

EXHIBIT E

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

FUNCTION MEDIA, L.L.C.)
Plaintiff)
VS.)
GOOGLE, INC. AND)
YAHOO!, INC.)
Defendants)

Case No.
2:07-CV-279 (CE)

CONFIDENTIAL

VIDEOTAPED DEPOSITION OF V. THOMAS
RHYNE, Ph.D., at 111 Congress
Avenue, Suite 810, Austin, Texas,
commencing at 9:05 A.M., Wednesday,
March 25, 2009, before Micheal A.
Johnson, CSR, and Notary Public.

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 19
 20 VIDEOGRAPHER:
 21
 Trey Perez
 22
 23
 24
 25

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1 me from my office is Sandeep Seth. 09:06:07
 2 THE VIDEOGRAPHER: Thank you. The 09:06:10
 3 witness will be sworn in. 09:06:11
 4 V. THOMAS RHYNE, III, 09:06:11
 5 having been first duly sworn, testified as follows: 09:06:19
 6 EXAMINATION 09:06:19
 7 BY MR. LUMISH: 09:06:19
 8 Q. Dr. Rhyne, would you please just state 09:06:19
 9 your name for the record. 09:06:23
 10 A. My full name is Vernon Thomas Rhyne, 09:06:24
 11 III. 09:06:27
 12 Q. All right. And you're serving as an 09:06:27
 13 expert in this case for Function Media? 09:06:30
 14 A. Yes. 09:06:31
 15 Q. And you understand this is a lawsuit 09:06:31
 16 brought by Function Media against Google and Yahoo!? 09:06:33
 17 A. Yes. 09:06:36
 18 Q. Okay. And we've met off the record 09:06:36
 19 here. You know who I am, and you understand that I 09:06:38
 20 represent Yahoo! here today? 09:06:42
 21 A. Yes. 09:06:44
 22 Q. All right. 09:06:44
 23 A. I may get the two of you confused as 09:06:44
 24 being Yahoo! or Mr. -- Google, but -- 09:06:47
 25 Q. Understood. 09:06:47

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1 PROCEEDINGS 09:05:01
 2 THE VIDEOGRAPHER: Good morning. 09:05:01
 3 We're on the record at 9:05 a.m. on March 25th, 09:05:06
 4 2009. My name is Trey Perez here with our court 09:05:11
 5 reporter, Micheal Johnson. We are here from 09:05:14
 6 Veritext National Deposition & Litigation Services 09:05:16
 7 at the request of the defendant. This deposition is 09:05:19
 8 being held at Fish & Richardson in the city of 09:05:24
 9 Austin, Texas. 09:05:28
 10 The caption of this case is Function 09:05:29
 11 Media, LLC, versus Google, Inc., and Yahoo! Inc., 09:05:30
 12 Case No. 207-CV-279-CE. This is the videotaped 09:05:35
 13 deposition Dr. Thomas Rhyne. 09:05:43
 14 Please note that audio and video 09:05:45
 15 recording will take place unless all parties agree 09:05:46
 16 to go off the record. Microphones are sensitive and 09:05:49
 17 may pick up whispers and private conversations. 09:05:51
 18 At this time will counsel and all 09:05:54
 19 present identify themselves for the record. 09:05:56
 20 MR. LUMISH: Doug Lumish, Weil 09:05:58
 21 Gotshal for Yahoo!. 09:06:01
 22 MR. WOLFF: Jason Wolff, Fish & 09:06:02
 23 Richardson for Google. 09:06:03
 24 MR. BRANDON: Jeremy Brandon, 09:06:03
 25 counsel for the plaintiff and the witness. And with 09:06:05

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1 A. -- but I'll try to keep that straight. 09:06:50
 2 Q. So, Mr. Wolff, my -- my colleague here, 09:06:51
 3 represents Google. He may ask you some questions 09:06:54
 4 later, but I'm going to -- 09:06:54
 5 A. I understand. 09:06:54
 6 Q. -- start off this morning. 09:06:54
 7 A. Sure. Uh-huh. 09:06:56
 8 MR. LUMISH: Would you please mark 09:06:57
 9 that as 84. 09:06:58
 10 (Deposition Exhibit No. 84 Marked.) 09:06:59
 11 Q. (BY MR. LUMISH) Sir, I want to hand you 09:07:07
 12 a couple of three documents here. First, I want to 09:07:09
 13 give you a report, which we've now marked as Exhibit 09:07:11
 14 84. Can you just take a moment, look at that, and 09:07:14
 15 confirm to me that that is, in fact, the expert 09:07:18
 16 report you submitted in this case? 09:07:20
 17 A. It's the body of the report. I think 09:07:22
 18 that there were some attachments as it was 09:07:24
 19 originally filed, primarily my resume and a list of 09:07:26
 20 cases, but it appears to be the declaration I guess 09:07:30
 21 is the way I think of it, Mr. Lumish. 09:07:33
 22 Q. All right. And then I want to give you 09:07:36
 23 the two patents that are addressed in your report. 09:07:37
 24 They have previously been marked, but the copies I 09:07:41
 25 have don't have the exhibit numbers on them. But I 09:07:44

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1 want to start by giving you the -- what we call the 09:07:47
 2 '025 patent, US patent 7,240,025, which was 09:07:50
 3 previously marked as Exhibit 48, and then US 09:07:56
 4 6446045, which was previously marked as Exhibit 51. 09:08:01
 5 You -- you refer to these patents as 09:08:24
 6 the '045 and the '025 patents; is that fair? 09:08:26
 7 A. Yes. 09:08:30
 8 Q. And you'll know which patents I mean 09:08:30
 9 when we use those numbers? 09:08:33
 10 A. Yes. 09:08:34
 11 Q. All right. How long did it take you to 09:08:35
 12 prepare your report, Exhibit 84? 09:08:37
 13 A. Well, I would say at that point in this 09:08:40
 14 case, not necessarily directly for the purposes of 09:08:42
 15 writing the report, but I -- I think I had no -- 09:08:45
 16 around 50 hours of effort invested in understanding 09:08:49
 17 the patents and -- and the claim construction 09:08:52
 18 issues. 09:08:54
 19 In terms of actually writing the 09:08:55
 20 report and finalizing it for submission, I -- I 09:08:58
 21 think probably somewhere in the neighborhood of 10 09:09:00
 22 to 20 hours in that particular task, but it was at 09:09:04
 23 the end of a lot of prior work. 09:09:07
 24 Q. When you say "50 hours," was that the 09:09:10
 25 total amount of time you had worked on this lawsuit 09:09:12

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1 up to the point that the report was complete? 09:09:14
 2 A. I'm not sure exactly how many hours, 09:09:16
 3 Mr. Lumish, but I think something between 50 and 09:09:19
 4 75 hours is -- is the best estimate I can give you 09:09:22
 5 now relative to the total amount of time that I've 09:09:26
 6 spent on this case. 09:09:28
 7 Q. Some of that time, those 50 to 75 hours, 09:09:30
 8 were spent on other issues like the allegations of 09:09:33
 9 infringement and the allegations of invalidity from 09:09:36
 10 both sides; is that true? 09:09:40
 11 A. No. 09:09:42
 12 Q. So you've spent no time on those issues? 09:09:42
 13 A. No. I -- I -- very early on in the 09:09:44
 14 case, just to get an understanding of -- of what the 09:09:47
 15 accused operations and products look like, I sat 09:09:50
 16 down with Mr. Brandon and was kind of walked through 09:09:56
 17 a couple of the Google websites that advertisers use 09:10:01
 18 to set up a -- an advertisement service through 09:10:06
 19 Google. That -- 09:10:11
 20 MR. BRANDON: Let me just caution 09:10:11
 21 you right here not to reveal the substance of any 09:10:12
 22 communications -- 09:10:14
 23 THE WITNESS: Oh. 09:10:14
 24 MR. BRANDON: -- that you've -- 09:10:15
 25 THE WITNESS: Okay. 09:10:17

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1 MR. BRANDON: -- had with me -- 09:10:18
 2 THE WITNESS: All right. 09:10:18
 3 MR. BRANDON: -- as those are 09:10:18
 4 privileged under the protective order. 09:10:19
 5 A. Okay. I -- all -- all I can say is that 09:10:21
 6 that limited probably no more than a 45-minute 09:10:23
 7 experience is the only thing I've done in any way to 09:10:26
 8 understand what will ultimately be my 09:10:29
 9 responsibilities relative to invalidity and 09:10:32
 10 infringement. 09:10:36
 11 Q. (BY MR. LUMISH) So as you sit here now, 09:10:36
 12 then, you haven't formed opinions about 09:10:38
 13 infringement -- on infringement, validity or 09:10:40
 14 invalidity; is that true? 09:10:45
 15 A. No. 09:10:46
 16 Q. And that's true for both -- 09:10:46
 17 A. Or yes. Yes. 09:10:46
 18 Q. Yes, it is true? 09:10:48
 19 A. Yes, it's true. 09:10:49
 20 Q. That's true for both Google and Yahoo!/? 09:10:50
 21 A. Yes. 09:10:53
 22 Q. You expect, though, that you are going 09:10:59
 23 to later work on those questions? 09:11:02
 24 A. I -- when I was retained as an expert 09:11:05
 25 for the plaintiff, Function Media, I assumed that 09:11:08

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1 would be part of my ultimate responsibilities. 09:11:12
 2 We've -- literally we've never discussed it at 09:11:14
 3 length. 09:11:17
 4 MR. BRANDON: Again, let me just 09:11:18
 5 caution you not to get into any discussions with 09:11:19
 6 counsel. 09:11:22
 7 A. I can't tell you what counsel and I've 09:11:22
 8 had, but I -- I haven't lifted a pen or -- or looked 09:11:24
 9 at a document or anything relative to infringement 09:11:27
 10 or validity. I don't -- I really know very little 09:11:30
 11 about what those issues may be. 09:11:35
 12 Q. (BY MR. LUMISH) All right. Can you 09:11:37
 13 tell me what you did to prepare for your report in 09:11:37
 14 or -- in order to make sure you were ready to go and 09:11:41
 15 had fully-formed opinions. 09:11:43
 16 A. I've had a number of face-to-face 09:11:44
 17 meetings with -- with the attorneys, with -- I've 09:11:47
 18 met the -- the two inventors, Ms. Stone and 09:11:51
 19 Mr. Dean, on several occasions, with the specific 09:11:55
 20 purpose of -- well, with two purposes: First, was 09:11:59
 21 to understand what the inventions represented and 09:12:04
 22 the claims of the two patents are, and then from the 09:12:08
 23 very beginning, to work with -- to work on the 09:12:13
 24 Markman construction -- claim construction issues. 09:12:22
 25 And I have been involved with various attorneys and 09:12:25

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1 the inventors in discussions where they were asking 09:12:32
 2 me what my -- 09:12:36
 3 MR. BRANDON: Let me -- let me just 09:12:37
 4 caution you again not to get into the substance of 09:12:38
 5 any communications you've had involving counsel, as 09:12:41
 6 those are privileged under the protective order. 09:12:44
 7 A. The main thing I've done is worked on 09:12:46
 8 what I think, in my opinion, are the appropriate 09:12:48
 9 constructions once it was made clear to me what 09:12:51
 10 terms were being proposed to be construed. And 09:12:54
 11 I've -- that's what I've done. 09:12:59
 12 MR. LUMISH: Let me make sure I 09:13:01
 13 understand your counsel's position. You're not 09:13:02
 14 saying that he can't tell me the basic facts, that 09:13:04
 15 he met with lawyers and when it was and all that? 09:13:07
 16 You're just saying you don't want him to talk about 09:13:09
 17 the substance based on an agreed provision, 09:13:12
 18 protective order, those things would be out of 09:13:12
 19 bounds? 09:13:13
 20 MR. BRANDON: Right. I don't want 09:13:13
 21 to talk -- want him talking about the communications 09:13:14
 22 he had with counsel present. 09:13:16
 23 MR. LUMISH: You don't want the 09:13:18
 24 substance of the communications? You're not arguing 09:13:19
 25 about the fact that there were discussions? 09:13:21

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1 MR. BRANDON: No, I'm not arguing 09:13:22
 2 about the fact that there were discussions. 09:13:24
 3 MR. LUMISH: All right. 09:13:26
 4 Q. (BY MR. LUMISH) So let me ask you that 09:13:26
 5 question. And how many times did you meet with 09:13:27
 6 counsel to prepare for your report in this case? 09:13:29
 7 A. I met with a team of people in Houston 09:13:32
 8 at Susman Godfrey's office on two occasions, and I 09:13:40
 9 met with a team of people here in Austin on one 09:13:45
 10 occasion, and I've had numerous other not 09:13:48
 11 face-to-face communications with some of those 09:13:53
 12 people. 09:13:56
 13 Q. And how many times did you meet with 09:13:58
 14 Mr. Stone or Ms. Dean? 09:14:00
 15 A. I think for the two meetings in Houston 09:14:03
 16 and the meeting here, they were present in both 09:14:05
 17 cases, although they -- they -- no, I think that's 09:14:08
 18 correct. For one of them, they arrived a little 09:14:11
 19 later than I did. But I believe they have been 09:14:14
 20 present for some or all of the meetings, the three 09:14:17
 21 meetings, face-to-face meetings that I described to 09:14:21
 22 you. 09:14:23
 23 Q. Why was it important to meet with 09:14:27
 24 Mr. Stone and Ms. -- Ms. Stone and Mr. Dean, pardon 09:14:30
 25 me? 09:14:32

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1 A. I didn't say it was important. 09:14:32
 2 Q. Did you -- did you speak with them 09:14:35
 3 directly? 09:14:38
 4 A. We were all together in the room. Yes. 09:14:38
 5 Q. Did they help you understand the claim 09:14:41
 6 construction issues in this case? 09:14:43
 7 MR. BRANDON: I'm going to -- I'm 09:14:45
 8 going to -- again, these are communications 09:14:46
 9 involving counsel, which are protected under the 09:14:49
 10 protective order and are privileged. 09:14:51
 11 MR. LUMISH: I'm not asking the 09:14:52
 12 substance of them. 09:14:53
 13 Q. (BY MR. LUMISH) I'm asking if they 09:14:54
 14 helped you form any opinions related to your claim 09:14:55
 15 construction. 09:14:58
 16 MR. BRANDON: I believe -- let me 09:14:58
 17 just ask the court reporter to read back the 09:14:59
 18 previous question. 09:15:01
 19 Q. (BY MR. LUMISH) Well, I'm asking it the 09:15:03
 20 way I just asked it now, which is: Did your 09:15:05
 21 discussions with the named inventors help you form 09:15:06
 22 any opinions about claim construction? 09:15:09
 23 A. I don't think so. 09:15:11
 24 Q. Why not? 09:15:14
 25 A. That's my opinion, that it didn't help 09:15:17

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1 me understand what they had in mind and when they 09:15:19
 2 applied for these patents. And I learned some 09:15:25
 3 interesting facts about their backgrounds and what 09:15:31
 4 they had been doing as businesses that led up -- 09:15:33
 5 as -- as I understand the history here. But in 09:15:37
 6 terms of the claim construction work, I -- I don't 09:15:40
 7 believe I've cited or relied on anything that either 09:15:42
 8 of those two individuals might have said to me 09:15:46
 9 during those meetings. 09:15:49
 10 Q. Did your discussions with the inventors 09:15:51
 11 influence your opinions in any way, then, on claim 09:15:53
 12 construction? 09:15:57
 13 A. I was going to say that's a pretty broad 09:15:58
 14 question until you got to the kicker. I don't think 09:16:00
 15 so, no. 09:16:02
 16 Q. You said there were some interesting 09:16:10
 17 facts you learned in the meetings with the 09:16:12
 18 inventors. What were those? 09:16:14
 19 MR. BRANDON: I'm going to instruct 09:16:15
 20 the witness not to answer on the grounds that they 09:16:16
 21 involve privileged communications involving counsel, 09:16:18
 22 and those are protected under the protective order. 09:16:20
 23 MR. LUMISH: I'm going to have to 09:16:23
 24 look at that protective order during the break, see 09:16:24
 25 if we want to come back to that. 09:16:26

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1 Q. (BY MR. LUMISH) You're a patent agent; 09:16:27
 2 is that right, sir? 09:16:29
 3 A. Yes. 09:16:30
 4 Q. How long has that been true? When did 09:16:33
 5 you get your registration admission to the patent 09:16:35
 6 office? 09:16:38
 7 A. I think 1999. 09:16:38
 8 Q. And have you prosecuted patents 09:16:40
 9 yourself? 09:16:42
 10 A. I have one patent application that's in 09:16:42
 11 the process of prosecution at this current time. 09:16:45
 12 Q. You're the prosecuting attorney -- 09:16:48
 13 prosecuting agent on that, pardon me? 09:16:49
 14 A. Yes. 09:16:51
 15 Q. And is that one of your own patents or a 09:16:51
 16 patent for somebody else? 09:16:53
 17 A. It's for my son and a friend of his, who 09:16:55
 18 at the time had worked in the computer game 09:16:57
 19 industry. And they had an idea that they felt was 09:17:00
 20 patentable, and I -- they didn't have a lot of 09:17:03
 21 money, so I agreed to do it pro bono for the two of 09:17:07
 22 them, and -- 09:17:11
 23 Q. Has anybody ever hired you to prosecute 09:17:11
 24 a patent for them? 09:17:14
 25 A. No. 09:17:14

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1 Q. Haven't done it for any companies or 09:17:15
 2 technologies outside your family? 09:17:16
 3 A. No. 09:17:18
 4 Q. Do you have any intentions of 09:17:18
 5 prosecuting patents going forward? 09:17:20
 6 A. No. 09:17:21
 7 Q. Why did you get the registration? 09:17:22
 8 A. An attorney at Fish & Richardson, whom I 09:17:25
 9 knew, who no longer works there, made me a bet. He 09:17:28
 10 said, "I bet you could take the patent bar" -- "or 09:17:33
 11 the patent office exam and pass it, given your 09:17:38
 12 experience in patent litigation and other aspects of 09:17:42
 13 the patent process." 09:17:45
 14 And, you know, I could have easily 09:17:48
 15 won the bet by flunking the test, but it sounded 09:17:50
 16 like an interesting thing to do. And I had a case 09:17:53
 17 that I was the expert in down in Corpus Christi, 09:17:55
 18 Texas, that settled on the eve of my driving to 09:17:59
 19 Corpus Christi to serve as a witness in that case. 09:18:04
 20 And I had about two weeks of clearance in my 09:18:06
 21 schedule. I signed up and took one of the patent 09:18:10
 22 bar preparation courses. And I had previously 09:18:14
 23 signed up to take the test, and I took it and passed 09:18:18
 24 it. 09:18:21
 25 And I just thought it would give me 09:18:21

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1 a better insight into all of these procedures and 09:18:23
 2 processes that take place during the prosecution 09:18:26
 3 process, and I -- it -- it was interesting. I guess 09:18:31
 4 that's the best thing that I can say. 09:18:35
 5 Q. The -- so to pass the test, though, you 09:18:37
 6 did have to take a class and study about the rules 09:18:40
 7 and regulations of the patent office; is that true? 09:18:43
 8 A. I don't know that I had to. I just had 09:18:46
 9 an opportunity to do so. 09:18:48
 10 Q. You did that, though? 09:18:48
 11 A. I did do that, uh-huh. It was 09:18:49
 12 interesting as well. I was probably 15 years older 09:18:51
 13 than anybody else in the room at the time. 09:18:59
 14 Q. Nothing wrong with that. 09:19:01
 15 To prepare your report in this case, 09:19:04
 16 you studied the patents, the '025 and the '045 09:19:06
 17 patents? 09:19:10
 18 A. Yes. 09:19:11
 19 Q. And how many times would you say you've 09:19:11
 20 read the '025 patent? 09:19:14
 21 A. Well, I -- I tend -- and this may be a 09:19:15
 22 bit of an issue for us. I tend to read the '045. I 09:19:17
 23 don't know whether that's right or wrong. I know 09:19:21
 24 they have the same specification s, but they're not 09:19:22
 25 formatted quite exactly the same. So I kind of -- 09:19:26

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1 where I maybe have a mental image, Mr. Lumish, of 09:19:29
 2 where something might be on one of these columns is 09:19:29
 3 not in exactly the same place. 09:19:32
 4 Q. Well, you're in luck. All of my notes 09:19:34
 5 today are on the '045. 09:19:36
 6 A. I'm -- I'm relieved. Okay. I don't 09:19:37
 7 know. I've probably been through that specification 09:19:42
 8 front to back more than five times, pretty much line 09:19:44
 9 by line. 09:19:48
 10 Q. And so did you ever read the '025 patent 09:19:49
 11 separately or did you just rely on the -- what you 09:19:52
 12 understood to be the identity of the specifications 09:19:55
 13 between the two of them? 09:19:58
 14 A. I have read it separately. It's my 09:19:58
 15 understanding, and I haven't tried to use some 09:20:01
 16 document comparison tool to confirm it, that the 09:20:03
 17 abstract is different. And obviously it is on the 09:20:06
 18 face of the patent, and obviously the claims are 09:20:08
 19 different. So whenever I wanted to rely on the -- 09:20:11
 20 the claims where certain terms appear, I've 09:20:15
 21 generally gone back where there's a term that is 09:20:18
 22 either only in or also in the '025, as well as the 09:20:21
 23 '045. I've -- I've looked at those, but I've 09:20:26
 24 generally relied on the specification as printed in 09:20:29
 25 the '045. 09:20:33

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1 Q. I asked you about what you did to 09:20:34
 2 prepare for your report. 09:20:36
 3 A. Uh-huh. 09:20:36
 4 Q. You told me you met with lawyers and met 09:20:37
 5 with the inventors. Did you do anything else? 09:20:39
 6 A. I did some things that are evidenced in 09:20:42
 7 my report. I've looked at the file histories for -- 09:20:45
 8 for the two patents. And I wouldn't say I've looked 09:20:51
 9 at every single piece of paper that are found in 09:20:54
 10 those file histories, but I've looked at generally 09:20:58
 11 the ebb and flow of office actions and any following 09:21:01
 12 amendment or argument that's provided by the 09:21:05
 13 applicants. I've looked at some technical 09:21:07
 14 dictionaries, at least for -- for one term or so. 09:21:12
 15 That's about all I can think. 09:21:18
 16 Q. How did you select the tech dictionaries 09:21:19
 17 to read? 09:21:22
 18 A. I have an old personal set of several. 09:21:23
 19 I tend often, if I think there's an appropriate 09:21:27
 20 definition, to rely on the IEEE Standard Dictionary. 09:21:30
 21 I also have a Microsoft -- a couple of versions of 09:21:37
 22 the Microsoft Computer Dictionary. And I remember 09:21:40
 23 looking into those, and I don't know that I -- I 09:21:42
 24 don't think I -- I cited to a deposition -- excuse 09:21:46
 25 me, to a definition from them, but I -- I do recall 09:21:49

