where you make that -- yes. In the Exhibit B  
23 that you just gave me, I can see that distinction.

24 MR. GRINSTEIN: Q. And now you are  
25 aware, of course, that Function Media's definition of

1 the word "publish" comes almost verbatim out the  
 2 glossary in the patents, right?  
 3 MR. LANE: Objection.  
 4 THE WITNESS: I don't know that for  
 5 sure.  
 6 MR. GRINSTEIN: Q. Turn with me --  
 7 A. Yes.  
 8 Q. Turn with me to column 11 of the '025  
 9 patent.  
 10 A. All right.  
 11 Q. If you look down the side to about  
 12 line 48 or so, there is a definition of the term  
 13 "publishing."  
 14 Do you see that?  
 15 A. Yes.  
 16 Q. It says "the act of placing or making  
 17 available the presentation or information."  
 18 Do you see that?  
 19 A. Yes.  
 20 Q. So the definition of "publishing" that  
 21 is provided by the glossary of the '025 patent  
 22 contains the notion of placing and the notion of  
 23 making available, fair?  
 24 A. Yes.  
 25 Q. Function Media's definition of the

1 THE WITNESS: Well, let's see, since  
 2 I was asked to sort of comment and render an opinion  
 3 on the claims in the patent, I am trying to figure  
 4 out which one you are referring to.  
 5 Can you help me out there?  
 6 MR. GRINSTEIN: Q. Well --  
 7 A. I mean, is it term 3?  
 8 Q. If you look on reference No. 27 you  
 9 can see -- in Exhibit B, you can see all the claims  
 10 that we are talking about. They are all in the '025  
 11 patent.  
 12 Are you asking -- are you talking about in  
 13 your expert report?  
 14 A. Yes. If you will -- I need to stick  
 15 true to this.  
 16 Q. It appears in C3, page 13 in your  
 17 report you talk about this term.  
 18 A. Thank you. C3 I think page 27 -- is  
 19 that correct -- in my report?  
 20 Q. Did I mess that up?  
 21 A. I did that.  
 22 Q. Yes, 27.  
 23 A. Yes.  
 24 Q. Not 13.  
 25 This is where you discuss the notion of

1 term "publishing" includes those two concepts,  
 2 placing or making available, right?  
 3 MR. LANE: Objection.  
 4 THE WITNESS: That's what Exhibit B  
 5 says.  
 6 MR. GRINSTEIN: Q. Yahoo!'s proposed  
 7 definition of this term does not include the concept of  
 8 making available, right?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: Exhibit B is the idea  
 11 of placing the internet -- placing the advertisement  
 12 at the internet media venue's location for public  
 13 display. I just read that off there.  
 14 MR. GRINSTEIN: Q. You didn't just read  
 15 me the words "making available," right?  
 16 A. Correct.  
 17 Q. So you think Yahoo!'s definition is  
 18 the correct definition, right?  
 19 A. Yes.  
 20 Q. Explain to me how Yahoo!'s definition  
 21 of this term, which includes the notion of  
 22 publishing, can be correct if it doesn't include the  
 23 concept of making available which is part of the  
 24 glossary definition of the word "publishing"?  
 25 MR. LANE: Objection.

1 publishing, right?  
 2 A. That's correct.  
 3 Q. So let me repeat my question.  
 4 How can it be that Yahoo!'s definition of  
 5 the term "publishing" is correct if it leaves out  
 6 the concept of making available which the glossary  
 7 expressly includes as part of the definition of  
 8 "publish"?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: Well, let's see, let me  
 11 read through my section C3 so I can respond properly  
 12 to you.  
 13 I need to refresh myself on this, so bear  
 14 with me.  
 15 Can I respond by saying if you take a look  
 16 at page 28 in my report, if you don't mind, under  
 17 the Basis and Reasons -- I am trying to respond to  
 18 your question, because you are talking about  
 19 publishing --  
 20 Q. Yes.  
 21 A. -- and in these claim terms, the three  
 22 that are in the third claim, this third section,  
 23 deal with -- all of those terms involve publishing  
 24 and advertisement to selected internet media venues.  
 25 Let me read from here. It says, "As

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1 discussed more fully below, the claim language,  
 2 specification and file history make clear that  
 3 publishing to selected internet media venues means  
 4 placing the advertisement at the media" -- I am  
 5 sorry -- "means placing the advertisement at the  
 6 internet media venues for public display."  
 7 And then from the Claim Language, A person  
 8 of ordinary skill in the art would have found the  
 9 notion of publishing an advertisement to an internet  
 10 media venue to be unusual -- an unusual one that  
 11 does not comport with the basic approach using  
 12 internet advertising in 2000.  
 13 At that time, advertisements were published  
 14 to the media venues -- I got that wrong.  
 15 At that time, advertisements were not  
 16 published to media venues, but they were typically  
 17 provided to or placed with the media venues which  
 18 then published the advertisement to the public.  
 19 Q. Can you answer my question without  
 20 just reading back your report?  
 21 MR. LANE: Objection.  
 22 THE WITNESS: I will be honest with  
 23 you, I prefer to use this report because this is  
 24 where the very precise language that I have sort of  
 25 analyzed and put down does a far better job than me

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1 responding to your questions.  
 2 MR. GRINSTEIN: Q. You understand the  
 3 purpose of this deposition is for me to ask questions to  
 4 understand what your report says?  
 5 A. I understand that.  
 6 Q. But you can't respond to my last  
 7 question without just referring me back to your  
 8 report, can you?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: Let's see, I am trying  
 11 to respond as best I can.  
 12 MR. GRINSTEIN: Q. Did you do anything  
 13 to prepare for this deposition today?  
 14 A. Yes.  
 15 Q. Did you read through your report?  
 16 A. Yes.  
 17 Q. Did you read through the patent?  
 18 A. Not last night, but yes, I have read  
 19 the patents, both of them very closely.  
 20 Q. Having reviewed your report recently  
 21 in preparing for this deposition and having read  
 22 through the patents, can you provide me any answer  
 23 to the question how it is you can define the word  
 24 "publish" to exclude the concept of making available  
 25 when that concept is included within the glossary

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1 definition of "publish"?  
 2 MR. LANE: Objection.  
 3 THE WITNESS: Well, my analysis of  
 4 everything that took place in the patents -- my  
 5 analysis of this patent and how internet advertising  
 6 was conducted in the year 2000 is -- my  
 7 understanding is in the report itself, and that is  
 8 in 2000, in 1999, ads are furnished to the internet  
 9 media venues. They are provided or placed with the  
 10 internet media venues. I mean, that's the language  
 11 I use in this report because it is very precise.  
 12 MR. GRINSTEIN: Q. What's a glossary?  
 13 MR. LANE: Objection.  
 14 THE WITNESS: Definition.  
 15 MR. GRINSTEIN: Q. A glossary provide  
 16 definitions?  
 17 A. It does.  
 18 Q. There is a glossary in this patent,  
 19 right?  
 20 A. Yes, sir, there is.  
 21 Q. So a glossary provides the definitions  
 22 of the terms that are used in the patent, right?  
 23 A. Yes.  
 24 Q. So if we want to find the definition  
 25 of any term that is used in the patent, one of the

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1 first places we would go would be the glossary,  
 2 right?  
 3 MR. LANE: Objection.  
 4 THE WITNESS: Not necessarily, no.  
 5 MR. GRINSTEIN: Q. So your understanding  
 6 is that the glossary can provide a definition for a term  
 7 but that definition doesn't necessarily control how we  
 8 interpret the patents?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: Say that one more time.  
 11 I may have gotten it backwards.  
 12 MR. GRINSTEIN: Q. It might have been a  
 13 bad question. I will give it a shot.  
 14 Your understanding is that the glossary  
 15 provides definitions in this patent, but those  
 16 definitions are not necessarily how we should read  
 17 the claims in the patent?  
 18 MR. LANE: Objection.  
 19 THE WITNESS: I just know that my  
 20 understanding of the claims are based on everything  
 21 that we talked about earlier, my experience in the  
 22 business as well as what sort of a person of  
 23 ordinary skill in the art would have known back  
 24 then, and that includes the fact that -- this is a  
 25 real precise point, I know you are trying to be good

1 on this, but advertisements were furnished to  
 2 internet media venues. They were not published to  
 3 internet media venues. That's the language I try to  
 4 use on page 28.  
 5 MR. GRINSTEIN: Q. Is it your  
 6 understanding that the way the claim term "publishing"  
 7 should be interpreted is to interpret it in view of what  
 8 somebody of ordinary skill in the art would think that  
 9 claim term means as opposed to what the patent says that  
 10 claim term means?  
 11 MR. LANE: Objection.  
 12 THE WITNESS: I think you have to --  
 13 let's see, I think you simply have to use your  
 14 understanding of what was going on in internet  
 15 advertising back in '99 and 2000 where ads are  
 16 provided to the internet media venues. They are not  
 17 published to the media venue.  
 18 MR. GRINSTEIN: Q. In column 11 of the  
 19 '025 patent, the word "publishing" again is defined in  
 20 the first line. It talks about the act of placing or  
 21 making available the presentation.  
 22 Do you see that?  
 23 A. Yes, I do.  
 24 Q. So the inventors of this patent knew  
 25 how to use the phrase "placing a presentation,"

1 right?  
 2 MR. LANE: Objection.  
 3 THE WITNESS: No.  
 4 MR. GRINSTEIN: Q. Well, they used it  
 5 in -- they have those words down there, right?  
 6 A. They do.  
 7 Q. They know how to use the phrase  
 8 "making available presentation," right?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: They have used it in  
 11 here, but that's not my understanding of what that  
 12 means.  
 13 MR. GRINSTEIN: Q. Well, I guess my  
 14 question is if the word -- if this claim term that we  
 15 are talking about was only meant to refer to placing a  
 16 presentation, why didn't the inventors just use the term  
 17 "placing the presentation" instead of the more  
 18 complicated term "publishing"?  
 19 MR. LANE: Objection.  
 20 THE WITNESS: I don't know. I don't  
 21 know what they intended when they wrote that.  
 22 MR. GRINSTEIN: Q. And you don't think  
 23 the glossary is a good place to look to figure out what  
 24 they intended?  
 25 MR. LANE: Objection.