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1 looking in them as well. 09:21:53
 2 Q. Other than the IEEE standard and the 09:21:54
 3 Microsoft dictionary you mentioned, what other 09:21:56
 4 dictionaries do you have as your -- your set that 09:21:59
 5 you mentioned? 09:22:01
 6 A. That I own? Oh, I've probably got 25 09:22:01
 7 various dictionaries in the electrical and technical 09:22:06
 8 arts. If you recall, there was a case entitled 09:22:09
 9 "Texas Digital Systems" a number of years ago. 09:22:14
 10 Interestingly enough, I was a partner in the 09:22:17
 11 formation of that little company, which still 09:22:20
 12 exists, although I'm not involved in. And it 09:22:22
 13 somehow or another elevated the role of dictionaries 09:22:25
 14 almost over anything else in the world. 09:22:28
 15 And I'm somewhat of an old book 09:22:31
 16 collector, and I spent some time on a couple of 09:22:34
 17 websites. And just bought representative issues of 09:22:36
 18 all the IEEE dictionaries and others. And so, like 09:22:42
 19 I say, I've got 20 to 25 computer and electrical 09:22:46
 20 engineering dictionaries in my own library. 09:22:49
 21 Q. Do you believe that the dictionaries are 09:22:51
 22 still elevated above everything else in the way you 09:22:53
 23 put it in the context of performing claim 09:22:55
 24 construction analyses? 09:22:57
 25 A. No. 09:22:58

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1 Q. What -- what do you believe to be the 09:22:59
 2 primary forms of evidence for that question, how to 09:23:02
 3 construe the claims of the patent? 09:23:05
 4 A. I'll give you my lay opinion of it. I'm 09:23:08
 5 not an attorney. But I start with the language of 09:23:11
 6 the claims. And then I read those -- that language 09:23:14
 7 in light of what's set forth in the specification. 09:23:17
 8 I -- I think that the file history can play a role 09:23:20
 9 if there were statements made by the applicant 09:23:24
 10 during the prosecution that characterize the meaning 09:23:28
 11 of certain claims or the character of the invention. 09:23:31
 12 And after you get through with that, 09:23:35
 13 if there's still -- if I feel it's still 09:23:38
 14 appropriate, I'll turn to a technical dictionary. 09:23:42
 15 Q. These statements to the patent office 09:23:46
 16 that you were just discussing -- 09:23:48
 17 A. Uh-huh. 09:23:48
 18 Q. -- between the applicant and the -- the 09:23:49
 19 patent office, would you agree those -- those can be 09:23:50
 20 important evidence as to what's meant by the terms 09:23:53
 21 of the patent? 09:23:55
 22 A. Yes. 09:23:55
 23 Q. And generally the back and forth with 09:23:57
 24 the patent office, do -- do you see that as 09:24:00
 25 intrinsic evidence about what the patent means? 09:24:03

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1 A. I think so, generally -- I generally -- 09:24:06
 2 again, that's a -- may be a legal issue, but in my 09:24:09
 3 own opinion, that's -- that's what I would consider 09:24:12
 4 to be intrinsic evidence. 09:24:14
 5 Q. You don't give the back and forth 09:24:17
 6 between the applicant and the patent office some 09:24:18
 7 lower level of review because you think of it as 09:24:21
 8 some outside source, do you? 09:24:25
 9 A. Well, I -- I laid out for you the 09:24:27
 10 hierarchy that I think is important. Okay. I 09:24:29
 11 think -- and -- and it has a role to play. I 09:24:31
 12 don't -- I don't consider it to be unimportant. But 09:24:36
 13 I think that -- I start, as I say, with the language 09:24:39
 14 of the claim itself and the patent specification, 09:24:44
 15 and if -- if there's something that's clearly a 09:24:47
 16 disavowal or a characterization in the file history 09:24:52
 17 for those claims of whichever patent that relates 09:24:54
 18 to, I think that's something I always take a look 09:24:58
 19 at. 09:25:02
 20 Q. Now, the -- you said you -- you've 09:25:04
 21 looked in this case at the IEEE dictionary and the 09:25:06
 22 Microsoft dictionary, but you didn't cite either one 09:25:10
 23 of those? You said that. I haven't actually gone 09:25:13
 24 back to confirm that in your report. Do you know 09:25:16
 25 why you didn't cite -- 09:25:18

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1 A. I -- I don't remember saying that I 09:25:19
 2 didn't cite either one of them. And, frankly, I 09:25:20
 3 don't remember. I thought maybe I had cited to 09:25:23
 4 something in the IEEE, but maybe I -- I don't -- I 09:25:26
 5 don't have an answer for that. If I didn't, I just 09:25:29
 6 didn't. 09:25:31
 7 Q. Okay. Well, we can come back to that 09:25:51
 8 one later. 09:25:54
 9 A. Uh-huh. 09:25:54
 10 Q. What did you do to prepare for your 09:25:55
 11 deposition today? 09:25:56
 12 A. I met with these two gentlemen to my 09:25:57
 13 left, Mr. Seth and Mr. Brandon, yesterday for most 09:26:00
 14 of the day. And then last night, I read from front 09:26:03
 15 to back the '045 patent. I reread my report, and I 09:26:07
 16 looked at the joint claim construction. I don't 09:26:12
 17 know whether to call it a brief or what, the table, 09:26:15
 18 that I think was Exhibit B to -- did you say 09:26:18
 19 "Jenevein" -- "Jenevein"? I don't know. 09:26:22
 20 Q. I think it's Jenevein. 09:26:24
 21 A. I -- I think I know who he is, because I 09:26:26
 22 live here in Austin. And I -- I believe I've met 09:26:28
 23 him in some university or local activity, but I 09:26:30
 24 couldn't remember his pronunciation. But that's 09:26:33
 25 what I'm talking about is that Exhibit B to 09:26:37

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1 Mr. Jenevein's report. I've -- I've read through 09:26:39
 2 that. 09:26:42
 3 Q. For either your -- to prepare for your 09:26:43
 4 report or to prepare for your deposition today, did 09:26:44
 5 you review the re-examination proceedings on the 09:26:47
 6 '045 and the '025 patents? 09:26:51
 7 A. No, I've never seen the re-examination 09:26:53
 8 proceedings. 09:26:55
 9 Q. Did you know the '045 and '025 patents 09:26:56
 10 are both in re-examination by the patent office? 09:26:59
 11 A. I -- 09:27:06
 12 MR. BRANDON: Again -- 09:27:06
 13 A. I think -- 09:27:07
 14 MR. LUMISH: I'm asking a fact here. 09:27:08
 15 A. I -- I have been told that. That's all 09:27:09
 16 I know. 09:27:12
 17 Q. (BY MR. LUMISH) What's a re-examination 09:27:16
 18 to your understanding? 09:27:18
 19 A. It's -- again, I'll give you -- I think 09:27:19
 20 I do understand. It's a process by which an 09:27:22
 21 alternate -- I want to say a third party -- a second 09:27:28
 22 party can ask based on some documented prior art 09:27:31
 23 that the patent office re-examine the claims of an 09:27:36
 24 issued patent. It -- it also can be asked for by 09:27:41
 25 the patent owner, as well. 09:27:44

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1 And it's -- it's essentially 09:27:50
 2 returning the patent to the patent office, along 09:27:52
 3 with a set of documents that allegedly might be 09:27:55
 4 considered as invalidating prior art and asking the 09:27:59
 5 patent office to reaffirm the claims or consider 09:28:03
 6 that the patent -- you have to accept the fact that 09:28:10
 7 the patent office may decide to invalidate the 09:28:12
 8 claims. 09:28:16
 9 Q. You understand in the re-examination, 09:28:19
 10 there's more of this back and forth we talked about 09:28:20
 11 between the applicant and the patent office, right? 09:28:23
 12 A. It's my understanding that there can be 09:28:25
 13 two forms of that. 09:28:27
 14 Q. What are the two forms? 09:28:29
 15 A. Not real good with Latin. Ex parte and 09:28:30
 16 inter partes that the -- that either it can be a 09:28:33
 17 dialogue only between the patent owner and the -- 09:28:37
 18 and the re-examiner at the patent office or it can 09:28:42
 19 be opened to other people participating and seeing 09:28:47
 20 that -- that flow of information. 09:28:50
 21 Q. Either way, if it's inter partes or 09:28:54
 22 ex parte, you understand that there is back and 09:28:57
 23 forth between the patent applicant and the examiner, 09:28:59
 24 right, the PTO representative in the form of the 09:29:01
 25 examiner? 09:29:06

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1 A. I -- I tend to call them the 09:29:06
 2 re-examiner. I don't know -- that's just the way I 09:29:08
 3 do. I'm very familiar -- well, I'm not as familiar 09:29:10
 4 with that as somebody who practices in that area all 09:29:14
 5 the time, but I have personally been involved as a 09:29:16
 6 technical expert, not as a patent agent, in a couple 09:29:18
 7 of re-exam processes. So I'm familiar with the back 09:29:22
 8 and forth process. 09:29:25
 9 Q. Just trying to make sure we're on the 09:29:26
 10 same page, though. You'll agree with me that in the 09:29:28
 11 re-examination process, there is back and forth 09:29:30
 12 between the applicant or his -- his or her lawyers 09:29:33
 13 and the patent office? 09:29:36
 14 A. Yes. It has some great similarities to 09:29:37
 15 the original process in -- in that sense of I think 09:29:41
 16 there are office actions and there are opportunities 09:29:46
 17 to respond. 09:29:48
 18 Q. When did you first learn about the 09:29:48
 19 re-examination of the '045 or the '025 patents? 09:29:51
 20 A. Very recently. Probably when I read 09:29:59
 21 through Exhibit B of the Jenevein report and saw 09:30:07
 22 some citations for support by either Google or 09:30:12
 23 Yahoo! or both from the re-examination portion of 09:30:16
 24 the file history of one or the other of the two. 09:30:20
 25 Q. This was after your report was 09:30:24

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1 submitted, then? 09:30:25
 2 A. Yes. 09:30:26
 3 Q. Were you surprised to see it? 09:30:27
 4 A. No. 09:30:29
 5 Q. Did you ask to see a copy of it from 09:30:30
 6 Function Media's counsel? 09:30:34
 7 A. No. 09:30:35
 8 Q. Did you go and get a copy yourself from 09:30:35
 9 the patent office? 09:30:37
 10 A. No. 09:30:38
 11 Q. Why not? 09:30:38
 12 A. Well, it -- I didn't learn about it 09:30:46
 13 until after I had written my report. And so the 09:30:48
 14 opinions that are expressed in my report are based 09:30:54
 15 on what I knew about things at that time, and that's 09:30:57
 16 just the -- that's -- that's a body of work that is 09:31:03
 17 complete and is done independent of any knowledge I 09:31:06
 18 might have gained had I known about the 09:31:10
 19 re-examination and looked into it. 09:31:12
 20 Q. Let me represent to you that there have 09:31:15
 21 been rejections of all the -- at least the asserted 09:31:18
 22 claims in this case by the patent office in those 09:31:20
 23 re-examinations and a response back from the 09:31:24
 24 Function Media lawyers in response to those 09:31:26
 25 rejections. 09:31:28

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1 Would you agree with me that the 09:31:30
 2 comments in response to the rejections would be 09:31:31
 3 relevant to claim construction? 09:31:34
 4 A. I don't think I would say they 09:31:36
 5 absolutely are. They might be, would be the best -- 09:31:38
 6 it's a pig in a poke as far as I know. I -- I 09:31:41
 7 don't -- I don't know whether they are relevant or 09:31:44
 8 not. 09:31:46
 9 Q. How about as a class, would you agree 09:31:46
 10 with me that responses back to rejection in the 09:31:48
 11 patent office during the re-examination are as a 09:31:50
 12 class type of evidence that would be relevant to 09:31:53
 13 claim construction? 09:31:57
 14 A. I don't have a basis to agree or 09:31:58
 15 disagree. I've never been asked that question, and 09:32:00
 16 I've never researched it or never had any lawyer 09:32:02
 17 tell me whether that was appropriate or not. I just 09:32:05
 18 had never dealt with that situation. 09:32:10
 19 Q. In other cases, you've done -- withdraw. 09:32:15
 20 How many times have you served as an 09:32:18
 21 expert in patent cases? 09:32:20
 22 A. Over the last 30-something years, 09:32:22
 23 probably over 70, I would say. 09:32:24
 24 Q. And in those cases you've -- withdraw. 09:32:25
 25 How many of those -- in how many of 09:32:28

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1 those cases have you done claim construction 09:32:30
 2 analyses, ballpark? 09:32:33
 3 A. Yeah. It's changed a lot over the 09:32:36
 4 years, Mr. Lumish. I actually started this before 09:32:38
 5 the Markman case was -- was found. And so in those 09:32:41
 6 days, as best I recall, that was generally 09:32:47
 7 considered part of your responsibility. And then 09:32:50
 8 kind of post Markman, a few times. But it's been my 09:32:57
 9 experience of late -- and I say the last eight years 09:33:04
 10 or so, since 2000, that for whatever reason, I -- in 09:33:08
 11 my cases, I haven't been involved in claim 09:33:15
 12 construction. 09:33:17
 13 So total cases, probably -- where 09:33:18
 14 I've been on the record for claim construction in -- 09:33:22
 15 in the form of either testimony at a Markman hearing 09:33:26
 16 or in writing a declaration in support of -- usually 09:33:30
 17 a brief on construction, I will say something on the 09:33:34
 18 order of ten times, maybe max. 09:33:39
 19 Q. The -- the Markman decision that you 09:33:41
 20 referenced, the Supreme Court I think is '96. Since 09:33:44
 21 then in '96, how many cases have you per -- how many 09:33:48
 22 cases have you performed a claim construction 09:33:51
 23 analyses? 09:33:53
 24 A. All I can tell you is not many. 09:33:54
 25 Q. More than five? 09:33:56

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1 A. I would think less than five. 09:33:57
 2 Q. You've done it before, though? 09:33:58
 3 A. By "it," you mean -- 09:34:00
 4 Q. Performed claim construction analysis 09:34:02
 5 after the Markman decision. 09:34:05
 6 A. Well, there -- you mean on the record 09:34:06
 7 where I actually testified or wrote a report, or 09:34:09
 8 whether I discussed with the attorneys who had 09:34:13
 9 retained me my opinions and tried to help them 09:34:15
 10 understand what terms -- I don't know which -- you 09:34:18
 11 understand the difference? 09:34:21
 12 Q. I do. Thank you for that. I mean the 09:34:22
 13 latter. 09:34:24
 14 Just where you -- as of -- in your 09:34:25
 15 work as a consultant, you have performed analysis 09:34:26
 16 under that Markman decision related to the claim 09:34:29
 17 construction of patents. 09:34:31
 18 A. Okay. I don't understand. I -- I gave 09:34:32
 19 you two things, and you said the latter. You mean 09:34:34
 20 on the record or whether I've just participated in 09:34:37
 21 discussions with the attorneys about what in the 09:34:39
 22 world does that technical term mean? 09:34:41
 23 Q. Well, I guess I thought the second one 09:34:43
 24 picked up the first one. So I want to know every 09:34:45
 25 time -- I want to know the number of times you've 09:34:47

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1 done that, whether it was on the record, as you put 09:34:49
 2 it, or just consulting with lawyers. So I want the 09:34:50
 3 two together. 09:34:53
 4 A. Since '98 or whatever -- 09:34:56
 5 Q. '96. 09:34:57
 6 A. '96? It -- it's very hard for me to 09:34:58
 7 say. There have been a lot of cases where I was not 09:35:03
 8 even retained until claim construction was already 09:35:05
 9 done. And there have been many cases of the ones 09:35:07
 10 that I've worked on where I -- I just wasn't 09:35:12
 11 involved in it. Whatever the attorneys did was what 09:35:16
 12 they did, and -- even though maybe it was still 09:35:19
 13 pending when I was brought into the case. Again, 09:35:21
 14 not many, maybe -- we'd -- we'd almost have to go -- 09:35:26
 15 you know, you didn't include the appendix to my 09:35:33
 16 report, but if we went through that list of last 09:35:36
 17 four years of cases, maybe that would help me to be 09:35:38
 18 able to give you some quantification. 09:35:41
 19 Q. Okay. I can give that to you if you 09:35:42
 20 want. I can get it for you later. 09:35:45
 21 A. I -- I just don't have any basis to say. 09:35:46
 22 Each case is unique in that relationship. 09:35:48
 23 Q. Let me ask this: Have you analyzed 09:35:50
 24 patents for claim construction purposes when those 09:35:53
 25 patents were in re-examination before? 09:35:56

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1 A. I -- I don't think so. The role that 09:36:07
 2 I've played in -- in re-examination has been, like, 09:36:09
 3 two or three cases in the last -- since, say, 2000, 09:36:12
 4 where I've been involved in a -- in a patent where 09:36:17
 5 there has been a re-exam. And generally my role has 09:36:20
 6 been to assist in responding to an office action 09:36:23
 7 during the re-exam process -- 09:36:27
 8 Q. All right. 09:36:29
 9 A. -- as a purely technical witness. And I 09:36:29
 10 don't think of that as involving claim construction, 09:36:32
 11 although in a sense, maybe it does. 09:36:35
 12 Q. My question was a little different, 09:36:37
 13 which is: Did you construe claims either in your 09:36:39
 14 report or in consulting relationship with lawyers 09:36:41
 15 when the patents were also in re-examination? 09:36:43
 16 A. I don't think -- I don't think I've done 09:36:45
 17 much of that. I mean, it -- I can think of a 09:36:48
 18 specific instance where the re-examiner had -- had 09:36:50
 19 found a claim to be invalid, because he had 09:36:55
 20 interpreted a term in the claim in a way that made 09:37:00
 21 it read on a reference. And I found his technical 09:37:03
 22 approach to be unsupportable. Actually went, had an 09:37:08
 23 interview with the attorney for the re-examination 09:37:13
 24 panel, and I don't know whose credit you give it to, 09:37:15
 25 but the re-examiner withdrew that opinion. 09:37:18

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1 So -- but that was -- I don't know 09:37:21
 2 whether you would call that claim construction or 09:37:23
 3 not. Okay. It just basically was the way in which 09:37:25
 4 the re-examiner had interpreted the scope of a 09:37:27
 5 particular claim. 09:37:30
 6 Q. Okay. But in this lawsuit, then -- 09:37:33
 7 let's -- let's return back to here for a moment. In 09:37:35
 8 this lawsuit, you haven't formed any opinions based 09:37:37
 9 on the re-examination proceedings of the '025 or the 09:37:40
 10 '045 patent? 09:37:45
 11 A. I know nothing about that, other than 09:37:45
 12 the fact that it's going forward. 09:37:47
 13 Q. And so you haven't taken into account 09:37:49
 14 the discussions between Function Media and its 09:37:51
 15 attorneys on one hand and the patent office on the 09:37:53
 16 other hand in forming your opinions in this case? 09:37:55
 17 A. I didn't even know of -- yes. Okay. 09:37:58
 18 That's the answer to your question. 09:38:01
 19 Q. Yes, you did not take those into 09:38:02
 20 account? 09:38:04
 21 A. Yes. If you'll tell me how you want me 09:38:04
 22 to answer your negative questions, I'll answer it 09:38:06
 23 either way. But I never know. If you say, "I 09:38:08
 24 didn't do this," do you want me to say, "No, I 09:38:10
 25 didn't" or "Yes, I did"? 09:38:12

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1 Q. Well, whatever makes it clear. 09:38:14
 2 A. Okay. I'll try to say, "Yes, I didn't," 09:38:15
 3 if -- if that applies. 09:38:20
 4 MR. LUMISH: Can I just see the 09:38:20
 5 question before that top one there, please? 09:38:20
 6 Q. (BY MR. LUMISH) All right. And then so 09:38:30
 7 the proceedings in the patent office related to the 09:38:32
 8 re-examinations of the '025 and '045 patents have 09:38:36
 9 not influenced your opinions as set forth in your 09:38:43
 10 report, Exhibit 84; is that true? 09:38:46
 11 A. There was no way for them to, because I 09:38:48
 12 wasn't aware of it at the time I formed -- 09:38:50
 13 Q. Okay. 09:38:50
 14 A. -- the opinions that are set forth in -- 09:38:53
 15 in Exhibit 84. 09:38:55
 16 Q. All right. Let's talk about the patents 09:38:57
 17 generally now. And you've got them in front of you. 09:38:58
 18 Look at them whenever you'd like to. I'm going to 09:39:01
 19 ask you some general questions, I don't think 09:39:03
 20 related to any particular page or line at this 09:39:05
 21 point. 09:39:07
 22 You understand in the patent 09:39:07
 23 there's -- there are several different entities; is 09:39:10
 24 that fair? There's an -- what's called a media 09:39:13
 25 venue on one hand? 09:39:16

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1 A. I'm aware that the patent and the claims 09:39:17
 2 deal was something referred to as the media venue. 09:39:19
 3 Q. And the media venue has its own 09:39:21
 4 interface in the patent; is that true? 09:39:24
 5 A. There's -- there is something that's 09:39:25
 6 referred to as the interface for the media venue. 09:39:27
 7 Q. There's a separate entity called a 09:39:29
 8 seller; is that right? 09:39:32
 9 A. Yes. 09:39:33
 10 Q. And the seller has its own interface; is 09:39:33
 11 that true? 09:39:36
 12 A. Yes. 09:39:36
 13 Q. There is something called a controller 09:39:37
 14 that's sort of used in some way in the patent; is 09:39:40
 15 that fair, as the third entity? 09:39:44
 16 MR. BRANDON: Objection, form. 09:39:46
 17 A. Yeah. Okay. I mean, there is something 09:39:48
 18 called a central controller or a presentation 09:39:50
 19 processor in the preferred embodiment. 09:39:53
 20 Q. (BY MR. LUMISH) All right. Now, I 09:39:55
 21 don't know if you address it in your report, but 09:39:55
 22 there's -- there's another entity called a buyer. 09:39:58
 23 Do you remember seeing that in the patent? 09:40:00
 24 A. Yes. 09:40:01
 25 Q. And the buyer has its own interface, as 09:40:01

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1 well? 09:40:04
 2 A. Yes. 09:40:04
 3 Q. Will you agree with me these are all 09:40:07
 4 separate entities in the patent; they're -- they're 09:40:09
 5 not all different names for one entity? 09:40:11
 6 MR. BRANDON: Objection, form. 09:40:14
 7 A. I've never really thought about it. I 09:40:17
 8 mean, I -- I sort of envision three of the four you 09:40:21
 9 just named, in -- in some sense I think of as being 09:40:24
 10 people. 09:40:27
 11 Q. (BY MR. LUMISH) Which -- which three? 09:40:28
 12 A. The seller, the -- the representative of 09:40:29
 13 the media venue, and the buyer. I mean, I -- I'm 09:40:33
 14 telling you, I think of it that way. That's not to 09:40:38
 15 say they have to be people. But I just always 09:40:40
 16 envisioned a human being doing something through 09:40:43
 17 that. The central controller has an operator that's 09:40:46
 18 referred to, but I tend to think of that as -- as -- 09:40:50
 19 as being -- I don't want to personify that, so... 09:40:52
 20 Q. Well, looking at them as people, I think 09:40:57
 21 that's fine. The -- you've never seen anything in 09:40:59
 22 the patents that would tell you the seller and the 09:41:01
 23 buyer are the same person, have you? 09:41:04
 24 A. My -- my feeling is they would not be. 09:41:06
 25 Okay. I don't remember the patent addressing that 09:41:10

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1 issue directly either way. 09:41:12
 2 Q. And the same is true for the seller and 09:41:14
 3 the media venue? For example, those, as you 09:41:16
 4 understand the patent, would be different people, 09:41:18
 5 the representative for the media venue? 09:41:20
 6 A. Well, again, I don't think they have to 09:41:21
 7 be people. As I said, I tend to personify those 09:41:23
 8 guys just to -- to have an imagery in my head. I -- 09:41:26
 9 I don't -- I don't remember the patent speaking to 09:41:30
 10 them to that issue one way or the other. I -- I 09:41:32
 11 have thought of them as being different. 09:41:35
 12 Q. Based on your studies of the patent, you 09:41:38
 13 think of the seller and the media venue 09:41:40
 14 representative as different people? 09:41:42
 15 A. I think so, yeah. 09:41:46
 16 Q. And then based on your study of the 09:41:47
 17 patent, you think of the buyer and the media venue 09:41:49
 18 representative as different people, as well? 09:41:51
 19 A. Yes. 09:41:53
 20 Q. And -- 09:41:54
 21 A. Again, I'm not saying they couldn't be 09:41:55
 22 something other than a person, but I'm just -- I 09:41:57
 23 have this little picture in my head of somebody who 09:41:59
 24 would represent -- represent those classes. 09:42:02
 25 Q. Do you also see the three interfaces 09:42:06

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1 used by those three people, as you think of them, as 09:42:08
 2 being different interfaces? So in other words, a 09:42:11
 3 seller interface is different from a buyer 09:42:14
 4 interface, and both of those are different from the 09:42:16
 5 media venue interface? 09:42:18
 6 A. I certainly think of them that way. I 09:42:19
 7 mean, I'm not saying somebody couldn't merge them in 09:42:24
 8 some way, but that they're generally -- but I think 09:42:27
 9 of them as being separate. I'm not saying they -- 09:42:32
 10 that there's not some possibility they could be 09:42:34
 11 merged, but that's the way I -- I see at least the 09:42:38
 12 preferred embodiment. 09:42:40
 13 Q. Do you see anything in the patent that 09:42:41
 14 tells you they are merged in the eyes of the patent? 09:42:43
 15 A. I don't see anything that speaks either 09:42:46
 16 way. 09:42:48
 17 Q. The patent, I mean either of the two 09:42:48
 18 patents, the '025 or the '045 patents? 09:42:50
 19 A. I don't know -- well, they have a common 09:42:54
 20 specification, to the best of my knowledge, other 09:42:57
 21 than a couple of punctuation -- punctuation errors. 09:42:59
 22 Q. Right. But my point is you haven't seen 09:43:01
 23 in either patent something that tells you the -- any 09:43:03
 24 of these three different interfaces can be merged 09:43:05
 25 with one of the others? 09:43:07

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1 A. I -- I just answered you by saying I 09:43:09
 2 don't think the patent speaks to that either way. 09:43:11
 3 Q. Based on your work on these cases in the 09:43:14
 4 past and your admission to the patent office as a 09:43:16
 5 patent agent, would you agree that in general in 09:43:19
 6 patents different terms should be given different 09:43:20
 7 meanings? 09:43:23
 8 A. I -- I've heard that question a number 09:43:26
 9 of times exactly the other way around. With common 09:43:28
 10 terms and common meanings, I think it would depend 09:43:31
 11 on the terms. Okay. 09:43:33
 12 Q. Well, let's take the three we're talking 09:43:35
 13 about. As reading the patent through the eyes of 09:43:37
 14 the person of a person skilled in the art, but also 09:43:41
 15 adding your own experience on top of that, would you 09:43:45
 16 agree that because different words are used for the 09:43:47
 17 seller interface and the buyer interface or the 09:43:50
 18 buyer interface and the media interview -- media 09:43:52
 19 venue interface, for example, that those have to be 09:43:53
 20 three different things? 09:43:56
 21 A. It's clear that they're different in the 09:43:57
 22 preferred embodiment. I think relative to the 09:44:00
 23 claims themselves, they each are addressed in one 09:44:02
 24 way or another separately in the claims. But I -- 09:44:07
 25 as I say, I don't remember anything in the patent 09:44:12

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1 that specifically says one way or the other. 09:44:14
 2 Certainly in the preferred 09:44:17
 3 embodiment, they're -- they're addressed 09:44:19
 4 differently. And I'm looking at figure 1B in the 09:44:20
 5 '045, and it -- it has separate icons representing 09:44:25
 6 the four things that you identified earlier -- 09:44:29
 7 Q. And uses -- 09:44:31
 8 A. -- in that figure. 09:44:32
 9 Q. -- different labels for the three, 09:44:35
 10 right? 09:44:37
 11 A. By label, I -- do you mean the -- the 09:44:37
 12 number -- you don't mean the element number, you 09:44:39
 13 mean the name? 09:44:42
 14 Q. Well, really both, right? So they each 09:44:42
 15 have a separate number, and they each have a 09:44:44
 16 separate name. 09:44:46
 17 A. That's true. 09:44:47
 18 Q. Does that tell that a person of ordinary 09:44:47
 19 skill in the art would understand the buyer 09:44:50
 20 interface and the media interface to be different 09:44:51
 21 interfaces? 09:44:54
 22 A. I would think that they would -- a 09:44:55
 23 person of ordinary skill in the art looking at this, 09:44:57
 24 would say this preferred embodiment in figure 1B has 09:44:59
 25 separate interfaces for those, the buyers and the 09:45:02

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1 media. 09:45:06
 2 Q. And the same would be true for the 09:45:06
 3 seller, that that interface would be different 09:45:08
 4 from either of the buyer or the media interfaces? 09:45:10
 5 A. From the point of view of what's 09:45:12
 6 disclosed for the preferred embodiment, for example, 09:45:14
 7 in figure 1B and some of the follow on figures, 09:45:17
 8 that's what is -- is disclosed there. 09:45:21
 9 Q. So my colleague's -- my colleague here 09:45:22
 10 reminds me I'm being selfish and only talking about 09:45:24
 11 the '025 and the '045 patent. There's the '059 09:45:27
 12 patent in this case as well, which is asserted only 09:45:31
 13 against Google, just tell you which -- explains a 09:45:34
 14 little bit why I -- 09:45:37
 15 A. I've been told that. 09:45:37
 16 Q. -- didn't remember to ask questions 09:45:38
 17 about it. But you understand that that patent also 09:45:38
 18 has an identical specification with -- withdraw. 09:45:40
 19 That that patent has the same 09:45:43
 20 specification with some minor changes, like the 09:45:45
 21 abstract, as compared to the '025 and '045 patents? 09:45:47
 22 A. It's my understanding that -- and I 09:45:51
 23 didn't deal with it directly relative to preparing 09:45:53
 24 my declaration, but it's my understanding it's 09:45:57
 25 what's called a continuation in part. And they 09:46:00

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1 introduce something called a third interface for -- 09:46:03
 2 I can't remember what the term is for somebody 09:46:07
 3 who -- it's like an advertising agency. 09:46:10
 4 Q. Okay. You're right. I'm sorry. I made 09:46:12
 5 a mistake. I should have looked at that patent more 09:46:14
 6 closely before I asked you that question. But let 09:46:17
 7 me ask a different question. 09:46:19
 8 We've talked about these three 09:46:20
 9 different interfaces in the '025 and the '045 09:46:22
 10 patents. Is your understanding about those 09:46:25
 11 interfaces the same as it relates to the '059 09:46:27
 12 patent, which I believe has the same disclosure? 09:46:29
 13 A. For -- for that part of what the '059 09:46:31
 14 discloses, I think it's the same. 09:46:35
 15 Q. And I assume you didn't read or consider 09:46:42
 16 or form any opinions on claim construction for the 09:46:45
 17 '059 patent that were influenced or based in any way 09:46:49
 18 on the re-examination proceedings for that patent; 09:46:53
 19 is that true? 09:46:56
 20 A. Yes, that's true. 09:46:57
 21 Q. Maybe I'll just call them the Function 09:47:00
 22 Media patents going forward. If I do that, will you 09:47:02
 23 understand I'm referring to the '059, the '025, and 09:47:05
 24 the '045 patents collectively? 09:47:10
 25 A. Yes. Other than -- and I don't think it 09:47:11

1 will come up today, unless somehow between you you 09:47:13
 2 decide to go there. There is a difference between 09:47:16
 3 the first two and the latter one. 09:47:18
 4 Q. Sure. 09:47:20
 5 A. But only in that -- the P part of the 09:47:20
 6 CIB, I guess. 09:47:24
 7 Q. So -- well, what I'll do, then, is when 09:47:24
 8 I think it's appropriate, I'll try to bundle the 09:47:26
 9 three together. If you think it's inappropriate in 09:47:28
 10 your answer, you should feel free, of course, at all 09:47:30
 11 times to tell me that -- 09:47:33
 12 A. Sure. 09:47:33
 13 Q. -- it's different from one of the three 09:47:33
 14 patents maybe than the others. We'll just see -- 09:47:34
 15 we'll see how it works. If it doesn't work, we'll 09:47:38
 16 try a different approach. 09:47:40
 17 MR. BRANDON: I'm going to -- I just 09:47:41
 18 ask the -- I just ask you, Mr. Lumish, to be clear 09:47:43
 19 in your question whether you're talking about the 09:47:45
 20 '025, '045, '059 or all three. 09:47:47
 21 MR. LUMISH: Well, when I say the 09:47:50
 22 Function Media patents, I mean all three. If I mean 09:47:51
 23 something different from that, I'll be clear that I 09:47:54
 24 mean something different. How about that? 09:47:56
 25 A. That's fine. 09:47:58

1 Q. (BY MR. LUMISH) In -- based on your 09:48:00
 2 work as a -- as a patent agent and just in relation 09:48:02
 3 to these different cases you've worked on over the 09:48:06
 4 years, would you agree that in general all terms in 09:48:08
 5 a claim should be given some meaning? 09:48:11
 6 A. Well, I mean, I don't know how to -- I 09:48:16
 7 don't know how to answer that. I think every -- 09:48:18
 8 every term, every word in a claim has meaning to -- 09:48:21
 9 to understanding the scope of the claim. I don't 09:48:26
 10 tend to think you should go in and cross out terms 09:48:29
 11 or ignore terms. I don't think they all need a 09:48:32
 12 Markman-style construction. 09:48:38
 13 Q. Understood. But as a general principle, 09:48:40
 14 you'd say that terms in the claims aren't 09:48:43
 15 surplusage, they're not redundant, they're supposed 09:48:46
 16 to have some independent meaning? Whether or not 09:48:49
 17 that's in dispute is a different question. 09:48:51
 18 MR. BRANDON: Objection, form. 09:48:53
 19 A. I've certainly seen claims where in 09:48:54
 20 trying to understand them, there seemed to be some 09:48:56
 21 words that were, as you just said, surpluses, that 09:49:00
 22 they just -- it's hard to understand why they were 09:49:03
 23 there. But the way I -- I would tend to phrase it 09:49:06
 24 is that every word in a claim is -- is worthy of 09:49:09
 25 consideration. 09:49:13

1 But, again, let me -- and maybe this 09:49:26
 2 will help you understand where we're going to end up 09:49:28
 3 going today. What I have focused on in this 09:49:30
 4 declaration of Exhibit 84 are the terms and the 09:49:34
 5 claims that are in dispute. 09:49:37
 6 Q. (BY MR. LUMISH) Okay. 09:49:37
 7 A. And that's what I was charged to do, and 09:49:38
 8 that's what I've done in that declaration. 09:49:42
 9 Q. Understood. In the '045 patent, 09:49:46
 10 Exhibit 51, will you please find the definition in 09:49:49
 11 the glossary for buyer, please? It's in column 8. 09:49:51
 12 A. For what? 09:49:54
 13 Q. For buyer. 09:49:56
 14 A. Oh, I'm sorry. 09:49:57
 15 Q. Your words -- 09:49:57
 16 A. I heard you say "fire," and I was trying 09:49:58
 17 to figure out how -- buyer. Okay. 09:50:00
 18 Q. Buyer. 09:50:02
 19 A. I have it. 09:50:02
 20 Q. It starts at column 8 on line 32 and it 09:50:02
 21 goes through 37. 09:50:03
 22 A. I have that. 09:50:05
 23 Q. If you'd read that to yourself, let me 09:50:06
 24 know when you're finished, please. 09:50:08
 25 (Witness Reviews Document.) 09:50:20

1 A. I have that. 09:50:20
 2 Q. (BY MR. LUMISH) The definition of buyer 09:50:21
 3 in the '045 patent -- or in the Function Media 09:50:22
 4 patents, generally doesn't say that the buyer's part 09:50:24
 5 of the Internet media venue; is that true? 09:50:29
 6 A. It's silent on that issue. 09:50:35
 7 Q. And my question's about Internet media 09:50:37
 8 venue. Let met broaden it slightly. You'll agree 09:50:39
 9 with me that the definition of buyer in the Function 09:50:43
 10 Media patents doesn't say it's part of any media 09:50:43
 11 venue? 09:50:45
 12 A. It -- it makes no statement one way or 09:50:45
 13 the other. 09:50:47
 14 Q. If you'd read the definition for media 09:50:47
 15 venues or media outlets, please, on column 10, 09:50:52
 16 beginning at line 38, just go ahead and read it to 09:50:55
 17 yourself. Let me know when you're finished, please. 09:50:59
 18 (Witness Reviews Document.) 09:51:08
 19 A. Okay. 09:51:08
 20 Q. (BY MR. LUMISH) The definition of media 09:51:09
 21 venues or media outlets in the Function Media 09:51:13
 22 patents doesn't say that the buyer is part of that 09:51:15
 23 media venue; is that true? 09:51:21
 24 MR. BRANDON: Objection to form. 09:51:26
 25 A. I have two comments: First off, this is 09:51:38

1 a definition or that -- the term media venues is -- 09:51:40
 2 is one of the disputed terms in -- in one particular 09:51:46
 3 area, so -- well, I want to make that caveat. And I 09:51:48
 4 have an opinion that's at variance with the opinions 09:51:51
 5 that have been offered as to the construction of the 09:51:53
 6 term "media venues" by your parties. Relative to 09:51:56
 7 your original question, I -- I don't see any 09:52:03
 8 statement either way. 09:52:06
 9 Q. (BY MR. LUMISH) Well, the definition of 09:52:07
 10 media venues or media outlets -- media outlets does 09:52:08
 11 reference the buyer, right? 09:52:11
 12 A. It does. 09:52:12
 13 Q. Doesn't say the buyer's part of the 09:52:12
 14 media venue or media outlets? 09:52:14
 15 A. It -- as I said, it doesn't say it is or 09:52:15
 16 isn't. It does speak to buyers, but as best I 09:52:19
 17 understand it, the -- the question you're asking me, 09:52:27
 18 I -- I don't think it affirms or precludes some sort 09:52:29
 19 of relationship, but I -- I don't think it says 09:52:34
 20 anything about it. 09:52:37
 21 Q. And neither do the definition of media 09:52:38
 22 venues or media outlets or the definition of buyer 09:52:40
 23 in the Function Media patents says that the buyer 09:52:44
 24 interface is part of the Internet media venue; is 09:52:47
 25 that true? 09:52:50

1 A. You asked me earlier about the entirety 09:52:50
 2 of the patent, and -- and I thought I had answered 09:52:53
 3 it. And so that would include these two 09:52:55
 4 definitions. But I don't think either one of 09:52:58
 5 them -- those two definitions make any reference to 09:53:01
 6 the interfaces at all. They're just defining who 09:53:03
 7 the buyer is and who -- or what the media venues 09:53:07
 8 are. 09:53:10
 9 Q. Well, but would you agree with me that a 09:53:11
 10 person of ordinary skill in the art reading the 09:53:13
 11 definitions of buyer and of media venues or media 09:53:15
 12 outlets wouldn't read them to say that the buyer's 09:53:17
 13 interface is part of the Internet media venue? 09:53:23
 14 A. I don't think they would see any 09:53:26
 15 teaching or -- or help relative to the question of 09:53:27
 16 interface. Neither of those definitions refers to 09:53:30
 17 anything about the interface. 09:53:33
 18 Q. So then you'd agree with me they 09:53:34
 19 wouldn't read those definitions to say that the 09:53:36
 20 buyer interface is part of the media venue in some 09:53:38
 21 way? 09:53:40
 22 A. I don't think they would read it to say 09:53:40
 23 it is or isn't, you know. It's silent on whatever 09:53:42
 24 the interface is -- the invention would provide for 09:53:45
 25 the media venue or the buyer. 09:53:49

1 Q. Can you read the definition of seller, 09:53:52
 2 please, on column 11, beginning in line 55 going 09:53:54
 3 through line 60. Let me know when you're finished, 09:53:58
 4 please. 09:54:05
 5 (Witness Reviews Document.) 09:54:10
 6 A. I'm finished. 09:54:10
 7 Q. (BY MR. LUMISH) Would you agree with me 09:54:11
 8 that a person of ordinary skill in the art wouldn't 09:54:12
 9 find anything in that definition that tells them 09:54:14
 10 that the seller or the seller interface is in any 09:54:17
 11 way part of the buyer or the media venue? 09:54:21
 12 MR. BRANDON: Objection, form. 09:54:24
 13 A. That's a compound question. Why don't 09:54:25
 14 you break it into two pieces. 09:54:27
 15 Q. (BY MR. LUMISH) Sure. Would you agree 09:54:29
 16 with me a person of ordinary skill in the art 09:54:31
 17 wouldn't find anything in the definition of seller 09:54:33
 18 that would tell them that the seller or the seller 09:54:35
 19 interface is somehow part of the Internet media 09:54:38
 20 venue or the Internet media venue interface? 09:54:41
 21 A. I don't think the -- the section of 09:54:43
 22 column 11 that you've referenced me to makes any 09:54:45
 23 statement one way or the other about the linkage. 09:54:48
 24 Q. And that would be your answer for media 09:54:52
 25 venue more broadly than Internet media venue, too? 09:54:55

1 A. Yes. 09:54:58
 2 Q. And you'd agree, then, that a person of 09:54:58
 3 ordinary skill in the art wouldn't find anything in 09:55:00
 4 the definition of seller that says the seller or the 09:55:02
 5 seller interface is part of the -- which one did I 09:55:03
 6 leave out -- part of the buyer or the buyer 09:55:09
 7 interface? 09:55:14
 8 A. That's multiply compound, but I'll 09:55:15
 9 answer it for you. I don't think that that 09:55:18
 10 definition -- those several lines make any statement 09:55:20
 11 one way or the other. It just tells you what the 09:55:23
 12 patentee intended the -- when they used the term 09:55:25
 13 "seller" what they wanted the reader of the patent 09:55:31
 14 to understand they had in mind. 09:55:33
 15 Q. Would you turn, please, to column 53 of 09:55:35
 16 the patent. This is in -- you and I are, again, 09:55:38
 17 using the '045 patent as our standard tool, but 09:55:42
 18 you'll find at the beginning the very top line of 09:55:45
 19 column 53 there, what's called the "example use of 09:55:48
 20 invention." 09:55:50
 21 A. Uh-huh. 09:55:51
 22 Q. And you've seen that example in the 09:55:52
 23 specifications for all three of the Function Media 09:55:54
 24 patents; is that true? 09:55:56
 25 A. I -- I don't know that I've specifically 09:55:57

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1 looked at it in the '059, but I know that it's in 09:55:59
 2 both the '025 and the '045. 09:56:02
 3 Q. All right. You're familiar with this 09:56:05
 4 example that's set forth here? 09:56:07
 5 A. Generally. 09:56:08
 6 Q. Well, you've -- you've read it, right? 09:56:09
 7 A. I've certainly read it a number of 09:56:12
 8 times, uh-huh. 09:56:14
 9 Q. Do you understand it? 09:56:15
 10 A. I think so, uh-huh. 09:56:16
 11 Q. You use it in your report, I believe, 09:56:17
 12 at -- at some level; is that true? 09:56:19
 13 A. That's a fact one way or the other, and 09:56:22
 14 I don't remember the answer to that. 09:56:24
 15 Q. The example of the invention describes 09:56:25
 16 three entities: The seller, the media, and the 09:56:29
 17 buyer. Do you see that on lines 18, 23 and, say, 51 09:56:32
 18 respectively? 09:56:38
 19 A. Yes. 09:56:39
 20 Q. And the example uses those as three 09:56:39
 21 separate entities, right? 09:56:42
 22 A. I believe so. 09:56:44
 23 Q. And the example describes each of them 09:56:45
 24 having three different interfaces that are different 09:56:47
 25 from the others. Do you agree with that? 09:56:49

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1 A. The way you stated your question, I 09:56:50
 2 think you misstated it. Each of them doesn't have 09:56:52
 3 three. 09:56:55
 4 Q. Okay. Thank you. I appreciate that. 09:56:55
 5 You'll agree with me that the 09:56:57
 6 example in the Function Media patents shown here on 09:56:58
 7 column 53 of the '045 patent and going forward 09:57:01
 8 describes each the seller, media, and buyer as 09:57:05
 9 having their own interfaces, which are different 09:57:08
 10 from the other two? 09:57:11
 11 A. Let me -- that -- that -- when I say I'm 09:57:13
 12 generally familiar with it, that's a very specific 09:57:16
 13 question, so give me a moment or two. 09:57:18
 14 (Witness Reviews Document.) 09:57:45
 15 A. That's certainly true very specifically 09:57:57
 16 for the media and the seller. Let me take a quick 09:58:00
 17 look in column 56 as to what they say about the 09:58:05
 18 buyer. 09:58:08
 19 They describe an interface that the 09:58:13
 20 buyer uses, as well. 09:58:15
 21 Q. (BY MR. LUMISH) Where are you looking 09:58:16
 22 there, please? 09:58:17
 23 A. Oh, around -- around line -- column 56, 09:58:18
 24 about line 35, where there's a paragraph No. 2, 09:58:34
 25 where it says, "John," who's a hypothetical buyer, 09:58:37