1 THE WITNESS: I think you have to  
 2 look what the common practice was back in '99 and  
 3 2000 and what sort of an ordinary person -- ordinary  
 4 skill in the art person would have understood.  
 5 MR. GRINSTEIN: Q. Let me ask you a  
 6 question about a different claim term then. Refer with  
 7 me on Exhibit B to the '045 patent, which is at the  
 8 front of Exhibit B, claim No. 8.  
 9 A. Yes, page 7.  
 10 Q. Page 7. That's the claim "media  
 11 venue," do you see that?  
 12 A. Yes, I do.  
 13 Q. And you can see the two parties  
 14 proposed constructions of that term, and they talk  
 15 about those physical or virtual locations -- I am  
 16 skipping the parenthetical -- where presentations  
 17 are placed or made available. And the definitions  
 18 go on.  
 19 Do you see that?  
 20 A. Yes, I see that.  
 21 Q. And apart from that parenthetical that  
 22 appears after the word "virtual locations," the  
 23 parties' construction of that term was basically the  
 24 same, right?  
 25 MR. LANE: Objection.

1 THE WITNESS: Let's see, say that one  
 2 more time. I was trying to read what you were  
 3 saying and listening at the same time.  
 4 MR. GRINSTEIN: Q. Other than the  
 5 information that is included in that parenthetical, e.g.  
 6 or the i.e., do you see that?  
 7 A. Yes.  
 8 Q. Other than that information, the  
 9 parties' definition of the term "media venue" is  
 10 basically the same; isn't that right?  
 11 MR. LANE: Objection.  
 12 THE WITNESS: No. Let's see, let me  
 13 refer back -- give me a minute to orient myself with  
 14 respect to my report, if you don't mind. That will  
 15 help me out to answer your question. This will  
 16 answer your question, I think.  
 17 I am sorry. You asked me if they are the  
 18 same except for?  
 19 MR. GRINSTEIN: Q. Except for the  
 20 parenthetical.  
 21 A. Well, let's see, this all has to do  
 22 with the '045 claim 1.  
 23 Q. "Media venue" appears all over the  
 24 place. One of the places it appears is the '045  
 25 claim.

1 A. Okay. Since -- let's see, I am trying  
 2 to give you a good precise answer again. I think if  
 3 you will take a look at page 47 of my report, which  
 4 is what I am much more comfortable with than almost  
 5 anything, the -- one of ordinary skill in the art at  
 6 the time of the '045 patent that was filed in  
 7 January 2000 would have understood the phrase "media  
 8 venue" to mean those physical or virtual locations,  
 9 i.e., addresses, where presentations are placed or  
 10 made available to present the information within the  
 11 framework of the media so that it is accessible by  
 12 the end users, consumers, viewers or buyers.

13 And so -- which is what is contained in --  
 14 after Google and Yahoo.

15 Q. Can you answer my question which is --

16 A. I will try.

17 Q. -- look at plaintiff's construction of  
 18 that term "media venue" and look at defendants'  
 19 definition of that term "media venue" and confirm  
 20 for me that really the only difference between those  
 21 two terms, the way the two parties have defined them  
 22 is what they have put in that parenthetical?

23 MR. LANE: Objection.

24 THE WITNESS: That Google -- or who  
 25 are you referring to? I am sorry.

1 Yahoo! definition includes the notion of addresses,  
 2 which is inside the parentheses.  
 3 MR. GRINSTEIN: Q. The first word of  
 4 Function Media's definition of "media venue" is "those,"  
 5 right?  
 6 A. Yes.  
 7 Q. The first word of Google's and  
 8 Yahoo!'s definition of that term is "those,"  
 9 correct?  
 10 A. Yes.  
 11 Q. The second word is "physical," both  
 12 definitions, right?  
 13 A. That's correct.  
 14 Q. The third word is "or," both  
 15 definitions, right?  
 16 A. Correct.  
 17 Q. Fourth word is "virtual," both  
 18 definitions, right?  
 19 A. Yes.  
 20 Q. Next word is "locations," both  
 21 definitions, right?  
 22 A. Yes.  
 23 Q. We hit the parenthetical. I said  
 24 that's different between the two terms, right?  
 25 A. Yes, you did.

1 MR. GRINSTEIN: Q. There is a column  
 2 that says Plaintiff's Construction, right?

3 A. I got that.

4 Q. You understand plaintiff is Function  
 5 Media?

6 A. I understand that.

7 Q. There is a column that says  
 8 Defendants' Constructions.

9 Do you see that?

10 A. Yes.

11 Q. Do you understand that is Yahoo! and  
 12 Google?

13 A. I do.

14 Q. There are words that are written in  
 15 each box of the columns corresponding with the two  
 16 sides' definition of the words "media venue."

17 Do you understand that?

18 A. I understand.

19 Q. Tell me whether or not there is any  
 20 difference between the two sides' definition of  
 21 "media venue" as it is displayed here in Exhibit 49,  
 22 page 7, any difference between those two terms other  
 23 than what is included in the parenthetical?

24 MR. LANE: Objection.

25 THE WITNESS: Well, the Google and

1 Q. After that you pick up with the word  
 2 "where," both definitions, right?  
 3 A. Yes.  
 4 Q. "Presentations," both definitions,  
 5 right?  
 6 A. Yes.  
 7 Q. If I follow this process through the  
 8 rest of the definition we are going to find that  
 9 every other word is the same; isn't that right?  
 10 A. That's correct.  
 11 Q. The difference between these two  
 12 definitions is the parenthetical, right?  
 13 A. That's correct. Sorry.  
 14 Q. Now what is your understanding of what  
 15 the word "physical locations" refers to in that  
 16 claim term?  
 17 A. Well, let's see here, "physical  
 18 location" is someplace that is the physical address  
 19 that is in the world.  
 20 Q. Would a billboard be an example of a  
 21 physical location?  
 22 MR. LANE: Objection.  
 23 THE WITNESS: Let's see, no. I will  
 24 say media venue -- sorry, I am kind of slow on this.  
 25 I've just got to get it right.

1 Billboard would be a physical address.  
 2 MR. GRINSTEIN: Q. The patents talk  
 3 about --  
 4 A. Physical location --  
 5 Q. There is mention of billboard within  
 6 the patents, right?  
 7 A. There is.  
 8 Q. The claims that we are talking about  
 9 in the patents, claims that you have analyzed in  
 10 your report, all talk about internet websites,  
 11 internet addresses, things like that, right?  
 12 A. They do.  
 13 Q. The claims you have analyzed in this  
 14 case are not directed towards billboards?  
 15 MR. LANE: Objection.  
 16 MR. GRINSTEIN: Q. Right?  
 17 A. Well, it is included in there. There  
 18 are physical addresses. There are tangible media.  
 19 Q. Well, the claims that we have talked  
 20 about all talk about internet media venues, right?  
 21 MR. LANE: Objection.  
 22 THE WITNESS: They talk about media  
 23 venues.  
 24 MR. GRINSTEIN: Q. Turn with me to  
 25 column 10 of the '025 patent.

1 A. It says, "the term media venues is  
 2 defined by the glossary" as you just referenced --  
 3 "as set forth in the specification as those physical  
 4 or virtual locations where presentations are placed  
 5 or made available to present information within the  
 6 framework of the media so that it is accessible by  
 7 the ends users," and so forth.  
 8 Q. When you rendered your opinion about  
 9 what the term "media venue" means, as your report  
 10 indicates on page 47, you looked in the glossary,  
 11 right?  
 12 A. I included that in that -- in my  
 13 opinion.  
 14 Q. What the glossary said supported your  
 15 opinion about what that claim term means, right?  
 16 A. Yes.  
 17 Q. Why didn't you look to the glossary  
 18 when you were trying to define the claim terms that  
 19 talked about publishing?  
 20 MR. LANE: Objection.  
 21 THE WITNESS: Well, I did include the  
 22 glossary when I -- let's see, the glossary is part  
 23 of the patent, so I included the thing from head to  
 24 toe. And in this case the glossary definition --  
 25 you just asked me why I didn't do something.

1 A. All right.  
 2 Q. Column 10 of the '025 patent talks  
 3 about -- there is a definition there for media  
 4 venues down at the bottom. Right?  
 5 A. Yes, there is.  
 6 Q. And the Yahoo! definition which you  
 7 support in your claim construction report is more or  
 8 less taken from this definition of media venues,  
 9 right?  
 10 MR. LANE: Objection.  
 11 THE WITNESS: Well, let's see. Let  
 12 me double-check.  
 13 MR. GRINSTEIN: Q. Let me clarify my  
 14 question so you can answer.  
 15 The Yahoo! definition with the exception of  
 16 the parenthetical is taken from the first sentence  
 17 of the definition of media venue in column 10 of the  
 18 '025 patent, right?  
 19 MR. LANE: Objection.  
 20 THE WITNESS: Well, let's see. I  
 21 don't want to go through the step-by-step process  
 22 again, but I am looking at my report on page 47  
 23 which talks about if you look under the Basis and  
 24 Reasons claims.  
 25 MR. GRINSTEIN: Q. Yes.

1 Repeat that one more time so I get it right,  
 2 sorry.  
 3 MR. GRINSTEIN: Q. You testified you  
 4 looked to the glossary when you were considering what  
 5 the definition of "media venue" meant, and it included  
 6 that definition.  
 7 A. Yes. That's here.  
 8 Q. Why didn't you include the definition  
 9 that was included in the glossary for "publishing"?  
 10 MR. LANE: Objection.  
 11 THE WITNESS: The definition in the  
 12 glossary in terms of "publishing" is not consistent  
 13 with what I understand that to be.  
 14 MR. GRINSTEIN: Q. Stick with your  
 15 report, we can just look at page 47 of your report. I  
 16 understand you like that better.  
 17 It says media venue is physical or virtual  
 18 locations where presentations are placed or made  
 19 available.  
 20 Do you see that?  
 21 A. Yes, I do.  
 22 Q. Why did you include the concept of  
 23 "made available" in the definition of "media venue"  
 24 when you didn't include it in the definition of  
 25 "publishing"?



1 MR. LANE: Objection.  
 2 THE WITNESS: Let's see, you have to  
 3 rephrase that. I am a little bit confused on what  
 4 you just said, sorry.  
 5 MR. GRINSTEIN: Q. Remember we had a  
 6 long discussion about the fact that the glossary defines  
 7 "publishing" as the act of placing or making available.  
 8 You remember that?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: Yes.  
 11 MR. GRINSTEIN: Q. We talked about how  
 12 Function Media included the concept of "making  
 13 available" in its definition of publishing whereas  
 14 Google and Yahoo! only included the concept of  
 15 "placing."  
 16 Do you remember that discussion.  
 17 A. Yes.  
 18 Q. My question for you is if "publishing"  
 19 only means placing and doesn't include the concept  
 20 making available as you contend, then why when you  
 21 defined "media venue" did you include the concept of  
 22 "making available" along with "placing"?  
 23 MR. LANE: Objection.  
 24 THE WITNESS: I think this is just --  
 25 this is -- if I understand your question correctly,

1 this is straight from the glossary itself.  
 2 MR. GRINSTEIN: Q. So why didn't you go  
 3 straight from the glossary for the concept of  
 4 "publishing"?  
 5 MR. LANE: Objection.  
 6 THE WITNESS: Because I agree --  
 7 let's see, because I disagree with what the  
 8 "publishing" -- the phrase "publishing" in the  
 9 glossary contains.  
 10 MR. GRINSTEIN: Q. Did you make a  
 11 mistake in including the phrase "made available" when  
 12 you defined "media venue"?  
 13 A. Here?  
 14 Q. Yes.  
 15 A. No.  
 16 Q. Now flip with me to page 48 of your  
 17 report.  
 18 A. All right.  
 19 Q. The first sentence of that report --  
 20 first sentence of the first paragraph on page 48  
 21 says, "For the reasons given below, within this  
 22 definition a person of ordinary skill in the art  
 23 would have understood the term 'virtual location' to  
 24 mean website addresses or URLs."  
 25 Do you see that?

1 A. Yes, sir.  
 2 Q. Look back at Exhibit B on page 7, your  
 3 definition -- or I will make it easier for you.  
 4 Just flip to the first page of the section  
 5 on page 47.  
 6 A. Yes.  
 7 Q. You see where you have included a  
 8 parenthetical after "virtual locations"?  
 9 Do you see that?  
 10 A. Yes, I do.  
 11 Q. It says, "i.e., addresses"?  
 12 A. Yes.  
 13 Q. And then flip to page 48, and in the  
 14 first sentence you say virtual locations means  
 15 website addresses or URLs; do you see that?  
 16 A. Yes.  
 17 Q. Why didn't you say, i.e., website  
 18 addresses or URLs when you were defining what  
 19 "virtual locations" meant?  
 20 MR. LANE: Objection.  
 21 THE WITNESS: Well, based on my  
 22 understanding of, again, what somebody of ordinary  
 23 skill back then, they would have understood "virtual  
 24 locations" to include -- let me just read this so I  
 25 can get it right.

1 Let me back up to page 47. I am trying to  
 2 answer your question. The term "media venues" as  
 3 defined in the glossary, as you just pointed out, as  
 4 set forth those physical or virtual locations or  
 5 presentations are placed or made available to  
 6 present the information within the framework of the  
 7 media so it is accessible by the end users,  
 8 consumers, viewers or buyers, and that's what I  
 9 think somebody of ordinary skill in the art would  
 10 have applied in that definition.  
 11 And then let me continue, on the top of page  
 12 48, "within this definition a person of ordinary  
 13 skill in the art would have understood the term  
 14 'virtual locations' to mean website addresses or  
 15 URLs."  
 16 Addresses -- website addresses and URLs were  
 17 in common use back then.  
 18 MR. GRINSTEIN: Q. Right. So if you  
 19 think "virtual locations" means website addresses or  
 20 URLs, then when you defined what "virtual locations"  
 21 mean with an i.e. when you define these terms, why  
 22 didn't you say website addresses or URLs instead of just  
 23 the word "addresses"?  
 24 A. In this case it was just addresses is  
 25 almost synonymous with website addresses. In 2000,

1 in 1999, those terms were almost synonymous.  
 2 Q. One Main Street, Marshall, Texas,  
 3 that's an address, isn't it?  
 4 A. Yes.  
 5 Q. When we are talking about virtual  
 6 locations, that's not referring to something like a  
 7 street address, is it?  
 8 A. No, it is not.  
 9 Q. But the word "addresses" by itself  
 10 wouldn't exclude that, would it?  
 11 A. No.  
 12 Q. Do you understand prosecution  
 13 estoppel?  
 14 A. No, that's not a phrase I am familiar  
 15 with.  
 16 Q. Do you understand how statements made  
 17 in the file history of a patent impact how claims  
 18 should be construed in a patent?  
 19 A. I have a general understanding of  
 20 that.  
 21 Q. What is it?  
 22 A. That those in the file history are  
 23 supplemental to the patent itself and they are the  
 24 exchange between I think the inventor and examiner,  
 25 somebody inside the patent office.

1 this is in your report.  
 2 A. Oh, okay. I will try to give you a  
 3 response.  
 4 What -- I am sorry, figure what?  
 5 Q. 4g.  
 6 A. Okay, I am on that page.  
 7 Q. There is a block that says 11380, do  
 8 you see that, in 4g?  
 9 A. Yes, I do.  
 10 Q. And that block says "Central  
 11 controller and presentation processor identifies  
 12 internal directory indexes and references affected  
 13 by edits or new presentation, adds to require  
 14 publication list."  
 15 Do you see that?  
 16 A. Yes, I do.  
 17 Q. And then it says, if you follow it  
 18 down to 11390, it says, "Central controller and  
 19 presentation processor publishes to presentation and  
 20 selection servers, or third-party directories, all  
 21 pages and/or files affected by updates, edits or new  
 22 presentations."  
 23 Do you see that?  
 24 A. I can see that, yes.  
 25 Q. Does that figure suggest to you that

1 That's my rough understanding of what the  
 2 file history includes.  
 3 Q. And do you know any particular rules  
 4 that courts apply when considering file histories of  
 5 patents --  
 6 MR. LANE: Objection.  
 7 MR. GRINSTEIN: Q. -- in the claim  
 8 construction process?  
 9 A. Say that one more time. That was a  
 10 pretty precise question.  
 11 Q. In the claim construction process, are  
 12 you familiar with any of the rules that courts  
 13 follow in considering the file histories of patents?  
 14 MR. LANE: Objection.  
 15 THE WITNESS: No.  
 16 MR. GRINSTEIN: Q. Are you familiar with  
 17 the concept of disclaiming coverage in a file history of  
 18 a patent?  
 19 A. No, that's not a phrase I have used  
 20 regularly.  
 21 Q. I will ask you just a couple of  
 22 questions about Figures 4g and 4h in the '025  
 23 patent.  
 24 A. In my report?  
 25 Q. We are on the patent. I don't think