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1 uses his computer and navigates to the P2R website 09:58:43
 2 where he finds a ticket, et cetera. 09:58:48
 3 Q. The patent there talking about 09:58:53
 4 navigating, would a person of -- of ordinary skill 09:58:56
 5 in the art understand that to refer to a browser? 09:58:59
 6 A. They would use a browse to the 09:59:01
 7 navigation. That's -- that's a process some people 09:59:03
 8 call surfing the web, but this wouldn't really be 09:59:05
 9 surfing, because they would have a specific website 09:59:08
 10 in mind. 09:59:11
 11 Q. Sorry to make you jump around, but the 09:59:14
 12 buyer interface is shown as figure 2d. Are you 09:59:15
 13 familiar with that figure in the Function Media 09:59:20
 14 patents? 09:59:23
 15 A. Yes. 09:59:23
 16 Q. If you could turn to that, please, and 09:59:24
 17 just confirm for me that part of the buyer interface 09:59:27
 18 is an Internet browser. You see that at the bottom 09:59:29
 19 as 5000C. 09:59:32
 20 A. I see that. 09:59:35
 21 MR. BRANDON: Objection, form. 09:59:35
 22 A. I'm not -- I -- if buyer interface, if I 09:59:36
 23 recall, may be a claim term or something, and I -- 09:59:42
 24 all I'm willing to agree with is that in figure 2d 09:59:46
 25 there is a block 5000C that is the buyer's choice of 09:59:49

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1 an Internet browser. I'm not comfortable at this 09:59:53
 2 point with agreeing with you that that is, quote, 09:59:57
 3 part of the buyer interface. In some ways I think 10:00:00
 4 it is the buyer interface. 10:00:04
 5 Q. (BY MR. LUMISH) Okay. If you turn to 10:00:06
 6 column 30 of the '045 patent, please, looking around 10:00:15
 7 line 45. I'm going to read into the record lines 45 10:00:18
 8 through 49. It says, quote, "The only software or 10:00:23
 9 programs required for the buyer Interface 5000 is an 10:00:26
 10 Internet browser 5000C of the buyer's choice. In 10:00:31
 11 the embodiment of the present invention, Internet 10:00:36
 12 Explorer by Microsoft would be used as buyer's 10:00:38
 13 choice of Internet browser 5000C," closed quote. 10:00:41
 14 A. In fact, that's the very section that I 10:00:45
 15 had in mind when I said that I think that section 10:00:47
 16 characterizes the buyer interface in terms of the 10:00:49
 17 Internet Browser 5000C, but that's -- that's what 10:00:52
 18 they say. 10:00:55
 19 Q. So we may disagree about whether 10:00:56
 20 software is the only requirement, but you'll -- 10:00:58
 21 A. Right. 10:00:58
 22 Q. -- at least agree with me that the 10:01:00
 23 browser that's used by the end user in this patent 10:01:03
 24 as buyer is either part of or the entirety of what's 10:01:06
 25 called the buyer interface? 10:01:09

1 A. The way you phrased that question, I 10:01:10
 2 agree. I agree. 10:01:12
 3 MR. BRANDON: Object. 10:01:12
 4 A. I agree with that. 10:01:13
 5 Q. (BY MR. LUMISH) The figure we looked 10:01:20
 6 at, 2d, in the text describing that we just looked 10:01:22
 7 at in column 30, neither one of those says that the 10:01:25
 8 browser is also in some way part of the Internet 10:01:27
 9 media venue or the Internet media venue interface, 10:01:30
 10 right? 10:01:32
 11 MR. BRANDON: Objection, form. 10:01:32
 12 A. I don't think that makes any statement 10:01:38
 13 one way or the other. 10:01:40
 14 Q. (BY MR. LUMISH) And neither one of 10:01:40
 15 those sections of the patent describe the browser as 10:01:42
 16 being part of the, more broadly, again, the media 10:01:44
 17 venue or the media venue interface? 10:01:48
 18 MR. BRANDON: Objection, form. 10:01:50
 19 A. I must have missed a word in your -- was 10:01:51
 20 your -- did your previous question say Internet 10:01:54
 21 media? 10:01:56
 22 Q. (BY MR. LUMISH) It did. 10:01:57
 23 A. Okay. I -- I apologize. I think I'm 10:01:57
 24 so -- that goes by. If you punch that word up for 10:02:00
 25 me, I'll remember it. But I don't think it -- 10:02:04

1 that -- either the figure or the cited portion of 10:02:06
 2 the specifications say anything one way or the other 10:02:12
 3 about the issue of the -- what the buyer's browser 10:02:14
 4 is in relation to the media venue interface or the 10:02:18
 5 Internet media venue interface. 10:02:25
 6 Q. In general terms in the Function Media 10:02:26
 7 patents, will you agree with me the buyer is the 10:02:28
 8 person looking in the browser at the advertisements 10:02:32
 9 or presentations that get published through the -- 10:02:35
 10 the broader process? 10:02:40
 11 MR. BRANDON: Objection, form. 10:02:41
 12 A. I certainly think that's true for the 10:02:49
 13 preferred embodiment. That's -- that's the 10:02:51
 14 embodiment that's shown. 10:02:52
 15 Q. (BY MR. LUMISH) So the buyer's the 10:02:55
 16 entity that might buy from the seller at some point 10:02:58
 17 if the advertisement was a good one? 10:03:00
 18 A. I didn't understand that as being -- I 10:03:02
 19 thought -- maybe we need to go back and reread the 10:03:04
 20 question before that one. I thought you were 10:03:07
 21 specifically asking not about the character of the 10:03:09
 22 buyer, but whether or not they were the person 10:03:12
 23 looking at the browser. 10:03:13
 24 Q. Well, I did in that last question, but 10:03:15
 25 I'm asking a different one now. 10:03:17

1 A. Okay. All right. Unrelated to that 10:03:19
 2 question, I would think the buyer is -- well, the 10:03:20
 3 buyer is what that glossary says it was. Whatever 10:03:25
 4 it is, a person, something, or a corporation that's 10:03:29
 5 looking to buy something, I guess. 10:03:32
 6 Q. Well, in the -- I'm just trying to -- we 10:03:48
 7 talked in the beginning about the four components -- 10:03:50
 8 or four of the components of the patent, talked 10:03:52
 9 about a seller, a buyer, a media venue and a 10:03:54
 10 controller. 10:03:57
 11 A. We did. 10:03:59
 12 Q. Let me go back to that for a moment. 10:04:00
 13 I'm just -- putting them in context with each other, 10:04:02
 14 would you agree with me that in the Function Media 10:04:04
 15 patents, the seller is the person who wants to 10:04:06
 16 advertise on a given media venue? 10:04:10
 17 A. Let's stop there. I -- I generally 10:04:14
 18 agree with that, except when you say "person," you 10:04:16
 19 know, I told you I personify the seller, but the 10:04:20
 20 definition is broader than a person. You took me to 10:04:23
 21 it a moment ago. It says. "A person" -- 10:04:28
 22 Q. Why don't we call them an entity and 10:04:30
 23 figure out later if they're people or not. How 10:04:32
 24 about that? 10:04:36
 25 A. I'm probably less comfortable with that, 10:04:36

1 because I'm not sure what you may mean. But we've 10:04:38
 2 got a definition of seller in column 11, beginning 10:04:41
 3 at line 55. And so I don't mind calling it a person 10:04:45
 4 just for the convenience of the deposition, but it 10:04:50
 5 clearly says that it could be a person, corporation, 10:04:53
 6 partnership, group or any other legal entity. 10:04:55
 7 Q. It uses the word "entity," so -- 10:04:58
 8 A. It does. 10:05:00
 9 Q. -- if we say "entity" to mean broadly 10:05:01
 10 all those things, would you be comfortable with 10:05:03
 11 that? 10:05:05
 12 A. For the purposes of this deposition, 10:05:05
 13 that's okay with me. 10:05:07
 14 Q. All right. So let's -- let me ask the 10:05:08
 15 question again, just to understand your 10:05:11
 16 understanding of the relationship among these four 10:05:12
 17 components in the Function Media patents. Is it -- 10:05:14
 18 MR. BRANDON: Objection to form. 10:05:18
 19 MR. LUMISH: I haven't asked a 10:05:20
 20 question yet. 10:05:21
 21 Q. (BY MR. LUMISH) Is it the seller who 10:05:23
 22 wants to provide presentations on the media venue? 10:05:26
 23 A. Indirectly. I mean, the seller doesn't 10:05:34
 24 create or provide the presentations. They want to 10:05:37
 25 sell their product. 10:05:40

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1 Q. And is it the buyer to whom the seller 10:05:43
 2 wants to sell its products? 10:05:48
 3 A. I don't know that the seller has a 10:05:49
 4 specific buyer in mind. They just would want it to 10:05:51
 5 be sold, and generally you think of the person who 10:05:55
 6 you sell it to as buying it from you. So I have -- 10:05:58
 7 I understand that relationship. In -- in any 10:06:01
 8 business transaction, there's usually a buyer and a 10:06:04
 9 seller. 10:06:07
 10 Q. In the patents, though, the Function 10:06:07
 11 Media patents, the buyer is the person who the 10:06:10
 12 seller hopes or -- or -- withdraw. 10:06:12
 13 In the Function Media patents, the 10:06:14
 14 things called buyers are the entities that the 10:06:16
 15 seller is trying to reach with its presentations; is 10:06:21
 16 that fair? 10:06:24
 17 A. Well, I -- I don't have a problem. 10:06:41
 18 That's not exactly the way the buyer's defined. 10:06:42
 19 It's defined more in terms of -- that the buyer 10:06:44
 20 wants to -- to buy what the seller is offering. But 10:06:47
 21 obviously I'm sure the seller wants there to be a 10:06:53
 22 buyer for the goods or services or whatever that 10:06:56
 23 they're trying to advertise. 10:06:59
 24 Q. Right. So I'm not asking about the 10:07:01
 25 definitions, per se, of the entities. I'm trying to 10:07:02

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1 understand your position on the relationships among 10:07:05
 2 the three or four. 10:07:08
 3 A. Uh-huh. 10:07:08
 4 Q. So what -- whatever helps you answer 10:07:10
 5 that question. But do you disagree, then, that 10:07:11
 6 the -- in the Function Media patents, the seller is 10:07:16
 7 trying to reach the buyers with the seller's 10:07:18
 8 presentations or advertisements? 10:07:22
 9 A. I don't know how -- I don't know any 10:07:27
 10 basis to disagree with -- that's a very general 10:07:30
 11 statement. I think all sellers are trying to reach 10:07:32
 12 buyers in every circumstance, and I don't think that 10:07:36
 13 relationship in the Function Media invention is any 10:07:38
 14 different with respect to the relationship between 10:07:40
 15 the seller and the ultimate buyer they're trying to 10:07:42
 16 reach. 10:07:45
 17 Q. And the seller is trying to reach the 10:07:45
 18 buyers in the Function Media patents by putting the 10:07:47
 19 presentations on the things called media venues or 10:07:50
 20 Internet media venues? 10:07:52
 21 MR. BRANDON: Objection to form. 10:07:54
 22 A. Again, you're using claim terms in a -- 10:07:58
 23 in a context outside of the claims. Like 10:08:01
 24 "presentations," I think that's -- that has a very 10:08:05
 25 specific meaning in the Function Media patents. 10:08:08

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1 They're trying to end up with an opportunity for 10:08:10
 2 that buyer to see an advertisement, call it a 10:08:14
 3 presentation, that -- I think that's the ultimate 10:08:18
 4 term that's generally used in this -- in the 10:08:21
 5 Function Media patents so that the buyer would be 10:08:23
 6 prompted to possibly buy their product. And the 10:08:26
 7 seller does seek to have advertisements for his or 10:08:31
 8 her products be provided through some media venue. 10:08:36
 9 Q. (BY MR. LUMISH) Let's go back to the 10:08:47
 10 example, please, on column 53. 10:08:49
 11 A. Okay. 10:08:52
 12 Q. We talked about the buyer in the -- a 10:08:59
 13 little bit. But if you look down at the bottom of 10:09:02
 14 that column beginning on line 65, the patent says, 10:09:04
 15 quote, "A computer operator at DEF installs the 10:09:08
 16 software on their computer and then is configured as 10:09:12
 17 Media Interface 6000 Figure 2e," closed quote. Do 10:09:16
 18 you see that? 10:09:20
 19 A. Yes. 10:09:20
 20 Q. That's telling a person of ordinary 10:09:20
 21 skill in the art that the computer is the thing 10:09:22
 22 called the media interface and that it's shown as 10:09:25
 23 reference No. 6000 in figure 2e; is that correct? 10:09:30
 24 MR. BRANDON: Objection, form. 10:09:33
 25 A. And you're really way up above something 10:09:34

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1 that is an issue relative to my understanding of the 10:09:39
 2 differences of opinion between myself and the 10:09:42
 3 experts for your two companies. That -- that 10:09:45
 4 certainly says that once they have installed -- if 10:09:51
 5 you look at -- at item No. 2 right above that, says 10:09:53
 6 "ABC sends DEF the necessary software to be 10:09:57
 7 installed on their computer." So DEF has a 10:10:00
 8 pre-existing computer. And when that software's 10:10:04
 9 installed, you then have configured that computer to 10:10:08
 10 serve as the media interface as it's shown at a 10:10:11
 11 level in figure 2e. 10:10:15
 12 I think there's a difference of 10:10:20
 13 opinion as to what the media interface referred to 10:10:22
 14 in the claims is relative to that figure. But the 10:10:28
 15 language of column 53 at the very bottom there is 10:10:30
 16 what it is, and it says that there was a computer 10:10:33
 17 owned by DEF, which when the necessary software has 10:10:38
 18 been installed and configured is shown in figure -- 10:10:41
 19 I guess that's 2e. 10:10:46
 20 Q. (BY MR. LUMISH) I'm not sure I 10:10:54
 21 understand your testimony completely, so forgive me, 10:10:56
 22 but I need to ask you about that. 10:10:59
 23 A. Sure. 10:11:00
 24 Q. I understand you may disagree in the 10:11:00
 25 claims, but do you also disagree that column 53, 10:11:02

1 lines 65 through 67, say that the media interface is 10:11:06
 2 the computer configured with software and is shown 10:11:12
 3 in figure 2e as referenced in rule 6000? 10:11:16
 4 MR. BRANDON: Objection, form. 10:11:20
 5 A. That -- I believe what they say there, 10:11:21
 6 then if you look at figure 2e, is that there is a 10:11:23
 7 view of what -- in a broad context, the patent calls 10:11:26
 8 the Media Interface 6000 in figure 2e. In fact, the 10:11:32
 9 title says "6000 Media Interface" on -- I'm looking 10:11:36
 10 at figure 2e at the very top. That -- that is a 10:11:40
 11 view of what the patent refers to in the 10:11:44
 12 specification as the media interface. 10:11:47
 13 Q. (BY MR. LUMISH) So that being a view 10:11:49
 14 means figure 2e and everything under reference 10:11:51
 15 numeral 6000 are a view of the media interface in 10:11:54
 16 the specification? 10:11:58
 17 MR. BRANDON: Objection, form. 10:11:58
 18 A. That -- that is a view. And I apologize 10:12:00
 19 for saying "that." Figure 2e is a view of what the 10:12:01
 20 specification in various places calls in a general 10:12:07
 21 term the Media Interface 6000. 10:12:09
 22 Q. (BY MR. LUMISH) And so -- but it's your 10:12:12
 23 ultimate opinion that in the claims, it's something 10:12:14
 24 narrower than what this figure shows and what this 10:12:17
 25 specification says is the media interview -- media 10:12:19

1 interface in column 3, line 65 through 67? 10:12:22
 2 MR. BRANDON: Objection, form. 10:12:26
 3 A. The way you stated your question and 10:12:26
 4 focused specifically on column 53, there's no 10:12:28
 5 question of what -- at what point they refer to that 10:12:31
 6 -- the pre-existing computer owned by the media 10:12:34
 7 corporation with the properly installed, quote, 10:12:38
 8 necessary software, once configured as being the 10:12:42
 9 Media Interface 6000 as shown in figure 2e. That's 10:12:46
 10 not the only reference to the media interface in the 10:12:52
 11 specification, but in that particular place, that -- 10:12:56
 12 that statement is made. 10:12:58
 13 Q. (BY MR. LUMISH) You mentioned the 10:12:59
 14 necessary software a couple of times. That's column 10:13:00
 15 53, lines 63, 64. It says, quote, "ABC sends DEF 10:13:03
 16 the necessary software to be installed on their 10:13:08
 17 computer," closed quote. 10:13:11
 18 A. Uh-huh. 10:13:13
 19 Q. Is that -- do you see that? 10:13:14
 20 A. I do. 10:13:15
 21 Q. Is it your opinion that the necessary 10:13:15
 22 software referred to on those two lines is, in fact, 10:13:18
 23 the media interface in the claims of the Function 10:13:21
 24 Media patents? 10:13:24
 25 A. I think we have to look at a particular 10:13:25

1 claim and see what the claim says is the function or 10:13:27
 2 character or -- or aspect of the -- of the media 10:13:31
 3 interface when that term -- or the Internet -- well, 10:13:35
 4 I guess media interface is used in the claim. In 10:13:37
 5 the claim it -- it relates that to a specific thing, 10:13:43
 6 and that -- that's where I draw the difference. 10:13:46
 7 Q. Are you saying it's different from claim 10:13:50
 8 to claim? 10:13:52
 9 A. I don't think so. But I think you 10:13:52
 10 can't -- you have to look to see what the claim says 10:13:55
 11 the media interface is and what it does. And we -- 10:13:59
 12 we can look at a claim if you want. 10:14:02
 13 Q. Sure. Let's do that. Why don't you 10:14:03
 14 take a look at claim 1 of the '045 patent. 10:14:05
 15 A. All right. 10:14:05
 16 Q. Actually, those -- let's find one that 10:14:12
 17 uses the language closer to what we've been 10:14:15
 18 discussing. So if you go to the '025 patent, 10:14:17
 19 please, claim 1... 10:14:20
 20 A. Yeah, I -- I was -- I was going to say, 10:14:21
 21 I think it's implied in claim 1, but it's not -- 10:14:22
 22 that particular term is not used. So if we go to 10:14:26
 23 '025, claim 1... 10:14:29
 24 Q. Beginning on line 63 -- 10:14:30
 25 A. Just -- give me just a moment. 10:14:32

1 Q. Of course. So this is column 64, 10:14:34
 2 line 63. 10:14:37
 3 A. Okay. All right. 10:14:39
 4 Q. The first three words there are "a first 10:14:40
 5 interface." You understand that to mean the media 10:14:42
 6 interface that we're talking about, right? 10:14:45
 7 A. Well, again, Mr. Lumish, a lot of other 10:14:47
 8 lawyers, such as yourself, have taught me that I 10:14:50
 9 have to be very careful about the way the words show 10:14:52
 10 up in a transcript. And -- and it -- it is the 10:14:56
 11 interface that the media venue will use to -- to get 10:15:01
 12 ahold of the computer system. And in some ways, 10:15:05
 13 it's called the media interface. I just don't want 10:15:10
 14 my agreement to your original question here to imply 10:15:14
 15 that the media interface is of necessity relative to 10:15:18
 16 that first limitation of claim 1 of the '025 patent, 10:15:23
 17 everything that's shown in figure 2e. 10:15:28
 18 Q. All right. So the -- that limitation of 10:15:31
 19 claim 1, the first limitation reads, quote, "A first 10:15:33
 20 interface to the computer system through which each 10:15:36
 21 of the Internet media venues is prompted to input 10:15:39
 22 presentation rules for the Internet media venue for 10:15:43
 23 displaying electronic advertisements on the Internet 10:15:45
 24 media venue," closed quote. 10:15:49
 25 That's not the seller interface, 10:15:51

1 that's not the buyer interface, this is talking in 10:15:52
 2 general terms, and we can discuss in a minute what's 10:15:55
 3 included in it. But it's discussing the media 10:15:58
 4 interface; is that true? 10:16:01
 5 A. I -- I -- I tend to think of that as 10:16:02
 6 being the interface through which the media venue is 10:16:04
 7 able -- when prompted to input presentation rules 10:16:08
 8 that are going to control the nature of the 10:16:12
 9 electronic advertisements, that they will be 10:16:15
 10 associated with receiving and -- and displaying. 10:16:18
 11 Q. Okay. So let's go back to the example, 10:16:23
 12 then, on column 53, please -- 10:16:25
 13 A. Okay. 10:16:25
 14 Q. -- down at line 63 through 67. 10:16:27
 15 A. And we're going back to the -- just for 10:16:29
 16 the record, to the '045? 10:16:31
 17 Q. Exactly. Anytime you and I are talking 10:16:32
 18 about the specification today, I think we'll be 10:16:34
 19 talking about the '045 patent unless one of us says 10:16:36
 20 otherwise. How about that? 10:16:39
 21 A. I -- you'd already made that caveat, and 10:16:40
 22 I just forgot it, so that's fine. Okay. 10:16:42
 23 Q. So -- but I am going to have you go back 10:16:45
 24 and forth to the claim language, so if you can keep 10:16:47
 25 that available to yourself, please. 10:16:49

1 A. Okay. That's fine. 10:16:50
 2 Q. So what I want to understand, then, is 10:16:51
 3 whether your opinion is that that first interface 10:16:53
 4 described in the first limitation of claim 1 is 10:16:55
 5 really just the necessary software that's described 10:16:58
 6 in column 53, lines 63 and 64. 10:17:01
 7 MR. BRANDON: Objection to the form. 10:17:05
 8 A. I think I've got your question in mind, 10:17:14
 9 and I think the answer to it is yes. 10:17:16
 10 Q. (BY MR. LUMISH) Okay. You'll agree 10:17:19
 11 with me at least, though, that column 53, lines 63 10:17:19
 12 and 64 mentioning this, quote, "necessary software," 10:17:23
 13 those lines don't say that that software is the 10:17:26
 14 media interface? 10:17:29
 15 A. They -- they say what they say. That 10:17:31
 16 last No. 3 paragraph says that once that necessary 10:17:35
 17 software has been installed and configured, then it 10:17:38
 18 is the media interface as shown in figure 2e. 10:17:42
 19 Q. And those lines don't say the word 10:17:44
 20 "interface" at all, right? 10:17:48
 21 MR. BRANDON: Objection, form. 10:17:51
 22 Q. (BY MR. LUMISH) Those two lines, 10:17:52
 23 fifty -- 63 and 64 don't use the word "interface"? 10:17:54
 24 A. Oh, the -- the -- okay. You're talking 10:17:56
 25 about paragraph No. 2? 10:17:59