1 the central controller and presentation processor is  
 2 publishing directly to the media venue interface?  
 3 MR. LANE: Objection.  
 4 THE WITNESS: No. I mean, it does  
 5 not.  
 6 MR. GRINSTEIN: What do you want to  
 7 do?  
 8 (Discussion off the record.)  
 9 VIDEO OPERATOR: Going off the  
 10 record. The time is 11:54.  
 11 (Break taken.)  
 12 VIDEO OPERATOR: We are back on the  
 13 record.  
 14 The time is 12:59.  
 15 MR. GRINSTEIN: Q. Mr. Kincaid, the next  
 16 series of questions I want to ask you focus on the  
 17 interface terms that appear in the patents, so if you  
 18 will turn with me to page 12 of Exhibit 49, which is the  
 19 Exhibit B right there.  
 20 A. Okay.  
 21 Q. It is just to orient you on what the  
 22 dispute is between the parties.  
 23 A. It will help me, if you don't mind, if  
 24 you will sort of let me know which of the terms we  
 25 are talking about and which claim it is coming out

1 of. That will help me orient and answer your  
 2 questions, I think.  
 3 Q. I am going to be -- the question I am  
 4 asking you right now is about page 7 of your report  
 5 which talks about claims 1 and 179 of the '025  
 6 patent.  
 7 A. Page 7, the first interface?  
 8 Q. Yes.  
 9 First of all, if you look at Exhibit B --  
 10 A. Yes.  
 11 Q. -- there is the Function Media  
 12 definition and there is the Google and Yahoo!  
 13 definition.  
 14 Do you see those?  
 15 A. Yes, I do.  
 16 Q. The Google and Yahoo! definition has  
 17 some text underlined. It says, "a person working on  
 18 behalf of."  
 19 Do you see that?  
 20 A. Yes.  
 21 Q. Are you aware that Google and Yahoo!  
 22 made a change to their definition of "first  
 23 interface to the computer system" and that change is  
 24 reflected by the fact that that text is underlined?  
 25 A. I wasn't aware of that.

1 Q. You couldn't tell me the difference  
 2 between what the previous definition was and what  
 3 this definition is?  
 4 MR. LANE: Objection.  
 5 THE WITNESS: No. I just looked -- I  
 6 looked at the patents, the file histories, and  
 7 that's what I base my report on.  
 8 MR. GRINSTEIN: Q. Did you come up with  
 9 these -- you say in your -- like, for example, on the  
 10 first page -- first paragraph page 7 --  
 11 A. Yes.  
 12 Q. -- one of ordinary skill in the art,  
 13 so on and so forth, would have understood the term  
 14 "first interface" to mean and then you have got a  
 15 definition right there?  
 16 A. Yes, I do.  
 17 Q. Did you come up with that definition  
 18 yourself or was that definition supplied to you?  
 19 MR. LANE: Objection.  
 20 THE WITNESS: That evolved out of the  
 21 back and forth between Michael and the other guys.  
 22 MR. GRINSTEIN: Q. You participated in  
 23 forming this definition?  
 24 A. Yes.  
 25 Q. Do you recall participating in forming

1 an amendment to the definition that changed some of  
 2 the words to it?  
 3 MR. LANE: Objection.  
 4 THE WITNESS: No.  
 5 MR. LANE: Are we getting close to  
 6 the communications?  
 7 MR. GRINSTEIN: I don't want to  
 8 trample that ground. I am just trying to  
 9 understand.  
 10 Q. The definition read before it was  
 11 altered, "software and hardware at the internet  
 12 media venue location that enables an agent of the  
 13 internet media venue to interact with the computer  
 14 system."  
 15 Do you remember that at one time the  
 16 proposed definition used the word "agent"?  
 17 A. No. I mean, that language -- let's  
 18 see, hang on one second. No, when I read the  
 19 patent, '025, that's what I base this claim language  
 20 right here. That's what I used.  
 21 I mean, that's what they asked me to do is  
 22 take a look at the claim language and render an  
 23 opinion on those terms and how they would be  
 24 understood by somebody with my background ten years  
 25 ago.

1 Q. Now one of the disputes between the  
 2 parties as to the definition of "first interface" is  
 3 that Function Media has defined it to mean software  
 4 and Google and Yahoo! has defined it to mean  
 5 software and hardware.  
 6 Do you understand that's one of the disputes  
 7 between the parties?  
 8 A. Yes.  
 9 Q. And that's a dispute that appears with  
 10 respect to other claim terms that are in dispute;  
 11 there are other situations in which Function Media  
 12 says "software" and Google and Yahoo! say "software  
 13 and hardware," Function Media says "software or  
 14 hardware" and Google and Yahoo! say "hardware and  
 15 software."  
 16 You understand that, right?  
 17 A. Yes.  
 18 Q. And your testimony is that one of  
 19 ordinary skill in the art would understand first  
 20 interface to the computer system to require software  
 21 running on hardware; is that your testimony?  
 22 A. That's correct. That's the definition  
 23 at the top of page 7 where it says software and  
 24 hardware at the internet media venue that enables  
 25 the person working on behalf of the internet media

1 venue to interact with the computer system.  
 2 Q. What's wrong with the definition of  
 3 this term that would just use "software"?  
 4 A. Well, the computer system is composed  
 5 of both hardware and software.  
 6 Q. And so your understanding is that you  
 7 can't have software unless you have the hardware  
 8 running it?  
 9 A. Well, you can't have an interface to a  
 10 computer system without hardware and software.  
 11 Q. Is it possible to run hardware without  
 12 electricity?  
 13 A. No.  
 14 Q. So --  
 15 A. Depends -- I mean, electronic  
 16 hardware, computers.  
 17 Q. Are you aware of any electronic  
 18 hardware that operates without electricity?  
 19 A. No.  
 20 Q. Why didn't you include software and  
 21 hardware and electricity in your definition of claim  
 22 7 because you need electricity to run an interface  
 23 too?  
 24 MR. LANE: Objection.  
 25 THE WITNESS: Well, when I was asked

1 to take a look at that term, those are the two  
 2 components that comprise in my mind -- they call it  
 3 the first interface to the computer system, and  
 4 that's -- if you look at sort of the discussion I  
 5 have on, I guess, pages 7 and 8, it is talking  
 6 about -- well, let me just read this real quick.  
 7 For one, the first interface, it explicitly  
 8 claims to be an interface between the IMV and a  
 9 computer system, and hardware and software both are  
 10 required to form that interface.  
 11 MR. GRINSTEIN: Q. Isn't electricity  
 12 required too?  
 13 A. There would be.  
 14 Q. So why isn't electricity part of your  
 15 definition if that is something that is required?  
 16 MR. LANE: Objection.  
 17 THE WITNESS: Well, that would be  
 18 sort of the cascading. You could go forever. I  
 19 think most people would understand if they read that  
 20 term the first interface to the computer system back  
 21 in 2000 and 1999 they would understand that first  
 22 interface to the computer system is primarily the  
 23 software and the hardware required to interact with  
 24 a computer system, which is what I sort of map out  
 25 on page 8.

1 MR. GRINSTEIN: Q. And one of the things  
 2 that you cite to support your opinion that most people  
 3 would understand what that term meant is a computer  
 4 dictionary; is that right?  
 5 A. That is correct.  
 6 Q. And you cite that on the bottom of  
 7 page 8 of your report?  
 8 A. Yes.  
 9 Q. Is that right?  
 10 A. That's correct.  
 11 Q. And I think you cited -- actually to  
 12 be clear, you also cite it on the bottom of 7?  
 13 A. Top, yes.  
 14 Q. And that dictionary is called the  
 15 Microsoft Computer Dictionary; is that right?  
 16 A. Let's see, yes, Computer Dictionary,  
 17 Comprehensive Standard for Business, School, Library  
 18 and Home, Microsoft Press.  
 19 Q. The edition you cite is the second  
 20 edition from 1994, right?  
 21 A. Yes.  
 22 Q. Let me show you that definition. We  
 23 are up to 50.  
 24 (Whereupon Exhibit 50 was marked for  
 25 identification.)

1 Q. Handing you what has been marked as  
 2 Exhibit 50, the front page of this appears to  
 3 suggest it is the first page of the Microsoft  
 4 Computer Dictionary.  
 5 A. Yes.  
 6 Q. If you flip to the next page, you can  
 7 see the copyright date is '94.  
 8 Do you see that?  
 9 A. Yes, the top of the page.  
 10 Q. If you flip to the third page of this  
 11 exhibit, there is a definition there of interface.  
 12 And at least a portion of that deposition -- a  
 13 portion of that definition is what you quote on  
 14 pages 7 and 8 of your expert report; is that right?  
 15 A. Let me read through it real quick.  
 16 Q. Sure.  
 17 A. That's correct.  
 18 Q. Your definition that you quote starts  
 19 "In computing different types of interfacing occur  
 20 on different levels ranging from highly visible user  
 21 interfaces that enable people to communicate with  
 22 programs to often invisible yet necessary hardware  
 23 interfaces that connect devices and components  
 24 inside the computer."  
 25 Do you see that?

1 A. Yes, I do.  
 2 Q. These patents are not -- do not speak  
 3 to the process of connecting devices and components  
 4 inside a computer, do they?  
 5 A. In the seller interface -- well, in  
 6 the specifications it talks about RAM and ROM and  
 7 serial ports and all kinds of things.  
 8 Q. Have the inventors -- I am sorry.  
 9 A. No, I am just trying to flesh out the  
 10 answer and make sure I get it right.  
 11 Q. Have the inventors of this invention  
 12 claimed they have invented a new kind of ROM?  
 13 A. No.  
 14 Q. Have they claimed that they have  
 15 invented a new kind of serial port?  
 16 A. No.  
 17 Q. And does the specification describe  
 18 how hardware interfaces connect devices and  
 19 components -- a new way of connecting devices and  
 20 components inside a computer?  
 21 A. No.  
 22 Q. This sentence I just read you said  
 23 there are different types of interfaces. On the one  
 24 end you have got user interfaces, and on the other  
 25 end you have hardware interfaces, is essentially

1 what it says?  
 2 MR. LANE: Objection.  
 3 THE WITNESS: Let's see, I mean, the  
 4 definition is pretty straightforward. It talks  
 5 about -- it doesn't talk about one on one end and  
 6 one on the other. It talks about different types of  
 7 interfacing operating at different levels ranging  
 8 from visible to what they call often invisible yet  
 9 necessary hardware interfacing.  
 10 MR. GRINSTEIN: Q. It does talk about a  
 11 range, doesn't it?  
 12 A. Yes, occurring on different levels.  
 13 Q. Ranging from user interfaces to  
 14 hardware interfaces, right?  
 15 A. Yes.  
 16 Q. The interfaces that -- where do the  
 17 interfaces that are discussed in these inventions  
 18 fall on that range?  
 19 Are they more like user interfaces that  
 20 enable people to communicate with programs, or are  
 21 they hardware interfaces that connect devices and  
 22 components inside the computer?  
 23 MR. LANE: Objection.  
 24 THE WITNESS: Well, let's see, let me  
 25 go back to -- let me go back to the claim language

1 real quick.  
 2 Well, my reading of the claim language is  
 3 that in -- to respond to your question right it  
 4 would be more towards, it says here -- let me back  
 5 up. Let me go back all the way here.  
 6 I am trying to answer your question. Bear  
 7 with me here for a second.  
 8 I think the claim language here talks about  
 9 someone at an internet media venue, they are being  
 10 prompted to input presentation rules, and that would  
 11 be a person interacting with a computer monitor and  
 12 a keyboard, something like that.  
 13 MR. GRINSTEIN: Q. A user?  
 14 A. A user.  
 15 Q. Mr. Kincaid, you think that the --  
 16 where these inventions fall on this range of  
 17 interfaces is they are more like user interfaces  
 18 because you quote the next sentence of this  
 19 definition which talks about user interfaces, right?  
 20 MR. LANE: Objection.  
 21 THE WITNESS: Well, let's see, I  
 22 think that -- rephrase that again because I just  
 23 got -- I am trying to read the definition and make  
 24 sure I get it right.  
 25 MR. GRINSTEIN: Q. The definition

1 describes a range of interfaces going from user  
 2 interfaces to hardware interfaces?  
 3 A. Right.  
 4 Q. You think that the inventions that are  
 5 discussed in these patents involve the user  
 6 interface side of that range because the only other  
 7 sentence of this definition that you have quoted  
 8 refers to user interfaces; isn't that right?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: Well, let's see, my  
 11 understanding of a user interface, given, again,  
 12 what somebody of ordinary skill in the art in 2000  
 13 or 1999 would have been familiar with is -- the  
 14 ordinary meaning of that is both hardware and  
 15 software through which a user communicates with a  
 16 computer system. If that answers your question,  
 17 then that's what I intended.  
 18 MR. GRINSTEIN: Q. Mr. Kincaid, try to  
 19 listen to my question.  
 20 A. Listening.  
 21 Q. The first sentence of this definition  
 22 that you quote -- which you quote on page 8 of your  
 23 report says that there are a range of interfaces  
 24 ranging from user interfaces to hardware interfaces;  
 25 isn't that right?

1 A. Yes.  
 2 Q. And I am asking you, doesn't the fact  
 3 that you then quote the next sentence of this  
 4 definition which talks about user interfaces,  
 5 doesn't that mean that you think these inventions  
 6 fall on the user interface side of that range?  
 7 MR. LANE: Objection.  
 8 THE WITNESS: Well, I can only go  
 9 back to what my understanding of what a user  
 10 interface is, and that is it is as I spelled out in  
 11 the last paragraph -- I am trying to answer your  
 12 question -- but it is the point where the user  
 13 interface is between the internet media venue and  
 14 the computer system. The users use interfaces to  
 15 connect to the computer system.  
 16 MR. GRINSTEIN: Q. Move to strike as  
 17 nonresponsive.  
 18 If you look down at the rest of the  
 19 definition, towards the bottom of the page there is  
 20 a discussion there about in hardware interfaces are  
 21 cards.  
 22 Do you see that?  
 23 A. I do.  
 24 Q. And it goes on to say other words,  
 25 right?

1 that's software, right?  
 2 MR. LANE: Objection.  
 3 THE WITNESS: Yes, prompts are caused  
 4 by software -- brought about by software.  
 5 MR. GRINSTEIN: Q. It says, "and other  
 6 devices that enable a user to interact with a program,"  
 7 right?  
 8 A. That's correct.  
 9 Q. The other devices -- this definition  
 10 is describing the graphical design, the commands and  
 11 prompts as devices, right?  
 12 MR. LANE: Objection.  
 13 THE WITNESS: Well, let's see, it is  
 14 defining this sentence you are pointing to, "user  
 15 interface consists of," those are the elements that  
 16 make up the user interface that enable a user to  
 17 interact with a program.  
 18 Q. And it says, user interfaces consist  
 19 of four things: Graphical design, commands, prompts  
 20 and other devices.  
 21 Do you see that?  
 22 A. Yes.  
 23 Q. When it uses the word "other devices"  
 24 it means devices other than graphical design,  
 25 commands and prompts, right?

1 A. Yes, it does.  
 2 Q. You did not quote that in your expert  
 3 report, did you?  
 4 A. No, I did not.  
 5 Q. The only part you quoted in your  
 6 expert report -- the only other sentence you quoted  
 7 in your expert report is the first sentence of the  
 8 second paragraph of this definition?  
 9 A. That's correct.  
 10 Q. That says, "user interfaces consist of  
 11 the graphical design, the commands, prompts and  
 12 other devices that enable a user to interact with  
 13 the program."  
 14 You quoted that in your expert report,  
 15 right?  
 16 A. That's correct.  
 17 Q. Graphical design, is that something  
 18 that is usually associated with software or  
 19 hardware?  
 20 A. That's software.  
 21 Q. Commands, that's software too, isn't  
 22 it?  
 23 MR. LANE: Objection.  
 24 THE WITNESS: It can be, but yes.  
 25 MR. GRINSTEIN: Q. Prompts, again,

1 A. Let me see how I treated that in here  
 2 because that's important, I think.  
 3 Sorry, can you repeat the question?  
 4 Q. Sure.  
 5 What the first sentence of the second  
 6 paragraph of the definition of interface says, which  
 7 is the second sentence you quote in your report,  
 8 what it is saying is that there are graphical  
 9 designs, commands, prompts and other types of  
 10 devices that are not graphical designs, commands and  
 11 prompts; isn't that what that phrase means?  
 12 A. Well, let's see, I am just trying to  
 13 read the sentence again.  
 14 "User interface consists of the graphical  
 15 design, commands, prompts and other devices that  
 16 enable a user to interact with a program."  
 17 You added a couple of words in there.  
 18 Sorry.  
 19 Q. I will ask it again.  
 20 A. I am sorry.  
 21 Q. When the definition that you quoted in  
 22 your expert report uses the term "other devices," it  
 23 is referring to devices other than graphical design,  
 24 commands and prompts, right?  
 25 A. Yes.

1 Q. So it is characterizing graphical  
2 design, commands and prompts as software, right --  
3 strike that question.

4 Do you think the word "other devices" is  
5 meant to refer to hardware?

6 MR. LANE: Objection.

7 THE WITNESS: Well, let's see.

8 MR. GRINSTEIN: Q. I am only asking you  
9 what this definition means. I am not asking you about  
10 the patents.

11 A. I understand that. I mean, that's  
12 what I have to go back to.

13 Q. Let me strike the question and be  
14 clear.

15 Right now I am asking you what this  
16 definition that you quoted in your expert report  
17 means. I am not asking you anything about the  
18 patents. I am just asking you to explain the  
19 definition that you utilized.

20 When you utilized that definition, did you  
21 understand the word "other devices" to refer to  
22 hardware?

23 A. Yes.

24 Q. If that refers to hardware, why is the  
25 word "other" in there?

1 that your testimony?

2 MR. LANE: Objection.

3 THE WITNESS: Well, let's see, sorry,  
4 if you will just ask that question again, I will try  
5 to give you a good answer.

6 MR. GRINSTEIN: Q. Your testimony is  
7 that you used a dictionary from 1994 because a 1994  
8 definition of the word "interface" is more relevant to  
9 these 2000 patents -- patents from the year 2000 than  
10 would be a 2009 dictionary which is nine years after the  
11 patents; is that your testimony?