1 Q. Correct. 10:18:01
 2 A. They don't use the term "interface" at 10:18:01
 3 all. 10:18:03
 4 Q. Interface only comes in line sixty -- at 10:18:06
 5 line 66 when the software's configured on -- 10:18:09
 6 installed on a computer, pardon me, that's then 10:18:13
 7 configured as the interface? 10:18:16
 8 A. It -- it says "interface," but it's with 10:18:18
 9 capital letters. It's the capital M, Media, capital 10:18:21
 10 I, Interface, number, 6000. And then I read as 10:18:25
 11 shown in figure 2e. 10:18:28
 12 Q. In your opinion, though, somehow the 10:18:29
 13 claim language excludes the computer and all the 10:18:32
 14 hardware shown in figure 2e, right? 10:18:36
 15 A. I believe that the first -- excuse me -- 10:18:38
 16 the first interface of claim 1 of the '025, because 10:18:43
 17 of the way the claim is written where it says that 10:18:46
 18 the venue -- each of the Internet media venues is 10:18:50
 19 prompted to input presentation rules, that there's 10:18:54
 20 support for that interface being the necessary 10:18:57
 21 software in the specification. 10:19:02
 22 Q. Let me make sure I've got my question 10:19:05
 23 answered. And I think you're answering my next 10:19:07
 24 question, which is why you had that opinion. 10:19:08
 25 A. Oh, I'm sorry. 10:19:09

1 Q. I want to make sure I have your opinion 10:19:10
 2 right. Your opinion is that somehow the claim 10:19:12
 3 language in -- in the first limitation of claim 1 10:19:14
 4 excludes the computer and the hardware components of 10:19:17
 5 figure 2e. Is that true or not? 10:19:21
 6 A. There's a pejorative nature that maybe I 10:19:24
 7 shouldn't be reading into it in two words in your 10:19:28
 8 question. One is the "somehow." Sounds like I 10:19:31
 9 don't have a definite source for my opinion, and 10:19:33
 10 that's not true. And secondly, "excludes" is really 10:19:35
 11 too strong. I mean, obviously software runs on 10:19:39
 12 something. But I think that the limitation of 10:19:43
 13 claim 1 of the '025 patent that we're talking about, 10:19:46
 14 the A first interface is met by the software. 10:19:49
 15 Q. Let me try it a different way. Pull out 10:19:55
 16 what -- what you thought is pejorative, which I 10:19:57
 17 certainly didn't mean it to be. 10:20:00
 18 A. I -- I know that, Mr. Lumish. I'm just 10:20:01
 19 saying I want to be careful with the words. 10:20:03
 20 Q. It's your opinion that the first 10:20:05
 21 interface in the first limitation of claim 1 does 10:20:06
 22 not include the computer or the hardware components 10:20:07
 23 of figure 2e or as described in the last three lines 10:20:12
 24 of column 53? Do I have your opinion correct, sir? 10:20:16
 25 A. Well, I think it includes a portion of 10:20:28

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1 what's described when you look at figure 2e, but not 10:20:31
 2 the entirety of it. 10:20:35
 3 Q. It doesn't include any of the hardware 10:20:36
 4 portion of what's shown in figure 2e. And by "it," 10:20:38
 5 I mean the first interface limitation of claim 1. 10:20:41
 6 A. The way I would phrase it is I don't 10:20:44
 7 think it requires it. Okay. And -- and I don't 10:20:46
 8 have a problem with include. It doesn't exclude it. 10:20:48
 9 It just -- what -- what's necessary to be the first 10:20:52
 10 interface that does the prompting, what's required 10:20:54
 11 of that limitation is what No. 2 at the bottom of 10:20:58
 12 column 53 calls the necessary software. 10:21:03
 13 Q. So you're saying the first interface 10:21:06
 14 could include hardware, but it must include 10:21:08
 15 software. Is that your opinion? 10:21:10
 16 A. I don't think it of necessity includes 10:21:11
 17 hardware. It doesn't exclude it. Obviously, 10:21:14
 18 software runs on a programmable piece of hardware. 10:21:16
 19 But what's -- you can see in No. 2 in column 53 at 10:21:19
 20 the bottom there, it says, "on their computer." So 10:21:23
 21 we have a pre-existing computer which is incapable 10:21:27
 22 of being used by the Internet media venue -- or to 10:21:30
 23 prompt the Internet media venue without that 10:21:37
 24 software. And that's the basis for my opinion, 10:21:40
 25 which is clearly different from the opinion 10:21:44

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1 expressed by your -- your expert. 10:21:45
 2 Q. Well, I -- I'm going to get to your -- 10:21:47
 3 your basis. I promise you. 10:21:49
 4 A. All right. 10:21:49
 5 Q. You'll have plenty of time to tell me 10:21:51
 6 what it is. But I still don't know that we've 10:21:53
 7 nailed down what your opinion is here. Do you 10:21:55
 8 agree -- withdraw. 10:21:58
 9 Is it true that your opinion is that 10:21:58
 10 the first interface in claim 1 of the '025 patent 10:22:01
 11 must include software and may include hardware? 10:22:10
 12 A. I don't think it -- it doesn't exclude 10:22:15
 13 hardware, but it -- it is met with that necessary 10:22:19
 14 software to be installed on their computer. It is 10:22:23
 15 the software. 10:22:26
 16 Q. So if you have software, you meet the 10:22:27
 17 requirement of claim 1, regardless of whether you 10:22:30
 18 provide the hardware in figure 2e? 10:22:32
 19 A. Again, it's -- it's not like somebody 10:22:36
 20 hands you the software and it sits as a CD on your 10:22:38
 21 desk and never gets executed. But when that 10:22:42
 22 software is operational, when it's been properly 10:22:44
 23 installed and configured, that is what provides the 10:22:48
 24 first interface that prompts the Internet media 10:22:51
 25 venues to input their presentation rules. 10:22:56

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1 Q. Now, to fulfill my promise, what is it 10:22:58
 2 about the claim language of claim 1 of the '025 10:23:01
 3 patent that you think tells a person of ordinary 10:23:04
 4 skill in the art that this requirement can be met by 10:23:06
 5 software alone? 10:23:09
 6 A. There's a citation relative to the 10:23:12
 7 prompting. And let's see, we agreed to use the 10:23:15
 8 '045. 10:23:18
 9 I'm -- I'm getting real dry, and I 10:23:20
 10 just saw your videographer get -- if you -- can 10:23:21
 11 we -- if we take a break, I can tell you that when 10:23:25
 12 we come back or I can try to find it now. 10:23:28
 13 Q. You can't just answer my question in a 10:23:30
 14 general term and then -- 10:23:32
 15 A. There's a section -- okay, there's a 10:23:32
 16 section of the patent specification, and I have 10:23:33
 17 to -- it takes me a little while to find it, a lot 10:23:34
 18 of columns, that specifically says that that -- that 10:23:37
 19 the prompting function -- it says specifically is 10:23:40
 20 associated with a piece of the software. Okay. And 10:23:43
 21 it doesn't mention hardware. 10:23:46
 22 Q. Okay. 10:23:48
 23 A. And there's at least one other place 10:23:49
 24 that I can show you. 10:23:50
 25 Q. But in the claim language you're saying 10:23:51

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1 it's the reference to prompting that answers my 10:23:53
 2 question as to why you think the claim language 10:23:55
 3 supports your opinion that the first interface could 10:23:57
 4 be provided by software alone? 10:24:01
 5 A. That language along with one other 10:24:03
 6 statement that's made earlier on, I think in 10:24:06
 7 column 5, which I can explain to you. I think it 10:24:08
 8 came up during the deposition of your expert. 10:24:10
 9 Q. I'm asking about claim language, just to 10:24:12
 10 be very clear. You're saying column 5. That's not 10:24:16
 11 the claim language. 10:24:19
 12 A. No, I understand. I misunderstood your 10:24:19
 13 question. Yeah, there is a -- that -- that is the 10:24:21
 14 link to a specific part of the specification, 10:24:25
 15 wherein the only thing that's associated with that 10:24:28
 16 prompting, I believe it says "specifically," is a 10:24:31
 17 piece of software. 10:24:34
 18 Q. But in the claim language, it's the 10:24:35
 19 reference to prompting that tells you that software 10:24:37
 20 alone is all that's required to practice this claim 10:24:40
 21 limitation? 10:24:42
 22 A. Frankly, I thought that's what I just 10:24:42
 23 said. But that's exactly it. 10:24:45
 24 Q. Okay. Before we break, I want to make 10:24:46
 25 sure I understand at least that -- 10:24:48

1 A. Yeah. Yes, sir. 10:24:48
 2 Q. -- discreet part of your opinion. 10:24:50
 3 A. Yes. 10:24:51
 4 MR. LUMISH: All right. Why don't 10:24:52
 5 we go ahead and -- why don't we go ahead and break 10:24:52
 6 and change the tape. 10:24:54
 7 THE VIDEOGRAPHER: This is the end 10:24:54
 8 of tape 1. Off the record, 10:25. 10:24:55
 9 (Recess Taken From 10:25 a.m. To 10:40 a.m.) 10:24:58
 10 THE VIDEOGRAPHER: This is the 10:40:04
 11 beginning of tape 2. Back on the record, 10:40. 10:40:09
 12 Q. (BY MR. LUMISH) Sir, we were talking 10:40:14
 13 about the claim language before we broke, and the 10:40:15
 14 word -- the reference to prompting in the claim is 10:40:17
 15 in forming your opinion. I think there were some 10:40:20
 16 specification cites that you wanted to point me to. 10:40:22
 17 A. I -- I -- well, I think it's appropriate 10:40:27
 18 for me to. Let's go -- I'll give you three, and one 10:40:28
 19 of which is more generic than the specific case 10:40:45
 20 we're in here, but as I recall, we were discussing 10:40:48
 21 the first interface that's called for in the first 10:40:50
 22 limitation of claim 1 -- 10:40:53
 23 Q. Right. 10:40:55
 24 A. -- of the '025. And -- and that as you 10:40:55
 25 read it, turns out to be relevant to the media being 10:40:59

1 prompted to input the rules. If you go to 10:41:03
 2 column 32 -- you there? 10:41:13
 3 If you take a look about line -- 10:41:14
 4 well, just the entire paragraph that starts at 10:41:17
 5 line 18, where they're talking about the media 10:41:21
 6 database, which is where the data fields containing 10:41:24
 7 information that relates to the media is held, and 10:41:27
 8 it gives you specific examples of what those fields 10:41:29
 9 would be. And in the last part of that paragraph, 10:41:35
 10 it says, "The media will input this information when 10:41:37
 11 first accessing the present invention and joining as 10:41:41
 12 a media" -- I guess I'm at line 30 and following. 10:41:45
 13 And then it goes on to say at line 32, "The Media 10:41:49
 14 Configuration No. 6717 will prompt the Media for the 10:41:52
 15 necessary information as well as obtain an agreement 10:42:00
 16 to a contract between the media and the management 10:42:04
 17 or operations" -- excuse me -- "operators of the 10:42:07
 18 present invention." And that's the prompt linkage. 10:42:11
 19 And that -- that block -- or that piece of software, 10:42:13
 20 the Media Configuration Program 6717, is shown in 10:42:18
 21 figure 2e at the lower left. It's the second block 10:42:24
 22 up from the bottom on the left. 10:42:31
 23 And then further on -- in column 33, 10:42:34
 24 and there's a typographical or scrivener's error at 10:42:42
 25 line 45. You can see that it reads as the 10:42:47

1 Presentation and Configuration Program 6717, 10:42:49
 2 column 33, line 45. That actually -- you can tell 10:42:56
 3 it from the number and the rest of the paragraph, 10:43:00
 4 that should say, "The Media Configuration Program," 10:43:03
 5 where it says, "Presentation and" -- "is both the 10:43:06
 6 gateway to the present invention and the controlling 10:43:10
 7 software interface for the Media." And then it goes 10:43:13
 8 on to talk about how the actual prompt is 10:43:17
 9 implemented. 10:43:20
 10 It gives you a sequence of steps 10:43:22
 11 that -- that the program will actually do as for -- 10:43:24
 12 as per the preferred embodiment. It says it 10:43:27
 13 "presents the media with a series of questions to 10:43:31
 14 answer. The answering of these questions 10:43:34
 15 contributes to the media database --" I'm going to 10:43:36
 16 ignore the numbers -- "the Presentation Database, 10:43:39
 17 and the Presentation Rules Database, the Media 10:43:42
 18 Inventory Database" -- it's an optional -- "and 10:43:45
 19 other databases necessary. The Media Configuration 10:43:49
 20 Program monitors the responses to the questions 10:43:52
 21 asked." 10:43:56
 22 And so it basically tells you even a 10:43:58
 23 specific way of doing the prompting and responding 10:44:00
 24 to those responses that the media venue 10:44:02
 25 representative performs. 10:44:05

1 And -- and then the last point is 10:44:07
 2 just a general point. I think -- again, I think 10:44:09
 3 this came up, as I understand it, during the 10:44:16
 4 deposition of your expert, Mr. Kinkaid, if I recall. 10:44:20
 5 And that -- that's the site that applies to the 10:44:25
 6 present invention in column 5. 10:44:28
 7 Q. What specifically are you referring to 10:44:34
 8 there? 10:44:36
 9 A. Lines -- I guess you'd say 27. And it 10:44:36
 10 reads as follows; it's just one sentence: "The 10:44:40
 11 present invention partially resides on the sellers' 10:44:43
 12 computer, controls and edits the presentation, and 10:44:46
 13 then automatically transmits that information and 10:44:49
 14 data for publication in traditional media and 10:44:52
 15 electronic networks." And I think -- first off, it 10:44:56
 16 says it resides on the computers, at least 10:45:01
 17 partially. And that, to me, is -- is another 10:45:05
 18 reference that supports the differing view that your 10:45:09
 19 expert and I have that this -- the invention really 10:45:13
 20 is a software invention that supports the idea that 10:45:16
 21 it's the software, and that applies equally there to 10:45:20
 22 the media interface, but also to the so-called 10:45:24
 23 second interface. 10:45:27
 24 Q. So the same supports you would then 10:45:29
 25 point me to for the second interface, is that what 10:45:31

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1 you meant by the last comment? 10:45:35
 2 A. For that -- I think that statement in 10:45:36
 3 column 5 applies kind of across the board. If 10:45:38
 4 you -- when we get -- if and when we get to the 10:45:40
 5 second interface, there are similar cites later on 10:45:42
 6 in the specification that link it to the prompts and 10:45:45
 7 refer to the seller software as the, quote, software 10:45:48
 8 interface. 10:45:53
 9 Q. Claim 179 is a method version of claim 1 10:45:54
 10 of the '025 patent. Would you agree with that? 10:46:00
 11 A. I know that there are parallel methods, 10:46:04
 12 and I just don't remember the numbers off the top of 10:46:07
 13 my head. I think that's correct, but let me just 10:46:09
 14 take a quick look to compare the two. They appear 10:46:11
 15 to be very parallel in terms of what they do with 10:46:49
 16 it. One -- one in apparatus form and one in a 10:46:52
 17 method form. 10:46:56
 18 Q. In claim 1 -- I'm sorry, pardon me. The 10:46:56
 19 first limitation of claim 179 also describes, quote, 10:46:59
 20 "prompting each of the Internet media venues through 10:47:01
 21 a first interface to the computer system," and goes 10:47:03
 22 from there. 10:47:06
 23 A. Uh-huh. 10:47:06
 24 Q. See that? 10:47:08
 25 A. Yes. 10:47:08

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1 Q. Would you agree that that's the same 10:47:08
 2 interface being referenced in the first limitation 10:47:10
 3 of claim 179 that is referenced in the first 10:47:12
 4 limitation of claim 1 or do we need to take those 10:47:15
 5 separately? 10:47:17
 6 A. I don't -- I can't think of any reason 10:47:26
 7 to disagree with that. They -- they are separate 10:47:29
 8 limitations and separate claims, but they are the 10:47:32
 9 interface of the computer system where the Internet 10:47:35
 10 media venue inputs the presentation rules. 10:47:39
 11 Q. And is your opinion for claim 179 the 10:47:42
 12 same as it was for claim 1, that that first 10:47:45
 13 interface can be performed by software -- can be -- 10:47:48
 14 can be met in the claim by software alone? 10:47:50
 15 A. Yes. In fact, it -- I base that on the 10:47:52
 16 fact that it is the software when properly installed 10:47:55
 17 and configured on -- as to use the language of that 10:47:58
 18 example we looked at in, what, column 53, I think, 10:48:02
 19 their computer, the preexisting computer at the 10:48:06
 20 media venue that does the prompting. 10:48:09
 21 Q. And is it the word "prompting," again, 10:48:12
 22 in the first limitation of claim 179 that tells you 10:48:14
 23 in the claim language, just focussing on the claim 10:48:16
 24 language for a moment, that software alone can be 10:48:19
 25 used to meet this requirement? 10:48:21

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1 A. That -- that's a key to it. 10:48:22
 2 Q. And is it the same specification cite 10:48:26
 3 that you gave me a minute ago in column 5, column 32 10:48:29
 4 and column 33 that you think supports that -- 10:48:33
 5 A. Yes. 10:48:36
 6 Q. -- notion of prompting? 10:48:37
 7 A. I'm sorry. Yes. 10:48:38
 8 Q. All right. In the Function Media 10:48:39
 9 patents, we're talking about prompting the user via 10:48:40
 10 these interfaces; is that right? 10:48:47
 11 A. That's the impression I get by reading 10:48:48
 12 it. I -- I don't -- you know, again, I don't think 10:48:50
 13 I'm going to be in a position to try to out -- 10:48:54
 14 identify the total scope of the claim relative to an 10:48:58
 15 issue such as infringement or something or prior art 10:49:01
 16 until Judge Everingham makes his Markman ruling and 10:49:03
 17 we see what he does with the claims. But in 10:49:07
 18 relation to the preferred embodiment, which is the 10:49:10
 19 only -- I don't know anything about your company's 10:49:12
 20 products to any degree. In relation to the 10:49:14
 21 preferred embodiment, there's certainly views that 10:49:17
 22 as a prompt that a human being would see to answer 10:49:20
 23 the questions. 10:49:23
 24 Q. So how do you prompt a human being in 10:49:24
 25 the Function Media patents? 10:49:27

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1 A. It says they present them with questions 10:49:28
 2 that they fill in, and then when they fill them in, 10:49:32
 3 it monitors their answers and -- 10:49:33
 4 Q. So the user -- 10:49:35
 5 A. -- stores -- stores them away. 10:49:36
 6 Q. Pardon. Sorry, didn't mean to interrupt 10:49:38
 7 you. 10:49:41
 8 A. No problem. 10:49:42
 9 Q. So in prompting the user in the Function 10:49:42
 10 Media patents, the user sees the prompt? 10:49:44
 11 A. That's -- that's what I think the 10:49:46
 12 preferred embodiment teaches. I think it's -- you 10:49:47
 13 know, again, they -- they say that it -- that media 10:49:50
 14 venue -- well, the representative of the media, I 10:50:03
 15 tend to think of basically, as I told you, I 10:50:05
 16 personify them as a human being. There are other 10:50:09
 17 ways you could -- could sort of ask questions. For 10:50:12
 18 example, just purely computationally of a database 10:50:14
 19 or something to extract the information you want out 10:50:18
 20 through queries, which are questions that produce 10:50:20
 21 answers. But I -- I tend to think of it as a human 10:50:23
 22 being at the media site who is responding to the 10:50:25
 23 prompts in the forms of questions and -- and 10:50:29
 24 entering answers. 10:50:31
 25 Q. To prompt a user by having them see the 10:50:32

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1 prompt, you have to have a monitor, don't you -- 10:50:36
 2 user does? 10:50:39
 3 A. You do. 10:50:39
 4 Q. The monitor -- a monitor is shown as a 10:50:40
 5 component of the media interface in figure 2e? 10:50:43
 6 A. That's correct. 10:50:48
 7 Q. That's shown as reference numeral 6310, 10:50:49
 8 right? 10:50:52
 9 A. It is. 10:50:52
 10 Q. Is there any other way that's taught in 10:50:56
 11 the 945 or the -- withdraw. 10:50:59
 12 Is there any other way taught in the 10:51:01
 13 Function Media patents for prompting somebody via 10:51:03
 14 these interfaces, other than by presenting them 10:51:06
 15 something they see on a monitor? 10:51:09
 16 A. Best answer I can give you without 10:51:11
 17 re-reading the lengthy specifications is say I don't 10:51:13
 18 recall one. 10:51:17
 19 Q. And to display something on a monitor, 10:51:17
 20 you have to process it on a processor, first, don't 10:51:20
 21 you, on the CPU? 10:51:26
 22 A. I bet I could figure out a way to avoid 10:51:27
 23 doing that, but that's -- that's a reasonable 10:51:30
 24 assumption. 10:51:33
 25 Q. You could figure out a way to display 10:51:33

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1 something on a -- on a monitor in the context of the 10:51:35
 2 Function Media patents without first processing the 10:51:38
 3 information to be displayed? 10:51:40
 4 A. No, that's a different question. In -- 10:51:41
 5 in the context of the hardware structure that's 10:51:44
 6 shown, for example, in figure 2e, the path to the 10:51:46
 7 monitor is through a CPU 6100, and they actually 10:51:48
 8 have a video driver, 6260, that goes out to the 10:51:52
 9 monitor, 6310. But there are architectures where 10:51:55
 10 information can be pulled out of, say, a data 10:51:59
 11 storage device and placed on a display without ever 10:52:02
 12 going through, say, the CPU like the microprocessor 10:52:04
 13 running the system. 10:52:09
 14 Q. All right. But in figure 2e of the 10:52:10
 15 Function Media patents, the prompt shown on the 10:52:13
 16 video monitor is a function of data that was 10:52:16
 17 processed by the CPU, in the video driver, right? 10:52:19
 18 A. I believe that's correct. 10:52:22
 19 Q. And all three of those, the video 10:52:22
 20 monitor, the video driver and the CPU, those are all 10:52:24
 21 hardware, right? 10:52:27
 22 A. I don't know that I would agree with 10:52:29
 23 that relative to the driver. 10:52:31
 24 Q. Okay. Driver might be software? 10:52:34
 25 A. Probably would be software in my 10:52:36

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1 experience. 10:52:37
 2 Q. In your experience, there are usually 10:52:38
 3 video cards, there are components of the video 10:52:41
 4 driver that run on video hardware; is that true? 10:52:44
 5 A. I don't understand that question. 10:52:49
 6 Q. Is there a video adapter or a card or 10:52:50
 7 something in your typical experience related to a 10:52:52
 8 PC? 10:52:56
 9 A. As of -- what are we talking about here, 10:52:56
 10 nineteen -- 2000? Isn't that the relevant -- sort 10:53:00
 11 of the priority date here? 10:53:03
 12 Q. Yes, sir. 10:53:05
 13 A. I don't know that it would necessarily 10:53:08
 14 be a card. There would be some hardware by that 10:53:09
 15 time that would be associated with getting 10:53:13
 16 information onto a display screen. 10:53:18
 17 Q. That's the thing the driver drives, 10:53:21
 18 right, it drives some piece of hardware that's 10:53:24
 19 designed for presenting video to a monitor? 10:53:26
 20 A. That's sort of a loose way of stating 10:53:30
 21 it, but there's an interaction between the driver, 10:53:33
 22 and if there, in fact, is a graphics processor, as 10:53:35
 23 you say a card, nowadays it could be a chip, it 10:53:40
 24 could actually be built into the -- the processor. 10:53:43
 25 Then -- then the driver is software that is executed 10:53:47

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1 to send data to and from that piece of physical 10:53:49
 2 hardware which ultimately then produces imagery on 10:53:53
 3 the screen. 10:53:57
 4 Q. In column 33 that you pointed me to, 10:54:00
 5 lines 49 and 50, it says, quote, "The Media 10:54:03
 6 Configuration Program 6717 presents the media with a 10:54:08
 7 series of questions to answer." That also tells a 10:54:11
 8 person of ordinary skill in the art that the media, 10:54:15
 9 as it's referred to here, is seeing something on a 10:54:18
 10 display, right? 10:54:21
 11 A. Yes. 10:54:23
 12 Q. On a monitor? 10:54:24
 13 A. That's correct. 10:54:24
 14 Q. And so the same hardware we've already 10:54:25
 15 talked about are the monitor, the CPU and video 10:54:27
 16 monitor, would be involved in that process, wouldn't 10:54:31
 17 it? 10:54:33
 18 A. I believe that's the case. 10:54:34
 19 Q. And you also continue to the next 10:54:35
 20 sentence in here -- on this column, so column 33, 10:54:38
 21 lines 50 and forward, which say, quote, "The 10:54:41
 22 answering of these questions contributes to the 10:54:44
 23 Media Database," and it continues from there. You 10:54:46
 24 see that? 10:54:49
 25 A. I haven't looked with you yet. Give me 10:54:50

1 just a minute. 10:54:54
 2 Q. Sure, column 34, line 50 and after. 10:54:54
 3 A. Oh, I'm sorry, I had the wrong patent 10:54:57
 4 open. It didn't look familiar at that point. 10:55:00
 5 Yes. I see that. 10:55:07
 6 Q. In the context of the Function Media 10:55:14
 7 patents, how does the media person answer questions? 10:55:15
 8 A. It -- I think it depends upon whether 10:55:21
 9 you're -- you see it at line 56, it says, "text 10:55:24
 10 entry." That would generally be done with a 10:55:27
 11 keyboard. It doesn't have to be. There are other 10:55:29
 12 ways to do it. And things like selecting 10:55:32
 13 photographs or creating graphics would probably be 10:55:37
 14 done in conjunction with the use of a mouse or some 10:55:41
 15 sort of pointing device. 10:55:44
 16 Q. Can you identify anything in the 10:55:45
 17 Function Media patents that says there's some way 10:55:47
 18 for the media venue person to answer these questions 10:55:51
 19 prompted by the monitor, other than with a keyboard 10:55:55
 20 or a mouse? 10:55:58
 21 MR. BRANDON: Objection, form. 10:55:59
 22 A. The -- the part of your question that -- 10:56:04
 23 that I have trouble with is "prompted by the 10:56:06
 24 monitor." That's sort of -- is already built. And 10:56:10
 25 I understand your position, and I've answered your 10:56:13

1 questions accurately, I think, as to the role the 10:56:15
 2 monitor would play. But had your question said 10:56:17
 3 "prompted by the Media Configuration Program 6717, I 10:56:20
 4 would have said that I don't know of any way to 10:56:25
 5 answer the questions that that software program will 10:56:28
 6 cause to be displayed, other than some sort of an 10:56:33
 7 input device. That would be hardware or -- other -- 10:56:36
 8 I mean, there are systems where you could speak to 10:56:42
 9 it through a microphone or something, but even 10:56:43
 10 that's kind of hardware. 10:56:46
 11 Q. (BY MR. LUMISH) The Function Media 10:56:47
 12 patents doesn't describe that kind of system, does 10:56:48
 13 it? 10:56:50
 14 A. I don't think so. It's -- again, that's 10:56:50
 15 a fact, and I don't have any recollection sitting 10:56:52
 16 here today that it talks about a system and -- and 10:56:55
 17 certainly figure 2e doesn't show something like a 10:56:58
 18 voice input. 10:57:01
 19 Q. And the Function Media patents don't 10:57:02
 20 show any form of prompting that doesn't include a 10:57:03
 21 monitor? 10:57:06
 22 A. I thought you already asked me that. 10:57:07
 23 But I'll answer it again. I'm -- I don't recall any 10:57:09
 24 other form of prompting, certainly relative to the 10:57:13
 25 preferred embodiment depicted in figure 2e, other 10:57:18

1 than that video monitor. 10:57:22
 2 Q. Monitor doesn't run on its own, right, 10:57:24
 3 it's got to connect to a computer? 10:57:26
 4 A. Again, in -- I could accurately say in 10:57:32
 5 answering your question that that's not true. I 10:57:36
 6 mean, if you plug it into the wall, you've got to 10:57:39
 7 have electricity, you've probably got to have a 10:57:42
 8 table or a stand of some kind to put it on. 10:57:45
 9 Q. Fair point. Let me -- I'll withdraw 10:57:48
 10 that question. I hear what you're saying, and I 10:57:50
 11 agree with you. 10:57:52
 12 A monitor, as shown in the Function 10:57:54
 13 Media patents, couldn't function to prompt the 10:57:57
 14 user -- or to display the prompt to the user, let's 10:58:02
 15 put it that way, unless it was plugged into a 10:58:05
 16 computer; is that true? 10:58:07
 17 A. The particular implementation shown in 10:58:12
 18 figure 2e, there is a computer associated with 10:58:15
 19 putting information on the monitor to present the 10:58:18
 20 media with a series of questions and answers as a 10:58:23
 21 way of implementing the prompt. 10:58:26
 22 Q. My question goes beyond 2e, but I 10:58:27
 23 appreciate your answer. 10:58:30
 24 There's nothing in the Function 10:58:30
 25 Media patents that describes a way of displaying the 10:58:32

1 prompts to the user, other than a monitor connected 10:58:36
 2 to a computer -- 10:58:39
 3 MR. BRANDON: Objection to form. 10:58:42
 4 Q. (BY MR. LUMISH) -- is that true? 10:58:43
 5 A. I was waiting for you to add. Again, 10:58:44
 6 that's a fact. And it -- I'm not aware, sitting 10:58:48
 7 here today, of any other place that a hardware 10:58:50
 8 architecture or structure is disclosed, other than 10:58:54
 9 one such as that shown in figure 2e where the 10:58:58
 10 monitor is operated in conjunction with a C -- a 10:59:01
 11 computer processor of some kind. 10:59:04
 12 Q. And given the time -- 2000 time period 10:59:06
 13 here, you'd understand the monitor is connected to 10:59:10
 14 the computer by a cable? 10:59:13
 15 A. Not necessarily, but I think that's 10:59:15
 16 what's certainly shown in figure 2e. I believe, you 10:59:18
 17 know, wireless connection, not sure where Bluetooth 10:59:21
 18 stood at exactly 2000, but that's not absolutely 10:59:26
 19 necessary, and I have operated probably in and about 10:59:29
 20 that time wireless links to monitors or printers, 10:59:32
 21 for example. But I -- I think that's the -- the 10:59:36
 22 type of technical -- of technology that's shown in 10:59:38
 23 figure 2e for that preferred embodiment. 10:59:42
 24 Q. There's no description in the Function 10:59:44
 25 Media patents of connecting a monitor to the 10:59:47

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1 computer without a cable, is there? 10:59:48
 2 A. Same answer I've given you twice now. 10:59:50
 3 And I don't mean that to be critically. It's a 10:59:53
 4 different question, but my answer is again that's a 10:59:55
 5 fact. I don't recall any such description in the 10:59:57
 6 specification of the Function Media patents. 11:00:02
 7 Q. The Media Configuration Program that you 11:00:04
 8 referenced in your answers before, that's running on 11:00:07
 9 this computer we're discussing, right? 11:00:09
 10 A. Well, let's be more specific than that. 11:00:11
 11 It's -- it's my belief -- and I haven't looked at 11:00:14
 12 the totality of the specifications to make sure I'm 11:00:18
 13 not missing something, but sitting here today my 11:00:22
 14 recollection is that the specification either 11:00:24
 15 specifically teaches or implies that CPU 6100 is 11:00:31
 16 where the Media Configuration Program 6717 would be 11:00:34
 17 executing. 11:00:38
 18 Q. All right. So do you see there's a big 11:00:39
 19 box around all of the components on figure 2e except 11:00:42
 20 for 6310, 6320, 6330 and 6340? 11:00:45
 21 A. Yes. 11:00:52
 22 Q. Do you read that box to mean it's a PC 11:00:54
 23 or some computer like that with all of its internal 11:00:57
 24 components? 11:01:00
 25 A. Not necessarily. I -- I read that to be 11:01:01

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1 the way you tend to draw drawings that are 11:01:06
 2 acceptable from the patent office's viewpoint. And, 11:01:09
 3 in fact, it troubled me a bit that this 6000 media 11:01:13
 4 interface heading was not more closely associated 11:01:17
 5 with that box. But I -- I don't -- unless there's 11:01:20
 6 some statement in the patent, which I do think talks 11:01:23
 7 about a particular CPU, an Intel device or 11:01:26
 8 something, I -- I don't -- I don't know. I don't 11:01:31
 9 necessarily read that. 11:01:32
 10 Q. Why did the location of the header 11:01:33
 11 bother you? 11:01:35
 12 A. It's -- it's my experience, again, that 11:01:36
 13 when you put a big box like that in a drawing that 11:01:41
 14 conforms to the patent office specifications for 11:01:43
 15 drawings, that generally identifies a higher level 11:01:46
 16 numerically identified, as you said, entity. And I 11:01:51
 17 did -- it's unusual in my experience to have the 11:01:56
 18 6000 media interface, that big black box, if you put 11:01:59
 19 that box in there and leave the four other elements 11:02:03
 20 outside it. But that -- you know, I'm not a -- I 11:02:07
 21 don't do that kind of drawing very regularly. But 11:02:08
 22 whether it's a PC or not, I really don't know. We 11:02:12
 23 can -- we can look for the specification if you 11:02:16
 24 wish, but it will take a while. It may be. 11:02:18
 25 Q. All right. Let's talk about the second 11:02:26

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1 interface. And I think you may have already 11:02:30
 2 answered this, but I want to make sure we're very 11:02:33
 3 clear. If you look at -- let's go back to claim 1 11:02:35
 4 of the '025 patent. The second interface 11:02:38
 5 requirement is set forth in column 65, in lines 3 11:02:46
 6 through 9 -- through, let's say, 7. 11:02:50
 7 A. Uh-huh. 11:02:53
 8 Q. Do you see that? 11:02:54
 9 A. Yes. 11:02:55
 10 Q. And it says, quote, "A second interface 11:02:55
 11 to the computer system through which a seller is 11:02:57
 12 prompted to input information to select one or more 11:03:00
 13 of the Internet media venues and prompted to input 11:03:04
 14 information to create an electronic advertisement 11:03:06
 15 for publication to the selected Internet media 11:03:10
 16 venues" and it goes -- closed quote. 11:03:13
 17 A. Uh-huh. 11:03:16
 18 Q. Is it your opinion that this second 11:03:17
 19 opinion also can be met purely by software again 11:03:20
 20 without any hardware? 11:03:23
 21 A. Yes. 11:03:25
 22 Q. And is that, again, based on the word 11:03:25
 23 "prompted"? 11:03:29
 24 A. That's a -- it -- it's one of the key 11:03:29
 25 things that I looked to in the specification. 11:03:33

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1 Q. I'm sorry. Let me -- let me ask my 11:03:35
 2 question differently. In the claim language, I just 11:03:37
 3 want to focus on that again for a moment. Is that 11:03:40
 4 the claim language that you think supports your 11:03:42
 5 conclusion? 11:03:44
 6 A. Well, I think the entirety of that 11:03:44
 7 limitation supports my conclusion, but when I link 11:03:46
 8 it to support in the specification, the linkage in 11:03:49
 9 part is based on the specific act that's referred to 11:03:53
 10 here that that interface prompts the user to input 11:03:58
 11 information as set forth in that limitation. 11:04:03
 12 Q. And is it the same set of specification 11:04:08
 13 cites that you pointed me to before, columns 5 -- in 11:04:14
 14 columns 5, 32 and 33 that you think support your 11:04:16
 15 conclusion that the prompting requires only 11:04:19
 16 software? 11:04:22
 17 A. I think -- as I said about the column 5 11:04:23
 18 cite, I think that's across the board. It's going 11:04:27
 19 to take me a minute to find it, but there is a 11:04:31
 20 similar statement regarding the second interface. 11:04:33
 21 And it's just going to take me a while to find it. 11:04:42
 22 Q. Sure. Take your time. 11:04:45
 23 A. Okay. As I -- as you will find in my 11:04:46
 24 declaration of Exhibit 84, I think I've pointed to 11:06:06
 25 the Presentation and Configuration Program 4715 as 11:06:09

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1 being the key piece of inventive software that is 11:06:15
 2 associated with the second interface. And I would 11:06:21
 3 point you to column 40, initially. Again, having 11:06:25
 4 pointed you to column 5, you can say beginning about 11:06:30
 5 line 17, they talk about the preferred embodiment of 11:06:42
 6 the present invention allows sellers to have 11:06:45
 7 self-serve relationships -- a self-serve 11:06:48
 8 relationship to the networks, and they say this 11:06:52
 9 relationship and process is accomplished through the 11:06:55
 10 Presentation and Configuration Program. 11:07:00
 11 And, I mean, I should have probably 11:07:03
 12 mentioned this earlier relative to the Media 11:07:05
 13 Configuration Program, but the very fact that it's 11:07:08
 14 named a program carries a software connotation. If 11:07:10
 15 you continue down to line 35, the specification 11:07:15
 16 reads, "Once installed and configured, the 11:07:23
 17 Presentation and Configuration Program 4715 allows 11:07:26
 18 the seller to control access to the program" -- 11:07:30
 19 forgive me. I think I just lost lock here a minute. 11:07:35
 20 There's a reference to prompting here. And let me 11:07:39
 21 find it again. Ah, I'm sorry. Go to 49. Let me 11:07:42
 22 back up. Let's -- let's go to 44. 11:08:00
 23 "Upon accessing the Presentation and 11:08:02
 24 Configuration Program 4715, the new Seller/client is 11:08:07
 25 presented with a series of forms containing yes/no 11:08:11

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1 choices, text entry areas, menu-driven choices, and 11:08:15
 2 other data and information entry methods. These 11:08:19
 3 forms lead the Seller through his establishment as a 11:08:21
 4 client of the given instance of the present 11:08:25
 5 invention. This portion of the Presentation and 11:08:27
 6 Configuration Program 4715 prompts the seller" -- 11:08:33
 7 and I won't read the rest of it, but that's, again, 11:08:36
 8 the -- the fact shown in the specification that it 11:08:39
 9 is the Presentation and Configuration Program 4715 11:08:42
 10 that prompts the seller for information. There's 11:08:47
 11 one other here. Again, it will take me a minute to 11:08:52
 12 find it. 11:08:57
 13 Q. I'm sorry, where's the word "prompt" in 11:09:01
 14 that? I'm just missing it. 11:09:04
 15 A. On line 51 of column 40. 11:09:06
 16 Q. Thank you. 11:09:09
 17 (Witness Reviews Document.) 11:10:24
 18 A. Well, I'm -- I seem -- I don't want to 11:10:51
 19 waste your time, but there is a similar statement to 11:10:54
 20 the one that I pointed you to in column 33 for the 11:10:57
 21 media configuration. I think the wording was almost 11:11:06
 22 parallel relative to the Presentation and 11:11:09
 23 Configuration Program being the gateway to the 11:11:14
 24 present invention and the controlling software 11:11:16
 25 interface for the seller. And I -- if -- if you 11:11:19

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1 want me to, I can find it or over lunch I can find 11:11:23
 2 it and tell you where that is. 11:11:26
 3 Q. Well, if you think they're parallel, 11:11:27
 4 then if you find them as we go along -- 11:11:29
 5 A. Okay. 11:11:29
 6 Q. -- throughout the day -- 11:11:31
 7 A. I -- 11:11:31
 8 Q. -- feel free to point them out. 11:11:33
 9 A. I -- again, I'm -- I'm getting older and 11:11:34
 10 my brain doesn't always work as well as it used to, 11:11:36
 11 but I -- I'm convinced by my recollection that there 11:11:39
 12 is a reference. And I'm much more effective with a 11:11:43
 13 text search on my computer. But what -- wherever 11:11:49
 14 that -- the gateway statement and the -- and the 11:11:52
 15 two-word phrase "software interface," I think those 11:11:54
 16 have relevance to this issue of whether it were -- 11:11:57
 17 the claim limitation deals with software or must 11:12:00
 18 require more than the software. 11:12:04
 19 Q. All right. Well, let's -- let's focus 11:12:06
 20 on the cite that we haven't talked about yet or the 11:12:08
 21 location of patent here, column 40. I think you 11:12:12
 22 focused -- principally on lines 44 down to 64. 11:12:16
 23 A. Okay. 11:12:20
 24 Q. No, I'm sorry, let's say from 17 down to 11:12:20
 25 64. You had some comments around line twenty -- 24 11:12:24

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1 through 26. 11:12:27
 2 This portion of the patent is 11:12:31
 3 talking about the seller interface as shown in 11:12:33
 4 figure 2c, right? 11:12:37
 5 A. I believe that's correct. Let me just 11:12:40
 6 check that subscript. Yes. It's talking about an 11:12:42
 7 aspect of what is shown in figure 2c and it's 11:12:46
 8 clearly labeled 4000, quote, "Seller Interface" with 11:12:49
 9 a capital S and a capital I. 11:12:54
 10 Q. All right. So you directed me to 11:12:57
 11 lines 24 through 26, which say, quote, "The seller 11:12:59
 12 obtains the Presentation and Configuration Program 11:13:02
 13 4715 on either a compact disk, CD-ROM, DVD disk, 11:13:03
 14 downloaded file, or some other method." 11:13:11
 15 A. Yes. 11:13:13
 16 Q. And then it says and then installs them, 11:13:13
 17 and goes from there. You see that? 11:13:15
 18 A. Yes. 11:13:17
 19 Q. That sentence between lines 24 and 11:13:17
 20 actually 29, never says that that software alone is 11:13:20
 21 the seller interface, does it? 11:13:24
 22 A. No. It just tells you how you obtain 11:13:27
 23 the program and what you do with it when you obtain 11:13:30
 24 it. 11:13:33
 25 Q. And it's only after the passage 11:13:33

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1 describes that software as having been installed 11:13:38
 2 that the next sentence says, quote, "This embodiment 11:13:41
 3 of this component of the present invention is shown 11:13:44
 4 as Seller Interface 4000 Figure 2c, which shows the 11:13:47
 5 relationship between the Presentation Program 4715 11:13:52
 6 and the associated hardware, programs and databases 11:13:56
 7 of Seller Interface 4000," closed quote. 11:13:59
 8 Do you disagree that that last 11:14:04
 9 sentence there of that paragraph is saying that the 11:14:06
 10 seller interface includes 4715 but also the hardware 11:14:09
 11 programs and databases shown in Seller Interface 11:14:14
 12 4000, figure 2c? 11:14:20
 13 A. A little bit. What -- this is very 11:14:21
 14 similar to what we looked at at the bottom of 11:14:23
 15 column 53. 11:14:26
 16 Q. When you say, "a little bit," you 11:14:27
 17 disagree a little bit? 11:14:29
 18 A. I agree or disagree a little bit. I -- 11:14:30
 19 I'm not 100 percent in agreement with you. 11:14:32
 20 Q. What do you disagree with what I said? 11:14:34
 21 A. Okay. This statement that's made here 11:14:37
 22 is very similar to the statement that we talked 11:14:38
 23 about earlier at the bottom of column 53. I -- I 11:14:40
 24 think that this -- it says, "This embodiment of this 11:14:43
 25 component of the present invention is shown as 11:14:47

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1 Seller Interface 4000," with a capital S and a 11:14:50
 2 capital I, as shown in Figure 2c. That's the way I 11:14:53
 3 read this, sticking figure 2c after that. Which 11:14:56
 4 shows the relationship between the Presentation 11:15:01
 5 Program, capital P, capital P, No. 4715, and the 11:15:02
 6 associated hardware. 11:15:07
 7 So there's no question of what 11:15:09
 8 figure 2c shows, both the Presentation Program 4715 11:15:10
 9 and the associated hardware programs and databases. 11:15:15
 10 And they're all shown in that figure. I -- I don't 11:15:21
 11 disagree with that. As what that figure depicts as 11:15:24
 12 the capital S, Seller, capital I, Interface 4000. 11:15:28
 13 Q. The language you pointed me to beginning 11:15:39
 14 on line 44 describes presenting the seller with a 11:15:44
 15 series of forms and prompting the seller for 11:15:48
 16 information. As before, that presentation of forms 11:15:51
 17 or prompting for information would be done visually 11:15:58
 18 through a monitor, wouldn't it? 11:16:01
 19 MR. BRANDON: Objection, form. 11:16:04
 20 A. I -- that's a reasonable way to assume 11:16:05
 21 it's done certainly in the context of figure 2c. 11:16:07
 22 And by the way, I didn't find the part I'm really 11:16:10
 23 looking for, but it -- just for the record, on -- in 11:16:13
 24 column 41 on the next page, there's another 11:16:16
 25 reference to the prompting at line 21. The 11:16:20