12 MR. LANE: Objection.

13 THE WITNESS: Yes.

14 MR. GRINSTEIN: Q. Now the Microsoft  
15 computer dictionary that you cited predates the first  
16 patent by six years; is that right?

17 A. That's correct.

18 Q. 1994, the first patent was filed in  
19 2000; is that right?

20 A. I think the first patent was -- let's  
21 see, it is either '99 or 2000. Let me look.

22 Q. Do you want to look at the first  
23 patent?

24 A. That would help. Let me take a look.

25 Q. Let me mark what -- we are going mark

1 A. From the dictionary in the quote?

2 Q. How is that -- how is your  
3 understanding that that word refers to hardware  
4 consistent with the fact that the definition  
5 includes the word "other" after just having  
6 described software?

7 A. Well, let's see, I am trying to answer  
8 your question, but that sentence has to be coupled  
9 up just like it is in the dictionary with the  
10 previous sentence. The whole thing is -- I took it  
11 as a whole. I didn't derive meaning out of that.

12 Q. Is that your best answer?

13 A. I am afraid it is.

14 Q. When you were looking for a dictionary  
15 definition to cite in your expert report, why did  
16 you use this 1994 version of this -- why did you use  
17 this 1994 dictionary instead of going to a  
18 dictionary that is a current dictionary from today?

19 A. I think that dictionary strikes --  
20 let's see, again, I was asked to take a look at what  
21 took place back in 1999 and 2000, and a dictionary  
22 today would have fundamentally changed.

23 Q. So you used the '94 dictionary because  
24 that speaks more to how one would interpret the  
25 patents in the years 2000 than a 2009 dictionary; is

1 this as Exhibit 51.

2 (Whereupon Exhibit 51 was marked for  
3 identification.)

4 A. That's '045.

5 Q. That's the '045.

6 If you look at the top of that patent in box  
7 22 you see a file date January 2000.

8 Do you see that?

9 A. Yes, I do.

10 Q. Does that confirm your understanding  
11 that the first patent in this case was filed in  
12 2000?

13 A. Yes. '045 was filed in 2000.

14 Q. Are you aware that Microsoft published  
15 a third edition of the computer dictionary in 1997?

16 A. No.

17 Q. 1997 is certainly a lot closer to 2000  
18 than 1994; is that right?

19 A. That's correct.

20 Q. I will show you -- this will be  
21 Exhibit 52.

22 (Whereupon Exhibit 52 was marked for  
23 identification.)

24 Q. The front of what I have shown you  
25 says Microsoft Third Edition.

1 A. Yes.  
 2 Q. If you look at the second page, it  
 3 says copyright 1997, right?  
 4 A. It does.  
 5 Q. This is the next edition of the  
 6 dictionary that you cited in your expert report,  
 7 right?  
 8 A. Yes.  
 9 Q. Flip with me to the third page of  
 10 Exhibit 52.  
 11 A. All right.  
 12 Q. Which is the third edition of the  
 13 Microsoft computer dictionary's definition of the  
 14 word "interface."  
 15 A. Yes.  
 16 Q. Do you see that?  
 17 A. I do.  
 18 Q. Definition No. 1 says, "The point at  
 19 which a connection is made between two elements so  
 20 that they can work with each other."  
 21 Do you see that?  
 22 A. I do.  
 23 Q. That's not really relevant to our  
 24 discussion today about whether interface means  
 25 hardware or software, is it?

1 MR. LANE: Objection.  
 2 THE WITNESS: Well, let's see, it is  
 3 kind of hard for me to react to that sort of on --  
 4 not on the fly but with respect to the report I  
 5 wrote because I didn't have access to this. I  
 6 apologize.  
 7 MR. GRINSTEIN: Q. Looking at that  
 8 definition it doesn't really speak to hardware versus  
 9 software, it doesn't use those words, does it?  
 10 A. No, it doesn't.  
 11 Q. Look at the second definition.  
 12 "Software that enables a program to work with the  
 13 user, the user interface which can be a command line  
 14 interface, menu-driven or graphical user interface  
 15 with another program such as the operating system or  
 16 with the computer's hardware."  
 17 Do you see that?  
 18 A. I do.  
 19 Q. The second definition of interface  
 20 expressly defines interface as software, doesn't it?  
 21 MR. LANE: Objection.  
 22 THE WITNESS: That's what the  
 23 definition states here.  
 24 MR. GRINSTEIN: Q. You didn't consider  
 25 this definition when you authored your expert report,

1 did you?  
 2 A. No, I didn't.  
 3 Q. Did you know that there is a fourth  
 4 edition of the Microsoft computer dictionary that  
 5 was published in 1999?  
 6 A. No.  
 7 Q. Let's look at that one.  
 8 A. All right.  
 9 Q. This will be Exhibit 53.  
 10 (Whereupon Exhibit 53 was marked for  
 11 identification.)  
 12 Q. The front page of Exhibit 53 says  
 13 Microsoft Computer Dictionary Fourth Edition.  
 14 Do you see that?  
 15 A. Yes, I do.  
 16 Q. If you flip to the next page, it has a  
 17 copyright date of 1999.  
 18 Do you see that?  
 19 A. Yes.  
 20 Q. Flip to the third page, it has the  
 21 definition of interface there, the second  
 22 definition, which is "software that enables a  
 23 program to work with the user, the user interface  
 24 which can be a command line interface, menu driven  
 25 or interface with another program such as the

1 operating system or with the computer's hardware."  
 2 Do you see that?  
 3 A. Yes, I do.  
 4 Q. And there is a "See also" and there is  
 5 a line right there.  
 6 Do you see that?  
 7 A. Yes.  
 8 Q. Other than the "See also," that  
 9 definition from the 1999 dictionary is the same as  
 10 the definition from the 1997 dictionary; isn't that  
 11 right?  
 12 A. Let me just take a look. That's the  
 13 one we just looked at.  
 14 Q. Right.  
 15 A. They appear to be the same.  
 16 Q. 1999 is only one year before the first  
 17 patent application in this case was filed, right?  
 18 A. Correct.  
 19 Q. In fact, if you look at the patent I  
 20 just showed you, the '045, the patent was filed on  
 21 January 10 of 2000; is that right?  
 22 A. Yes.  
 23 Q. So depending upon when in 1999 the  
 24 book came out, it could be only months before it was  
 25 filed, right?



1 A. That could be true.  
 2 Q. If any edition of the Microsoft  
 3 computer dictionary is going to be relevant to how  
 4 someone of ordinary skill in the art would interpret  
 5 these patents in the year 2000, it is going to be  
 6 the 1999 edition; isn't that right?  
 7 MR. LANE: Objection.  
 8 THE WITNESS: I don't think that's  
 9 correct at all.  
 10 MR. GRINSTEIN: Q. You just testified  
 11 earlier that you cited the 1994 edition of the computer  
 12 dictionary --  
 13 A. Yes.  
 14 Q. -- as opposed to a contemporary  
 15 dictionary because 1994 is more relevant to what  
 16 somebody of ordinary skill in the art would think  
 17 these patents meant in 2000.  
 18 That was your testimony then, right?  
 19 A. Yes.  
 20 Q. So if 1994 is more relevant to a 2000  
 21 dated patent than is 2009 then plainly 1999 is more  
 22 relevant to a 2000 patent than 1994; isn't that  
 23 right?  
 24 MR. LANE: Objection.  
 25 THE WITNESS: I don't think you

1 dictionary be more appropriate to the time frame?  
 2 MR. LANE: Objection.  
 3 THE WITNESS: It could have been.  
 4 MR. GRINSTEIN: Q. And so -- you didn't  
 5 even consider the 1999 version; is that right?  
 6 A. No.  
 7 Q. Is that just an oversight on your  
 8 part?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: No, it is not an  
 11 oversight.  
 12 MR. GRINSTEIN: Q. Having seen the  
 13 dictionary definitions that you have just seen, the 1999  
 14 version and the 1997 version, if you were to write your  
 15 expert report again today would you cite the 1994  
 16 version of that computer dictionary?  
 17 MR. LANE: Objection.  
 18 THE WITNESS: If I were to rewrite it  
 19 today knowing that these two exist, would I have  
 20 cited that, yes.  
 21 MR. GRINSTEIN: Q. Why?  
 22 A. Well, more current information, closer  
 23 to the patent date.  
 24 Q. You would have cited the 1994 --  
 25 A. No, I thought you said '99. I am

1 can -- no. I mean, somebody who is -- like me, my  
 2 understanding would be based on sort of the current  
 3 dictionary that I had.  
 4 MR. GRINSTEIN: Q. And wouldn't the  
 5 current dictionary that the date these patents be filed  
 6 be the 1999 version?  
 7 A. I don't know that it would be.  
 8 Q. Did you -- do you own the 1994 edition  
 9 of the computer dictionary?  
 10 A. No.  
 11 Q. This is something that was provided to  
 12 you?  
 13 A. This came up in the back and forth  
 14 between Michael and myself.  
 15 Q. So was it just an oversight that your  
 16 patent -- excuse me -- your expert report skips two  
 17 versions of the Microsoft computer dictionary, the  
 18 fourth edition and third edition, and goes back to  
 19 the second edition to find its definition of  
 20 "interface"?  
 21 MR. LANE: Objection.  
 22 THE WITNESS: No, I think that was  
 23 just trying to find a dictionary that was  
 24 appropriate to the time frame.  
 25 MR. GRINSTEIN: Q. And wouldn't the 1999