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1 specification says, "The Presentation and 11:16:25
 2 Configuration Program 4715 would then prompt the 11:16:28
 3 Seller for the necessary and optional information to 11:16:30
 4 complete the presentation blocks." I remember that 11:16:33
 5 there were two there, but I still haven't found that 11:16:39
 6 gateway statement, but I'll keep looking. 11:16:42
 7 Q. (BY MR. LUMISH) Okay. Now, your 11:16:44
 8 last -- the beginning of this answer was that my 11:16:45
 9 question presented a reasonable way. There's no way 11:16:47
 10 shown in the Function Media patents for prompting 11:16:50
 11 the seller via the seller interface, other than by 11:16:52
 12 presenting information visually through a monitor; 11:16:57
 13 is that true? 11:17:00
 14 MR. BRANDON: Objection, form. 11:17:01
 15 A. Again, that's a fact as to what the 11:17:01
 16 specification contains, and I have no recollection 11:17:03
 17 of any other way of doing the specific style of 11:17:05
 18 prompting that is disclosed in columns 40 and 41 for 11:17:11
 19 the Presentation and Configuration Program 4715, 11:17:16
 20 other than using a video monitor. 11:17:21
 21 Q. (BY MR. LUMISH) The video monitor is 11:17:23
 22 shown in the Seller Interface figure, figure 2c, as 11:17:24
 23 reference numeral 4310, right? 11:17:28
 24 A. Yes. 11:17:31
 25 Q. And, again, it's got a CPU as hardware 11:17:32

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1 that's at least involved in presenting -- presenting 11:17:37
 2 forms or prompting for information via that monitor? 11:17:41
 3 MR. BRANDON: Objection, form. 11:17:44
 4 A. As best I remember, the way that this 11:17:45
 5 description in figure 2c is explained to operate 11:17:50
 6 figure -- the Presentation Configuration Program 11:17:55
 7 4715 runs on CPU 4100 and via the pathway through 11:18:00
 8 Video Driver 4260, will place information on the 11:18:06
 9 screen of the Video Monitor 4310, which is the way 11:18:13
 10 it accomplishes the prompting. It -- by "it," I 11:18:18
 11 mean the Presentation and Configuration Program 11:18:22
 12 4715. 11:18:25
 13 Q. (BY MR. LUMISH) And the monitor, CPU 11:18:26
 14 and any cabling connecting the monitor to the CPU, 11:18:28
 15 you'd agree are all hardware? 11:18:31
 16 A. Yes. 11:18:33
 17 Q. And the video driver may or may not 11:18:34
 18 include hardware? 11:18:36
 19 A. I would think the driver would not 11:18:36
 20 include hardware. I -- I think of drivers as being 11:18:38
 21 software. But it may operate in conjunction with a 11:18:42
 22 graphics subprocessor or card or whatever. 11:18:45
 23 Q. The driver's driving some hardware? 11:18:50
 24 A. It's -- it's certainly driving the video 11:18:52
 25 monitor, which is hardware. Whether there's 11:18:54

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1 something else in that pathway really the speci- -- 11:18:56
 2 the drawing, figure 2c, doesn't say anything about 11:19:00
 3 that. 11:19:03
 4 Q. And the seller now inputting 11:19:08
 5 information -- I asked you these questions about the 11:19:12
 6 media venue, but I want to make sure we've covered 11:19:14
 7 off on the seller, too. There's nothing in the 11:19:16
 8 Function Media patents that -- withdraw. 11:19:18
 9 The only way taught in the Function 11:19:20
 10 Media patents for the seller to input information to 11:19:22
 11 the seller interface is via keyboard or mouse or 11:19:24
 12 pointing device like that, right? 11:19:29
 13 MR. BRANDON: Objection, form. 11:19:30
 14 A. Figure 2c simply labels a block, 11:19:33
 15 No. 4320, as input devices, and those would be 11:19:38
 16 typical input devices for a computer system at this 11:19:41
 17 time frame. As to whether there's anything else 11:19:43
 18 disclosed in the specification of the Function Media 11:19:47
 19 patents as an input device, I just don't recall. 11:19:50
 20 Q. (BY MR. LUMISH) A person of ordinary 11:19:53
 21 skill in the art would understand those input 11:19:54
 22 devices in the Function Media patents to be 11:19:57
 23 hardware, wouldn't they? 11:20:00
 24 A. Yes. 11:20:01
 25 Q. There's no description in any Function 11:20:02

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1 Media patents of a seller inputting information 11:20:03
 2 through the interface without using hardware? 11:20:05
 3 A. That's a fact, and I don't recall 11:20:08
 4 whether there is such a description or not. 11:20:11
 5 Q. You can't point me, as you sit here, to 11:20:22
 6 any description in the Function Media patents of 11:20:24
 7 input by the seller without the use of hardware; I 11:20:28
 8 mean, in other words, where it teaches you a way to 11:20:34
 9 do it not using hardware? 11:20:36
 10 MR. BRANDON: Objection to form. 11:20:38
 11 A. I think that answer is encompassed in my 11:20:39
 12 previous answer to your previous question, but I'll 11:20:42
 13 give it to you again. I -- I can't tell you any 11:20:45
 14 place in the specification where such a disclosure 11:20:47
 15 is found. There may be one, but I just don't recall 11:20:51
 16 one to point you to. 11:20:55
 17 Q. (BY MR. LUMISH) I know you said you 11:21:05
 18 didn't do an invalidity analysis in this case, but 11:21:07
 19 in -- in your efforts to construe the claims, did 11:21:09
 20 you try to take into account anything that was 11:21:13
 21 either, in fact, different or stated to be different 11:21:17
 22 in the Function Media patents as compared to the 11:21:25
 23 prior art? 11:21:28
 24 MR. BRANDON: Objection to form. 11:21:29
 25 A. I told you that I did look at the file 11:21:30

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1 history, and I may have the name wrong, but I 11:21:34
 2 believe that for the 40 -- '045, one of the foci of 11:21:37
 3 the examiner's initial rejections of the claims was 11:21:46
 4 this patent that's shown on the face of the '045 11:21:52
 5 patent Manderberg, and I did look at the discussion 11:21:56
 6 that was made relative to that. I don't remember 11:22:02
 7 all the details, but I looked at -- at what the 11:22:08
 8 examiner had said and what was said in response. 11:22:10
 9 And, in fact, there may have been an amendment made 11:22:15
 10 or something. But absent re-looking at that part of 11:22:17
 11 the file history, I don't have a clear recollection 11:22:19
 12 of it today, but I did look at that. 11:22:22
 13 Q. (BY MR. LUMISH) Stepping out of the 11:22:24
 14 file history for a moment, just in your own 11:22:25
 15 experience -- withdraw and let me ask a foundational 11:22:28
 16 question. 11:22:30
 17 Other than in this lawsuit, have you 11:22:31
 18 any professional experience related to Internet 11:22:33
 19 advertising? 11:22:36
 20 A. I -- I would think the best answer to 11:22:43
 21 your question is no. Not -- not specifically with 11:22:44
 22 respect to the purpose of advertising on behalf of a 11:22:47
 23 seller who wishes to obtain interest from a buyer. 11:22:50
 24 Q. All right. You haven't designed or 11:22:56
 25 engineered or developed systems for media venues, 11:22:58

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1 sellers and buyers to coordinate with each other for 11:23:04
 2 Internet advertising? 11:23:07
 3 A. I have not for that particular task. 11:23:08
 4 Q. Had you for any reason studied that 11:23:12
 5 technology or business model prior to your work in 11:23:16
 6 this lawsuit? 11:23:20
 7 MR. BRANDON: Objection to form. 11:23:21
 8 A. I think I mentioned in my explanation of 11:23:24
 9 my prior experience to the general area of Internet 11:23:27
 10 that I have done over the last probably -- I guess 11:23:30
 11 it's been within the last eight to ten years, a 11:23:32
 12 couple of Internet sales-related patent cases. 11:23:36
 13 Q. (BY MR. LUMISH) Okay. 11:23:36
 14 A. Generally, I think one of them in 11:23:44
 15 particular dealt with automobile purchases. And 11:23:46
 16 I -- I think under the broad rubric of Internet 11:23:51
 17 advertising, the -- the studies that I did -- in 11:23:55
 18 fact, Yahoo! was one of the websites that I looked 11:23:59
 19 at in terms of trying to match a buyer with a dealer 11:24:03
 20 in his or her general geographic area based on the 11:24:08
 21 buyer's expressed interest in a particular type of 11:24:14
 22 car. And I -- I, in fact, got down and dirty with 11:24:17
 23 the software that was necessary -- or that was used 11:24:23
 24 to provide that information to the buyer. 11:24:25
 25 There's another one, I think -- I 11:24:31

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1 would have to look at what I said in my -- in my 11:24:32
 2 declaration, but I -- I think that has some 11:24:34
 3 similarity to the general idea of matching buyers 11:24:41
 4 and sellers in a situation where I guess in a sense 11:24:46
 5 Yahoo! would be considered, if you want to try to 11:24:51
 6 use the vocabulary of these claims, the media 11:24:54
 7 themselves, because the information that I saw was 11:24:58
 8 typically in a Yahoo! screen or subscreen or 11:25:01
 9 something. 11:25:04
 10 Q. (BY MR. LUMISH) What was the name of 11:25:05
 11 that case? 11:25:06
 12 A. AutoBytel is one word. A-u-t-o, I 11:25:06
 13 think, capital B-y-t-e-l versus Dealix, D-e-a-l-i-x. 11:25:12
 14 Q. And for which side's attorneys were you 11:25:19
 15 working? 11:25:23
 16 A. I worked -- I? I don't know whether I 11:25:24
 17 worked for the attorneys or whether I worked for 11:25:26
 18 AutoBytel themselves. But they were the 11:25:29
 19 plaintiffs -- I think they were the defendant -- I 11:25:40
 20 think they were the plaintiffs asserting a lawsuit 11:25:46
 21 against Dealix, but I may have that exactly 11:25:49
 22 backwards. It's been a number of years. And it 11:25:52
 23 settled on the eve of going to trial, so we never 11:25:54
 24 actually had trial testimony. 11:25:57
 25 Q. What year was it? 11:25:58

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1 A. If it's -- 11:25:58
 2 Q. Or what years? 11:25:59
 3 A. If it's not in this list at the 11:26:00
 4 end of -- well, you -- I don't have the appendix, 11:26:04
 5 but it's not -- 11:26:06
 6 Q. Let me give you that. 11:26:07
 7 A. Okay. 11:26:09
 8 Q. Would it be on Exhibit A of your CV, 11:26:32
 9 sir? 11:26:35
 10 A. My answer was if -- if it's not, it's 11:26:35
 11 more than four years ago. But it's easy enough to 11:26:37
 12 look at that. 11:26:41
 13 MR. LUMISH: Let me mark that as 11:26:42
 14 Exhibit 85, please. 11:26:45
 15 (Deposition Exhibit No. 85 Marked.) 11:26:45
 16 Q. (BY MR. LUMISH) Let me hand you what's 11:26:59
 17 now marked as Exhibit 85, which was Exhibit A to 11:27:00
 18 your report. If you could just confirm that for me, 11:27:03
 19 please, if you recognize it as Exhibit A from your 11:27:06
 20 report in this case. 11:27:09
 21 A. It appears to be. 11:27:13
 22 Q. And is this an accurate resume or CV, as 11:27:14
 23 we call it? 11:27:18
 24 A. Well, sorry. It is as of the time I 11:27:21
 25 filed it as an appendix to my declaration. 11:27:26

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1 Q. Did you create Exhibit A or -- I'm 11:27:30
 2 sorry, Exhibit 85, purposely with this case in mind? 11:27:33
 3 A. No. This is what I consider my 11:27:37
 4 short-form resume. In fact, since it lists all my 11:27:39
 5 publications, it's pretty much my long-form resume 11:27:42
 6 that I just keep my -- for myself. 11:27:46
 7 Q. Did you change Exhibit 85, your resume, 11:27:48
 8 in any way from what it was to what we see here 11:27:52
 9 in -- in the exhibit when you submitted it with your 11:27:56
 10 expert report? 11:27:58
 11 A. Other than trying to update as best I 11:27:58
 12 could the list of cases on pages 47 and 48, no. 11:28:02
 13 Q. All right. 11:28:06
 14 A. I think somewhere in here I moved, and 11:28:07
 15 it may be that I had to correct my mailing address 11:28:10
 16 and ZIP code. But, in fact, I think the ZIP code 11:28:13
 17 shown on here is wrong. Where it shows on the first 11:28:18
 18 page 78746, that should be 59, in case you may owe 11:28:21
 19 me anything, Mr. Lumish. But -- and the extent -- 11:28:27
 20 it should say 78759. Do you mind if I correct the 11:28:31
 21 exhibit? Do you mind if I hand correct the exhibit 11:28:35
 22 or this is -- 11:28:39
 23 Q. I don't think it's necessary. If you 11:28:39
 24 want to just say on the record what you think is -- 11:28:41
 25 A. 78759-6828, but it does have the correct 11:28:43

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1 phone number. So I probably need to go on my 11:28:47
 2 computer and fix this. But I did attempt as best I 11:28:49
 3 can to update the list of cases, although there may 11:28:52
 4 be some other cases that have taken place since the 11:28:59
 5 date of this filing where I have either been deposed 11:29:04
 6 or testified at trial or something. 11:29:07
 7 Q. The AutoBytel case as shown on page 46, 11:29:09
 8 six from the bottom. Do you see that? 11:29:13
 9 A. Yes. 11:29:15
 10 Q. And it says, "testimony deposition." Do 11:29:15
 11 you see that? 11:29:17
 12 A. Yes. 11:29:18
 13 Q. So you issued a report in this case and 11:29:19
 14 were deposed on that report; is that true? 11:29:21
 15 A. By this case, you mean AutoBytel? 11:29:24
 16 Q. Yes, sir. 11:29:26
 17 A. I did. 11:29:27
 18 Q. Was there more than one report that you 11:29:27
 19 issued in that case? 11:29:29
 20 A. I don't remember. 11:29:30
 21 Q. Do you remember how many times you were 11:29:31
 22 deposed? 11:29:32
 23 A. Once. 11:29:33
 24 Q. And did you keep copies of the 11:29:33
 25 reports -- report or reports or the deposition 11:29:36

1 transcript from that case? 11:29:38
 2 A. I'm certain I don't have the deposition 11:29:39
 3 transcript. If the reports -- I think that -- I 11:29:41
 4 don't know whether I have a copy maybe on a backup 11:29:52
 5 disk or something somewhere, but I'm -- I'm fairly 11:29:54
 6 certain that what I did was confidential to either 11:29:58
 7 one or both parties. I -- I don't know how to 11:30:03
 8 answer that. I didn't intentionally keep a report. 11:30:07
 9 I don't have a hard copy. The only possibility I 11:30:10
 10 might have would be I do a periodic backup, and 11:30:13
 11 there may be one there. But I'm -- to the best of 11:30:17
 12 my recollection, whatever I did would have been 11:30:22
 13 confidential. And if you wish to obtain it, you'd 11:30:25
 14 probably have to deal with the attorneys to try to 11:30:27
 15 break that confidentiality. 11:30:29
 16 Q. Can you recall what -- now seeing it in 11:30:31
 17 print, which side you were on? 11:30:33
 18 A. Not any better than I could earlier. 11:30:36
 19 I -- I apologize. I just -- since it didn't go to 11:30:37
 20 trial -- let me just think about that. I -- I'm 11:30:41
 21 pretty certain that I represented AutoBytel, and 11:30:50
 22 they were the plaintiff. 11:30:53
 23 Q. Do you recall what law firm was -- you 11:30:54
 24 were working with on that matter? 11:30:57
 25 A. Is it Paul Hastings? Is that a name of 11:31:00

1 a firm? 11:31:04
 2 Q. It is. 11:31:04
 3 A. Yes. 11:31:05
 4 Q. So you believe that's the firm you were 11:31:06
 5 working with on the AutoBytel matter? 11:31:07
 6 A. Yes. 11:31:09
 7 Q. Do you remember any specific attorneys? 11:31:09
 8 A. No, I don't. I can picture their faces, 11:31:17
 9 but I can't tell you their names. And I'll be 11:31:20
 10 helpful enough to tell you it was out of their San 11:31:23
 11 Diego office, if that helps you. I'm pretty sure 11:31:23
 12 that the gentleman I worked with is no longer with 11:31:29
 13 them. There was a female associate, and I just 11:31:30
 14 can't remember her name. 11:31:37
 15 Q. You don't remember his name either? 11:31:38
 16 A. Doug something or other is about as best 11:31:40
 17 I can give you. 11:31:43
 18 Q. Does the name John Benassi ring a bell 11:31:44
 19 to you? 11:31:48
 20 A. No. Wait. 11:31:49
 21 Q. Wait and see if my colleague gives me 11:31:53
 22 anything here. 11:31:56
 23 A. You're getting help here. I'll wait. 11:31:57
 24 Q. Doug Olsen? 11:31:58
 25 A. Yes. Yeah. I did not work directly 11:31:59

1 with him. He was the -- sort of the senior 11:32:01
 2 litigation rainmaker kind of a guy. And I apologize 11:32:04
 3 for not being able to remember the young lady's 11:32:11
 4 name. She was really a lot of fun to work with. 11:32:13
 5 Q. Vicki Norton? 11:32:16
 6 A. No. 11:32:18
 7 Q. We're out of guesses. 11:32:18
 8 Going back to the origin of those 11:32:24
 9 questions, in the '99-2000 time frame -- let's -- 11:32:26
 10 let's say 2000, just start over. 11:32:31
 11 In the 2000 time frame, you weren't 11:32:33
 12 an expert in Internet advertising; is that fair? 11:32:35
 13 A. I would not have been the right person 11:32:37
 14 to have hired to serve in that particular -- in the 11:32:39
 15 advertising aspects of that. I'm a well-qualified 11:32:45
 16 person to deal with the Internet aspects of it and 11:32:48
 17 the hardware and software of implementing a system, 11:32:53
 18 but I would not offer myself up as an expert in the 11:32:56
 19 art of advertising. 11:33:00
 20 Q. And you hadn't worked with Internet 11:33:03
 21 advertising companies before this case to understand 11:33:05
 22 the general relationships between sellers, 11:33:10
 23 publishers -- let's -- let's call them advertisers, 11:33:15
 24 publishers, and buyers? 11:33:19
 25 A. Again, I'm not trying to make what I did 11:33:22

1 in the AutoBytel case, you know, bigger than it 11:33:24
 2 really is. It is what it is. But part of what we 11:33:27
 3 did was to study the way in which a car dealer 11:33:29
 4 associated himself or herself with a website such as 11:33:35
 5 Yahoo!. I can't remember whether it's Yahoo!/cars 11:33:40
 6 and there are others like cars.com, maybe 11:33:47
 7 bluebook.com, and there's some other big name in 11:33:57
 8 that area that starts with an E. That's about the 11:33:59
 9 best I can remember. And we did study the way in 11:34:02
 10 which a perspective buyer would be linked from a 11:34:04
 11 website, such as the one you get at Yahoo!'s 11:34:10
 12 automobile site to a car dealership. And -- and 11:34:13
 13 I -- from the time I began to understand what the 11:34:19
 14 Function Media patents dealt with, there are some 11:34:22
 15 similarities there. And we did look at both the 11:34:25
 16 business associations inherent in that three-way 11:34:31
 17 play and who paid for what and how it was 11:34:35
 18 implemented technically. So a little bit. Not in 11:34:41
 19 the broad sense that the Function Media patents deal 11:34:45
 20 with, but in that specific instance of car 11:34:48
 21 purchasers -- purchasers and car dealers being 11:34:54
 22 linked through an intermediary website. 11:34:56
 23 Q. That case, though, was within the last 11:35:01
 24 four years -- your testimony in that case was in the 11:35:03
 25 last four years? 11:35:06

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1 A. It's my practice to -- to only list 11:35:06
 2 cases within the last four years. And since it's on 11:35:08
 3 page 47, unless I'm in error, it has been within the 11:35:11
 4 last four years. 11:35:15
 5 Q. Just tell you my -- my read of the case 11:35:16
 6 number is that it was a case that wasn't even filed 11:35:18
 7 until 2004. Says 2:04. 11:35:21
 8 A. Okay. I -- I think that's probably 11:35:25
 9 correct. It's before Judge Davis sitting in 11:35:27
 10 Marshall. 11:35:33
 11 Q. Before that case, though, you -- you 11:35:44
 12 hadn't worked or weren't familiar with the ways in 11:35:47
 13 which advertisers, publishers and any other Internet 11:35:51
 14 companies would work together to provide advertising 11:35:57
 15 to people browsing the Internet? 11:36:00
 16 MR. BRANDON: Objection to form. 11:36:05
 17 A. As a buyer, I had a lot of experience 11:36:05
 18 with using the Internet to buy stuff, and I had seen 11:36:10
 19 and been interested in and -- I -- I actually 11:36:14
 20 remember discussing with one of the Internet experts 11:36:18
 21 at MCC, where I had worked, when I began to see what 11:36:25
 22 I called rotating advertisements on websites. And I 11:36:25
 23 knew a little bit about it, but I had not done any 11:36:30
 24 in-depth study of that field. 11:36:32
 25 Q. (BY MR. LUMISH) So let me ask it 11:36:34

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1 differently. 11:36:36
 2 In the 2000 time frame, then, when 11:36:36
 3 the patent was filed but before your work on 11:36:38
 4 AutoBytel, you weren't an expert in the way in which 11:36:41
 5 advertisers and sellers would work together to 11:36:46
 6 provide advertisements to people browsing on the 11:36:48
 7 Internet? 11:36:52
 8 MR. BRANDON: Objection, form. 11:36:53
 9 A. I'm not going to answer that question no 11:36:54
 10 as you might have expected me to, because you said 11:36:57
 11 "the way in which," and that way includes a whole 11:36:59
 12 lot of technology that I am and was then an expert 11:37:02
 13 in. On the technical side of that way, I -- I was 11:37:06
 14 very comfortable with that. 11:37:10
 15 Q. (BY MR. LUMISH) But on the business 11:37:11
 16 model side as far as what the relationships were 11:37:12
 17 among those people and what the typical steps were 11:37:15
 18 in providing that advertisements -- those -- those 11:37:19
 19 types of advertisements, you weren't an expert in 11:37:21
 20 that in 2000? 11:37:24
 21 MR. BRANDON: Objection, form. 11:37:25
 22 A. I knew something about it. There's a 11:37:25
 23 term I think that people use called an eyeball, and 11:37:27
 24 I understood a little bit about how people were 11:37:30
 25 putting up websites and making revenue from them, 11:37:32