1 sorry.  
 2 Q. I am saying if you were to rewrite  
 3 your expert report today would you cite the '94  
 4 dictionary definition or the 1999 dictionary  
 5 definition now that you know '99 exists?  
 6 MR. LANE: Objection.  
 7 THE WITNESS: I would -- I would use  
 8 the '99 dictionary.  
 9 MR. GRINSTEIN: Q. Let's take a look at  
 10 the specification for a second of the '025 patent.  
 11 A. Okay. Let's see, which claim are you  
 12 at so I can find it?  
 13 Q. I am talking about the specification  
 14 right now. Just to be clear, we are still talking  
 15 about the claim first interface, but I want you to  
 16 look at the patent itself, which is the '025 patent,  
 17 which is Exhibit 48.  
 18 A. All right.  
 19 What -- where would you like me to look at  
 20 that?  
 21 Q. If you would, can we look at column 5,  
 22 and I want to focus in on lines 31 through 34.  
 23 A. All right. Inside the specifications?  
 24 Q. Yes, of the '025 patent, column 5.  
 25 A. Okay. Lines 3 --

1 Q. 31 through 34.  
 2 A. Thank you.  
 3 Q. Those read, "The present invention  
 4 partially resides on the seller's computers,  
 5 controls and edits the presentation and then  
 6 automatically transmits that information and data  
 7 for publication in traditional media and electronic  
 8 networks."  
 9 A. Yes, it does.  
 10 Q. Do you see that?  
 11 A. Yes, I see that.  
 12 Q. Have you reviewed that portion of the  
 13 specification before?  
 14 A. Yes.  
 15 Q. Did you look at it again in  
 16 anticipation of this deposition?  
 17 A. Just -- no. When I -- that was before  
 18 I wrote the report, so I haven't reviewed it since I  
 19 wrote the report.  
 20 Q. The seller interface of course is part  
 21 of the present invention, right?  
 22 MR. LANE: Objection.  
 23 THE WITNESS: Let's see, when you  
 24 talk about the present invention, you will help me  
 25 out if you sort of be -- if you tell me which of

1 Q. So you would agree that the present  
 2 invention -- part of the present invention is the  
 3 seller interface, right?  
 4 MR. LANE: Objection.  
 5 THE WITNESS: Well, let's see, again,  
 6 when you are talking about the invention, this is  
 7 the '025, which is the second term?  
 8 MR. GRINSTEIN: Q. Uh-huh. Well, '025 I  
 9 don't think is the second term but the second interface.  
 10 If you look at '025 claim 1, which is back  
 11 in the claims section, there are a bunch of terms,  
 12 and it is one of the terms.  
 13 A. Okay.  
 14 Q. And my only question is, the seller  
 15 interface is part of the invention, right?  
 16 MR. LANE: Objection.  
 17 THE WITNESS: Yes.  
 18 MR. GRINSTEIN: Q. And your testimony is  
 19 that the second interface, the seller interface,  
 20 includes hardware, right?  
 21 A. Hardware and software, yes.  
 22 Q. And that hardware includes the  
 23 seller's computer, right?  
 24 A. Yes, includes hardware, computers at  
 25 the seller's location, yes.

1 these claims -- the terms that you are talking  
 2 about, it will help me sort of respond to you.  
 3 MR. GRINSTEIN: Q. Well, on --  
 4 A. Because the '045 and '025 are two  
 5 different things.  
 6 Q. We are talking about the claim term  
 7 "first interface to the computer system."  
 8 A. Okay.  
 9 Q. And that claim term appears in the  
 10 '025 patent, claim 179.  
 11 A. Okay.  
 12 Q. The seller interface is actually the  
 13 second interface to the computer system, isn't it?  
 14 A. Let me check real quick.  
 15 Let's see, the first interface, hardware,  
 16 software, internet media venue, location, and then  
 17 the second interface to the computer system is  
 18 through which the seller is prompted to input  
 19 information to select one or more of the internet  
 20 media venues, so yes.  
 21 Q. I skipped a little bit. To be clear,  
 22 I am talking about the second interface right now.  
 23 That's the seller interface, right?  
 24 A. That's correct, and that's the second  
 25 term.

1 Q. So when the line here says, "the  
 2 present invention partially resides on the seller's  
 3 computers," if you understand "interface" to mean  
 4 hardware, that line is essentially saying the  
 5 hardware and software partially resides on the  
 6 seller's hardware; isn't that right?  
 7 MR. LANE: Objection.  
 8 THE WITNESS: If you will rephrase  
 9 that, I will try to give you a straight answer.  
 10 MR. GRINSTEIN: Q. We agreed that the  
 11 seller interface is part of the present invention, and  
 12 your opinion is that the seller interface includes  
 13 hardware like the seller's computer.  
 14 If that's the case, then essentially what  
 15 this line in the specification is saying is that the  
 16 seller's computer partially resides on the seller's  
 17 computer, doesn't it?  
 18 MR. LANE: Objection.  
 19 THE WITNESS: Say it one more time  
 20 because --  
 21 MR. GRINSTEIN: Q. I will do it one more  
 22 time.  
 23 We have agreed that the present invention  
 24 includes the seller's interface. We have agreed  
 25 that the seller's interface includes the seller's

1 computer, right?  
 2 A. The seller interfaces both the  
 3 hardware and software, yes.  
 4 Q. One part of the hardware and software  
 5 is the seller's computer, right?  
 6 A. You just said something that was  
 7 confusing, when you said one part of the hardware is  
 8 hardware and software.  
 9 Q. You say that the second interface, the  
 10 seller interface, includes hardware and software,  
 11 right?  
 12 A. Yes.  
 13 Q. And this is the seller we are talking  
 14 about, right?  
 15 A. Yes.  
 16 Q. So it is the seller's computer as part  
 17 of that hardware, right?  
 18 A. Yes.  
 19 Q. So if the present invention includes  
 20 the seller interface and if the seller interface  
 21 includes the seller's computer, then what this line  
 22 in the specification is saying is that the seller's  
 23 computer partially resides on the seller's computer,  
 24 right?  
 25 MR. LANE: Objection.

1 understand. I apologize.  
 2 Q. If the seller's interface includes the  
 3 seller's computer and other hardware, why would it  
 4 have been necessary for the inventor to state that  
 5 the present invention partially resides on the  
 6 seller's computer?  
 7 MR. LANE: Objection.  
 8 THE WITNESS: I am not sure why, but  
 9 the seller interface is where the seller interacts  
 10 with the computer system to create the  
 11 presentations, and it is at the seller's location.  
 12 MR. GRINSTEIN: Q. Let's go back to  
 13 Exhibit B -- I am sorry -- not Exhibit B, Exhibit 49  
 14 which is Exhibit B, claim construction chart, and we  
 15 were at page 12, item No. 7.  
 16 There is -- you see that Google and Yahoo!'s  
 17 definition of "first interface to the computer  
 18 system" is "software and hardware at the internet  
 19 media venue location."  
 20 Do you see that?  
 21 A. Yes.  
 22 Q. I want to ask you about -- a question  
 23 about your understanding of what "at the location"  
 24 means.  
 25 A. Okay.

1 THE WITNESS: Wait a second. Let's  
 2 see, let me read the line again that you just said.  
 3 MR. GRINSTEIN: Q. Column 5, line 31.  
 4 A. I apologize. I am truly not trying to  
 5 be stupid or argumentative, but I heard you say the  
 6 word "hardware" twice. When you said the present  
 7 invention partially resides on the seller's  
 8 computers, controls and edits the presentation, and  
 9 so forth on that line -- could you just one more  
 10 time ask that question?  
 11 Q. Right.  
 12 If the present invention includes the  
 13 seller's interface and the seller's interface  
 14 includes the seller's computer, what sense does the  
 15 line "the present invention partially resides on the  
 16 seller's computer" make to the extent it is  
 17 suggesting that the seller's computer is residing on  
 18 the seller's computer?  
 19 MR. LANE: Objection.  
 20 THE WITNESS: I must have -- could  
 21 you just replay that back? Maybe I just heard you  
 22 wrong. You said a computer resides on a computer.  
 23 MR. GRINSTEIN: Q. You can't answer my  
 24 question as I have stated it?  
 25 A. I don't think so, no. I just do not

1 Q. You say in your report on page 9  
 2 that -- up on the top first full paragraph, "The  
 3 claim language also makes clear that the  
 4 interface" -- we are talking about the first  
 5 interface here -- "is installed on a computer at the  
 6 internet media venue location."  
 7 Do you see that?  
 8 A. Yes, I do.  
 9 Q. Your opinion is that the first  
 10 interface is installed at a computer at the internet  
 11 media venue, right?  
 12 A. Yes.  
 13 Q. Let me ask you a hypothetical.  
 14 Suppose you had a system, a computer system,  
 15 that provided the interface to the internet media  
 16 venue via a web portal. So suppose that there was a  
 17 website that the internet media venue was using as  
 18 the interface, or at least as part of the interface.  
 19 So to interact with the system the internet  
 20 media venue logs onto a website and there is the  
 21 interface right there.  
 22 Are you with me right there?  
 23 A. I understand what you are saying, but  
 24 that's not what my understanding of the interface  
 25 is.

1 Q. Let me ask the question again.  
 2 If the internet media venue was accessing  
 3 the interface or at least the software component of  
 4 the interface via the internet, would that involve,  
 5 in your words, software installed and a computer at  
 6 the internet media venue location?  
 7 MR. LANE: Objection.  
 8 THE WITNESS: No, because my  
 9 understanding based on the claim language, the terms  
 10 that I took a look at and all of the specifications  
 11 were that software was installed I think via the CD,  
 12 CD-ROM, on the internet media venue's hardware to  
 13 enable the internet media venue -- somebody at that  
 14 location to interface with the system.  
 15 MR. GRINSTEIN: Q. Is it your belief  
 16 that the only way to infringe the claims of the '025  
 17 patent is to install software via CD-ROM?  
 18 MR. LANE: Objection.  
 19 THE WITNESS: No.  
 20 MR. GRINSTEIN: Q. There are other ways  
 21 of getting the software to the internet media venue  
 22 location, right?  
 23 MR. LANE: Objection.  
 24 THE WITNESS: Well, at this point in  
 25 time that was the most -- again, when I read this --

1 and the language in the specification talks about  
 2 installing software from a CD at the internet media  
 3 venue's location, that was the most common way of  
 4 doing that.  
 5 MR. GRINSTEIN: Q. Can you name a claim  
 6 that is in dispute in this case that limits the way  
 7 software gets installed to just being a CD-ROM?  
 8 MR. LANE: Objection.  
 9 THE WITNESS: No.  
 10 VIDEO OPERATOR: This is the end of  
 11 Volume I, videotape No. 2, in the deposition of Gene  
 12 Kincaid.  
 13 We are going off the record. The time is  
 14 1:47.  
 15 (Break taken.)  
 16 VIDEO OPERATOR: We are back on the  
 17 record. This is the beginning of Volume I,  
 18 videotape No. 3 in the deposition of Gene Kincaid.  
 19 The time is 2:08.  
 20 MR. GRINSTEIN: Q. Mr. Kincaid, I want  
 21 to now talk about the claim term "self-serve interface,"  
 22 which, again, to help understand what the dispute is, if  
 23 you look on Exhibit B -- I will let you hit the report  
 24 on it.  
 25 A. That would be great. Thanks.

1 Q. On Exhibit 49, it is in the '025  
 2 reference No. 6 on page 12. And I want to talk to  
 3 you about the difference between parties'  
 4 constructions here.  
 5 The word I want to focus in on in the Google  
 6 and Yahoo! construction is the word "directly."  
 7 Do you see there is Google and Yahoo!'s  
 8 definition of software and hardware at the internet  
 9 media venue or seller location that a person working  
 10 on behalf of the internet media venue or seller uses  
 11 directly without the aid of anyone else?  
 12 Do you see that.  
 13 A. I must be on the wrong page.  
 14 Q. It is page 12, term 6, reference No.  
 15 6.  
 16 A. Okay. All right, I am with you.  
 17 Q. Do you see the word "directly"?  
 18 A. Yes.  
 19 Q. Why is that word necessary there?  
 20 MR. LANE: Objection.  
 21 THE WITNESS: Well, let's see, let me  
 22 take a look at my report real quick so I can sort of  
 23 refresh myself on this section and respond to you.  
 24 MR. GRINSTEIN: Q. You can't answer the  
 25 question without looking at your report?

1 A. I prefer to look at my report.  
 2 Q. Okay.  
 3 A. I am sorry, if you repeat your  
 4 question real quick.  
 5 Q. You used the term -- the word  
 6 "directly" in your definition of "self-serve  
 7 interface," and my question is why was it necessary  
 8 to include that word in the definition?  
 9 MR. LANE: Objection.  
 10 THE WITNESS: Let's see, let me read  
 11 directly from my report that speaks to that.  
 12 It says, "With respect to the second  
 13 difference, self-serve, in my opinion one of  
 14 ordinary skill in the art in January 2000 would have  
 15 understood from the claim language that a self-serve  
 16 interface was one via which a person is working at  
 17 seller's location with respect to the second  
 18 interface or on behalf of the IMV at the IMV's  
 19 location with respect to the first interface  
 20 interacted directly with the computer system."  
 21 Q. And I guess my question is, is if the  
 22 word "directly" wasn't in there, would -- let me  
 23 strike that and ask it this way: The opposite of  
 24 direct is indirect, of course, right?  
 25 MR. LANE: Objection.

1 THE WITNESS: No.  
 2 MR. GRINSTEIN: Q. Is there some sort of  
 3 indirect usage of the self-serve interface that you are  
 4 intending to exclude by using the word "directly"?  
 5 A. If you will restate that. I am  
 6 just --  
 7 Q. Is there some sort of indirect use of  
 8 the self-serve interface that you mean to exclude by  
 9 using the word "directly" in the definition of  
 10 "self-serve interface"?  
 11 A. No.  
 12 Q. There is another difference between  
 13 the parties on this claim term. You see that the  
 14 Function Media definition says -- has the phrase  
 15 "uses without requiring the aid of anyone else."  
 16 And the Google and Yahoo! definition says "uses  
 17 directly without the aid of anyone else."  
 18 Do you see that difference?  
 19 A. Yes, I see the difference.  
 20 Q. What do you understand to be the  
 21 distinction -- the practical distinction between  
 22 those two phrases?  
 23 MR. LANE: Objection.  
 24 THE WITNESS: Well, let's see, if you  
 25 will ask that question again -- maybe rephrase that.

1 MR. GRINSTEIN: Q. What's the practical  
 2 difference between -- in your mind -- between the  
 3 Function Media definition and the Google and Yahoo!  
 4 definition with respect to that term I just mentioned?  
 5 A. And the term being?  
 6 Q. "Requiring the aid of anyone else"  
 7 versus "directly without the aid of anyone else."  
 8 A. Well, I don't know how to answer that  
 9 question. I am just looking at the language in the  
 10 claim that talks about self-serve interface, and in  
 11 my mind that is sort of where you disagree.  
 12 Q. Do you do online banking?  
 13 A. Yes.  
 14 Q. And so you have been on sort of your  
 15 bank's website and you log on and do your banking  
 16 and you don't call up a banker to assist you through  
 17 the process; that's right?  
 18 A. That's correct.  
 19 Q. But a lot of online banks, they have a  
 20 little portion of their website that says if you  
 21 have a question about how to use this, you can call  
 22 us or e-mail us.  
 23 You have seen something like that before,  
 24 right?  
 25 A. I have seen something like that.

1 Q. And let me step back a second.  
 2 When you are using the online bank  
 3 without -- on your own and just doing your banking  
 4 without talking to anyone, would you consider that  
 5 an example of being self-served?  
 6 MR. LANE: Objection.  
 7 THE WITNESS: Today, yes, I would  
 8 include that.  
 9 MR. GRINSTEIN: Q. If the online bank  
 10 website that you use, let's call it Bank of America, if  
 11 the Bank of America website allowed you to do self-serve  
 12 banking but also had a little portion of the website  
 13 that said, listen, if you have any questions or need any  
 14 help, call us up and we will help you, if they had that  
 15 extra sort of help feature on the website, would you no  
 16 longer consider it self-serve?  
 17 MR. LANE: Objection.  
 18 THE WITNESS: Hypothetically, if you  
 19 are getting help from somebody else, then it is no  
 20 longer self-serve.  
 21 MR. GRINSTEIN: Q. But what if the  
 22 website didn't require you to get the help, it just said  
 23 if you needed it, there is someone to ask, otherwise  
 24 have your --  
 25 MR. LANE: Objection.

1 MR. GRINSTEIN: Q. If that was the way  
 2 the website was constructed, and it is probably the way  
 3 your online bank is constructed, would you consider that  
 4 self-serve?  
 5 MR. LANE: Objection.  
 6 THE WITNESS: If you will rephrase  
 7 that just one quick way.  
 8 MR. GRINSTEIN: Q. Sure.  
 9 If your online bank allowed you to do your  
 10 banking by yourself, log on to the internet without  
 11 talking to anybody if you didn't want to, but it  
 12 also had a portion of the website that if you ran  
 13 into trouble doing your own banking, you could call  
 14 someone for help, would you consider that sort of a  
 15 system self-serve?  
 16 MR. LANE: Objection.  
 17 THE WITNESS: No.  
 18 MR. GRINSTEIN: Q. Because?  
 19 A. Because you are talking -- working  
 20 with somebody to get something done rather than  
 21 doing it yourself.  
 22 Q. What portion of the patent  
 23 specification have you reviewed that suggests that  
 24 someone using this invention couldn't have a help  
 25 desk or something like that?