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1 but I would not have agreed to take on a case where 11:37:36
 2 my -- what the attorneys needed was expertise in the 11:37:38
 3 advertising business process. 11:37:41
 4 Q. (BY MR. LUMISH) Let's look at claim 1 11:37:50
 5 of the '045 patent, please. 11:37:59
 6 A. Okay. By the way, just for your record, 11:38:01
 7 I mentioned that in paragraph -- that case, that 11:38:07
 8 AutoBytel case. That's the case where I said 11:38:09
 9 including a case dealing with Internet-based support 11:38:13
 10 for car purchasers, that was the case that I'm 11:38:16
 11 referring to in paragraph 7. 11:38:19
 12 Q. And you're pointing at paragraph 7 of 11:38:20
 13 your report, Exhibit 84? 11:38:24
 14 A. 84, yes. 11:38:25
 15 All right. '045, claim 1. 11:38:28
 16 Q. Yes, please. 11:38:31
 17 A. I have that. 11:38:32
 18 Q. I just want to read a preamble for a 11:38:33
 19 moment. It says, quote, "A method of using a 11:38:34
 20 network of computers to contract for, facilitate, 11:38:36
 21 and control the creating and publishing of 11:38:40
 22 presentations by a seller to a plurality of media 11:38:43
 23 venues owned or controlled by other than the 11:38:47
 24 seller," closed quote. 11:38:51
 25 First of all, this is directed to a 11:38:52

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1 method of using a network of computers, right? 11:38:54
 2 A. Yes. 11:38:57
 3 Q. And the network of computers is 11:38:58
 4 hardware? 11:39:00
 5 A. In part. 11:39:00
 6 Q. And then it says that the method is, in 11:39:01
 7 part, anyway, the publishing of presentations by a 11:39:06
 8 seller to a plurality of media venues. You 11:39:10
 9 understand that language to be saying that 11:39:13
 10 presentations are published to media venues? 11:39:18
 11 MR. BRANDON: Objection to form. 11:39:23
 12 A. As you asked your question very 11:39:27
 13 precisely, I can agree with that. It says 11:39:30
 14 "publishing" -- "creating and publishing of 11:39:33
 15 presentations to a plurality of media venues." 11:39:35
 16 Q. (BY MR. LUMISH) And then step E of the 11:39:37
 17 claim, which is at column 64 beginning at line 5 -- 11:39:39
 18 well, withdraw it. 11:39:48
 19 I think we're going to have a fight 11:39:49
 20 over that question. So let me -- let me start you 11:39:51
 21 at line 6 -- 11:39:53
 22 A. We're not going to have -- 11:39:53
 23 Q. -- language that says "whereby." 11:39:54
 24 A. We're not going to have a fight. 11:39:56
 25 Q. Well, we will later, but in a 11:39:58

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1 gentlemanly way. 11:40:00
 2 A. Well, I outweigh you by probably a 11:40:01
 3 hundred pounds. 11:40:03
 4 Q. I don't want to tangle with you. All 11:40:04
 5 right. Let's go to 64, line 6. 11:40:06
 6 A. Okay. 11:40:08
 7 Q. It says, quote, "Whereby the seller may 11:40:09
 8 select one or more of the media venues, create a 11:40:11
 9 presentation that complies with said guidelines of 11:40:15
 10 the media venues selected, and transmit the 11:40:18
 11 presentation to the selected media venues for 11:40:21
 12 publication," closed quote. 11:40:24
 13 A. Yes. 11:40:26
 14 Q. I really just want to ask about the last 11:40:27
 15 phrase. I want to focus on the last phrase. Do you 11:40:29
 16 agree with me that in this portion of the claim, 11:40:32
 17 it's describing the presentations being transmitted 11:40:34
 18 to the media venues? 11:40:37
 19 A. Yes. 11:40:52
 20 Q. Let's go to the '025 patent and look at 11:40:55
 21 the same type of claim language, please. Go to 11:40:58
 22 claim 1's preamble. 11:41:01
 23 A. Okay. 11:41:10
 24 Q. And, again, this preamble -- read it for 11:41:11
 25 whatever context you'd like, please -- is saying 11:41:13

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1 that the advertisements now, instead of 11:41:16
 2 presentations -- the advertisements are being 11:41:18
 3 published to Internet media venues. Do you agree 11:41:20
 4 with that? 11:41:23
 5 MR. BRANDON: Objection to form. 11:41:23
 6 A. I need to have that question reread. I 11:41:35
 7 was expecting you to ask something, and I -- I think 11:41:37
 8 you asked something different. So you can either 11:41:39
 9 re-ask or -- 11:41:41
 10 Q. (BY MR. LUMISH) I'll just re-ask it. 11:41:41
 11 I'm just asking, sir, if you agree 11:41:41
 12 that the preamble of claim 1 of the '025 patent is 11:41:43
 13 describing the advertisements as being published to 11:41:46
 14 Internet media venues. 11:41:49
 15 A. Yes. 11:41:52
 16 Q. And then the third limitation of the 11:41:53
 17 claim, which is the second interface, read that 11:41:55
 18 again for your -- whatever context you'd like. But 11:42:03
 19 my question is whether you agree with -- that that 11:42:05
 20 says that the advertisements are, quote, "for 11:42:07
 21 publication to the selected Internet media venues," 11:42:13
 22 meaning that it will be published to the Internet 11:42:16
 23 media venues. 11:42:19
 24 A. I believe that's what the language says. 11:42:22
 25 Q. And then the fifth limitation to the 11:42:24

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1 last one there, the computer controller limitation, 11:42:26
 2 also says in the beginning in the second line, 11:42:31
 3 quote, "Publishing the electronic advertisement to 11:42:34
 4 one or more of the selected Internet media venues." 11:42:37
 5 You agree that that means what it says, that the 11:42:39
 6 advertisements are published to the Internet media 11:42:42
 7 venues? 11:42:45
 8 A. I agree that it means what it says, and 11:42:45
 9 that's what it says. 11:42:47
 10 Q. And claim 179 has the same requirements 11:42:48
 11 in method form. Do you agree with that generally, 11:42:51
 12 or do we need to go through those one by one? 11:42:53
 13 (Witness Reviews Document.) 11:43:09
 14 MR. BRANDON: What's the question 11:43:11
 15 again, please? 11:43:12
 16 MR. LUMISH: Just whether the same 11:43:13
 17 requirements read the same way are in claim 179. 11:43:14
 18 MR. BRANDON: Are you talking about 11:43:17
 19 publishing? 11:43:18
 20 MR. LUMISH: The same -- yeah, the 11:43:21
 21 preamble has the same -- 11:43:23
 22 A. I can answer your question a little more 11:43:25
 23 specifically. I remember your -- what you asked me. 11:43:27
 24 I agree that claim 179 has language that refers to 11:43:29
 25 publishing customized electronic advertisements to 11:43:33

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1 Internet menu venues -- media venues, that the 11:43:37
 2 fourth limitation prompting the seller refers to 11:43:49
 3 creating an electrical -- an electronic 11:43:54
 4 advertisement for publication to the selected 11:43:57
 5 Internet media venues, and that the last limitation 11:43:59
 6 also has language which refers to publishing the 11:44:02
 7 electronic advertisement to one or more of the 11:44:17
 8 selected Internet media venues. 11:44:20
 9 Q. (BY MR. LUMISH) And claims 1 and 179 of 11:44:23
 10 the '025 patent towards their very end there also 11:44:26
 11 describe the advertisements as being displayed on 11:44:32
 12 Internet media venues. Do you agree with that? 11:44:38
 13 A. It's part of the whereby clause. But, 11:44:44
 14 yes, I agree with -- I agree with that for 179. Let 11:44:48
 15 me quickly look back at claim 1. 11:44:51
 16 Q. Well, I don't think claim 1 has it. But 11:44:53
 17 please do go back to it. I think I -- I don't know 11:44:56
 18 if I asked you this, but it does describe at the end 11:44:59
 19 of that claim transmitting the presentation to the 11:45:01
 20 media venues. 11:45:03
 21 A. I'm confused. 11:45:04
 22 MR. BRANDON: As am I. 11:45:05
 23 Q. (BY MR. LUMISH) You're going back to 11:45:07
 24 claim 1 of the '045? 11:45:08
 25 A. No, claim 1 of the 65 -- of the '0 -- 11:45:09

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1 '025. 11:45:12

2 Q. I was the one who was confused. I 11:45:13

3 thought you were switching patents on me. 11:45:15

4 A. No. I was answering you in the context 11:45:17

5 of these two somewhat parallel claims. 11:45:19

6 Q. My fault. So let me ask that question 11:45:21

7 again to make sure we're very clear on the report. 11:45:24

8 That claim 1 and 179 of the '025 patent, both 11:45:27

9 require at the end of those claims displaying the 11:45:30

10 advertisements on Internet media venues? 11:45:32

11 A. That -- that statement is made in the 11:45:40

12 "whereby clause." Okay. And I tend to interpret 11:45:42

13 "whereby clauses" a little differently. But there's 11:45:48

14 no question but which both -- both claims say 11:45:51

15 "whereby the electronic advertisement is displayed 11:45:55

16 on the menus," they both have that language. 11:45:59

17 Q. And the language means what it says, 11:46:05

18 that the advertisements are, in fact, displayed on 11:46:08

19 the Internet media venues, right? 11:46:10

20 A. It means that as a result of doing all 11:46:12

21 those steps, the advertisement -- and here I 11:46:14

22 think -- I'll -- I'll wait to see what Judge 11:46:19

23 Everingham may or may not do with any of this claim 11:46:21

24 language or I probably need to talk to some lawyers 11:46:24

25 some more, if whether the end result of performing 11:46:26

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1 all the steps and having that whereby clause 11:46:30

2 requires that in order to infringe the claim you 11:46:34

3 must display it. The customized electronic 11:46:35

4 advertisement is something -- again, I -- I have 11:46:41

5 been involved in situations where whereby clauses 11:46:46

6 were given a little different view from what an 11:46:48

7 ordinary nonwhereby-type limitation of a claim was 11:46:52

8 interpreted. And I -- I -- that's probably more of 11:46:56

9 a legal or wherever the current state of the law is 11:47:01

10 as to whether that claim actually requires to be 11:47:05

11 infringed, the display of whether it's something 11:47:09

12 that as a result of performing the other steps, it 11:47:12

13 can be displayed. And I just haven't worked that -- 11:47:15

14 I didn't understand it to be in -- in dispute 11:47:20

15 between the parties at this point. 11:47:25

16 Q. So did you read claims 1 and 179 to 11:47:27

17 require the display or just to maybe require or 11:47:30

18 maybe allow for the display? Did you read it in 11:47:35

19 some way different from is displayed? 11:47:38

20 MR. BRANDON: Objection, form. 11:47:41

21 A. I'm not going to offer you an opinion 11:47:47

22 either way today. I can understand that if the 11:47:49

23 whereby clause is treated as being an absolute 11:47:52

24 requirement that you must display it, that -- that 11:47:55

25 certainly could be one way of interpreting that 11:47:58

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1 whereby clause. I'm just not -- I haven't 11:48:01

2 researched it from a claim construction point of 11:48:05

3 view. It wasn't something that's addressed in my 11:48:10

4 report. 11:48:12

5 Q. (BY MR. LUMISH) So you haven't reached 11:48:12

6 an opinion on that question yet? 11:48:13

7 A. Yeah. And my problem there is more of a 11:48:14

8 legal problem. And I'm -- I'm not sure but 11:48:17

9 what there's some case law somewhere that I've seen 11:48:20

10 over the years. I'm not sure it's currently 11:48:22

11 relevant that implied that a whereby clause is not 11:48:25

12 as concrete in its requirement as a regular claim 11:48:27

13 limitation that says you -- you know, you must do 11:48:31

14 this. I'm not trying to weasel out. I just -- 11:48:34

15 Mr. Lumish, I just don't -- I don't have an opinion 11:48:37

16 at the present time. 11:48:40

17 Q. All right. So then let's focus on the 11:48:41

18 language in the claims that says publishing or 11:48:43

19 transmitting to the Internet media venues. 11:48:46

20 A. Uh-huh. 11:48:46

21 Q. And I want to look at the specification 11:48:47

22 and talk about how that claim language is, sir. It 11:48:49

23 isn't shown in the specification? 11:48:53

24 A. Okay. As long as you recognized it, to 11:48:55

25 the best of my knowledge, the -- the publishing may 11:48:56

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1 be one of the terms that's in dispute between the 11:48:59

2 parties as to how it should be construed. I think 11:49:02

3 that's true. But I'm -- I'm happy to look with you 11:49:05

4 at the specification to see what it says. 11:49:07

5 Q. All right. Would you -- 11:49:09

6 MR. BRANDON: And objection to the 11:49:09

7 form to the previous question. 11:49:11

8 Q. (BY MR. LUMISH) Would you please find 11:49:12

9 column 43, line 53 and forward on the -- in the '045 11:49:14

10 patent. 11:49:18

11 A. Excuse me, 53? 11:49:21

12 Q. Column 43 -- 11:49:23

13 A. Oh, I'm sorry. 11:49:23

14 Q. -- starting at line 53. I'll read it 11:49:24

15 into the record. 11:49:26

16 A. I missed -- 11:49:26

17 Q. Through line 56. I just want to make 11:49:27

18 sure you're there. 11:49:29

19 A. I'm there. 11:49:29

20 Q. And, again, as always, please read 11:49:30

21 whatever else you'd like for context. But this 11:49:33

22 portion of the patent reads, quote, "The 11:49:35

23 presentations are then separated by their 11:49:38

24 publication destination; resident or nonresident. 11:49:40

25 The presentations destined for nonresident 11:49:44

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1 publication are formatted into media transaction 11:49:47
 2 messages and sent to the appropriate Media Interface 11:49:50
 3 6000 for processing and ultimate publication," 11:49:53
 4 closed quote. 11:49:57
 5 You've read this sentence before, 11:49:58
 6 right? 11:50:01
 7 A. I'm -- I'm sorry, you mean -- 11:50:03
 8 Q. You've read this part of the patent 11:50:05
 9 before? 11:50:07
 10 A. I thought you meant had I read the 11:50:07
 11 preceding sentence. No, I've read that part before. 11:50:09
 12 Q. You understand that this is describing 11:50:12
 13 after the presentations have been generated by the 11:50:13
 14 Presentation Generation Program, they are sent to 11:50:19
 15 the media interfaces. 11:50:20
 16 MR. BRANDON: Object to form. 11:50:24
 17 A. If they're destined for nonresident 11:50:30
 18 publication. 11:50:32
 19 Q. (BY MR. LUMISH) And nonresident 11:50:36
 20 means -- well, let's look at the glossary, but 11:50:40
 21 nonresident means in this patent not owned or 11:50:43
 22 controlled -- I'm paraphrasing here -- by the 11:50:49
 23 management operators or affiliates of the invention. 11:50:51
 24 Wholly owned it should -- it should read. 11:50:58
 25 A. Again, that may be -- some aspect of 11:51:02

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1 that may be in contention between the parties or 11:51:05
 2 between me and your expert, Mr. Kinkaid. But that's 11:51:07
 3 certainly what I think the definition that's -- 11:51:10
 4 there at the top of column 11 says. 11:51:13
 5 Q. But at least in this example that we 11:51:15
 6 looked at in column 43, lines 53 to 56, that type of 11:51:18
 7 presentation is being sent to the media interface, 11:51:21
 8 right? That's what's described there? 11:51:24
 9 A. Yes. And according -- again, I think 11:51:28
 10 this is with respect to a preferred embodiment, but 11:51:31
 11 that's -- that's what the -- that portion of the 11:51:34
 12 function -- the specification of the '045 patent 11:51:36
 13 says. 11:51:40
 14 Q. And let's go back to the example, 11:51:41
 15 please, towards the back of -- well, towards the 11:51:43
 16 latter half -- 11:51:45
 17 A. I have it. 11:51:47
 18 Q. -- part of the patent, column 54. 11:51:48
 19 A. Okay. 11:51:50
 20 Q. Lines 56 and 57 are -- or really, the 11:51:50
 21 paragraph 14 there, beginning at line 56 says, 11:51:55
 22 quote, "Once the ads and presentations are received 11:51:58
 23 by the Media, any changes or updating are either 11:52:01
 24 allowed or denied by the Seller Interface based on 11:52:05
 25 the restrictions entered by the Media during their 11:52:09

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1 setup." And I left out some of the reference 11:52:09
 2 numerals. Do you see that? 11:52:13
 3 A. I do. Let me just -- let me kind of 11:52:14
 4 just digest that again. 11:52:16
 5 (Witness Reviews Document.) 11:52:37
 6 A. Okay. 11:52:38
 7 Q. (BY MR. LUMISH) I've really focused on 11:52:38
 8 the language here "received by the Media." You'll 11:52:40
 9 agree with me that this portion of the patent is 11:52:42
 10 describing the ads or presentations as being sent to 11:52:45
 11 or transmitted to and so received by the media, 11:52:48
 12 specifically. 11:52:52
 13 A. I do. 11:52:53
 14 Q. And then if you go to column 56, still 11:52:55
 15 in the example here, paragraph 17 in describing the 11:52:58
 16 seller participation -- so on lines 13 through 15, 11:53:06
 17 reads, quote, "The ABC Central Controller and 11:53:12
 18 Presentation Processor 1000 then transmits the 11:53:16
 19 appropriate formatted presentations to each media 11:53:20
 20 that was selected by XYZ," closed quote. 11:53:23
 21 This is another example where the 11:53:27
 22 specification's explicitly describing the 11:53:29
 23 transmission of the advertisement to the media 11:53:33
 24 specifically? 11:53:35
 25 A. Yes. 11:53:36

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1 Q. Would you agree with me, sir -- so 11:53:41
 2 switching away from that, let me change gears, but 11:53:44
 3 in the same vein. 11:53:47
 4 Would you agree with me, sir, that 11:53:48
 5 the claims never say anywhere that the 11:53:49
 6 advertisements are published or displayed -- 11:53:51
 7 withdraw. Let me start over. 11:53:53
 8 Would you agree with me that the 11:53:54
 9 claims of the Function Media patents never say that 11:53:56
 10 the advertisements or presentations are published or 11:53:58
 11 transmitted to the buyer or the buyer interface? 11:54:02
 12 MR. BRANDON: Objection to form. 11:54:08
 13 A. I -- I don't know. Okay. There may be 11:54:10
 14 a claim that says that, and we'd -- we'd have to 11:54:13
 15 look at all of the asserted claims, if that's the 11:54:15
 16 only set you want me to look at. 11:54:18
 17 Q. (BY MR. LUMISH) How about claim 1 -- 11:54:22
 18 feel free to go back through them -- claim 1 of the 11:54:23
 19 '025 patent or claims 1 or 179 of the '045 patents, 11:54:27
 20 those don't describe transmitting or publishing the 11:54:30
 21 advertisements to the buyer or the buyer interface? 11:54:35
 22 MR. BRANDON: Objection to form. 11:54:39
 23 A. They don't specifically include those 11:54:50
 24 words, but I -- I think that depends on what the 11:54:52
 25 court ultimately decides the appropriate 11:54:55

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1 construction of media venues is. 11:54:57
 2 Q. (BY MR. LUMISH) Those claims never 11:54:59
 3 mentioned buyer at all, right? 11:55:00
 4 A. The claim 1 of the '045 does not. 11:55:02
 5 MR. BRANDON: Object to form on the 11:55:10
 6 previous question. 11:55:11
 7 A. Let me -- let me reread that. 11:55:14
 8 Q. (BY MR. LUMISH) Take your time. 11:55:18
 9 A. I'll -- I'll stand by my previous answer 11:55:31
 10 regarding claim 1 of the '045. 11:55:34
 11 Q. Previous answer being it doesn't use 11:55:37
 12 those words -- doesn't reference the buyer? 11:55:39
 13 A. I can't find the word "buyer" anywhere 11:55:41
 14 in that claim. I can't find the word "buyer" in 11:55:43
 15 claim 1 of the '025, nor can I find the word "buyer" 11:56:00
 16 in the language of claim 179 of the '025 patent. 11:56:22
 17 Q. If you go to the '045 patent and look at 11:56:30
 18 claim 7 -- well, let's look at claim 13. It says, 11:56:35
 19 quote, "The method of claim 1 further providing 11:56:45
 20 means with instructions for a buyer to select and 11:56:48
 21 purchase offers of sellers," closed quote. You see 11:56:51
 22 that? 11:56:55
 23 A. Yes. 11:56:55
 24 Q. So this claim does refer explicitly to a 11:56:56
 25 buyer? 11:56:58

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1 A. Claim 13 does reference a buyer. 11:56:59
 2 Q. There's nowhere in the specification of 11:57:08
 3 the Function Media patents where there's a 11:57:11
 4 description of publishing or transmitting the 11:57:14
 5 advertisements or presentations to the buyer or the 11:57:18
 6 buyer interface, as opposed to the media venue or 11:57:22
 7 media venue interface; is that true? 11:57:26
 8 MR. BRANDON: Objection, form. 11:57:27
 9 A. I -- I can't confirm or deny that. I 11:57:28
 10 don't -- I don't know. 11:57:32
 11 Q. (BY MR. LUMISH) You didn't identify 11:57:32
 12 anywhere in your report where there's a description 11:57:34
 13 in the Function Media patents of transmitting or 11:57:36
 14 publishing the advertisements or presentations to 11:57:38
 15 the buyer or the buyer interface, as opposed to -- 11:57:41
 16 to the media venue or its interface? 11:57:44
 17 A. I think that's outside the scope of the 11:57:47
 18 report, which was to provide my opinions as to the 11:57:49
 19 appropriate constructions of the disputed terms. 11:57:52
 20 And unless I'm wrong, I don't recall there being a 11:57:56
 21 disputed term that would have elicited an opinion on 11:57:59
 22 that topic. 11:58:03
 23 Q. Will you look at figure 4f for me, 11:58:04
 24 please, in the '045 patent. 11:58:06
 25 A. 4f, like fox? 11:58:08

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1 Q. Yes, sir. 11:58:10
 2 A. I have it. 11:58:10
 3 Q. You see there's a buyer figure shown at 11:58:11
 4 the bottom there as a person, kind of a stick figure 11:58:14
 5 almost? 11:58:18
 6 A. Yes. 11:58:18
 7 Q. There's three of them interlaced or 11:58:19
 8 overlaid with each other? 11:58:22
 9 A. There are. 11:58:23
 10 Q. And this process -- and please read 11:58:24
 11 whatever you'd like, but really starting at the 11:58:26
 12 upper right corner, 11350, it's describing -- well, 11:58:28
 13 withdraw. Let me start with that one. 11:58:33
 14 Reference No. 11350 describes the 11:58:34
 15 Central Controller and Presentation Processor as 11:58:38
 16 sending the Transaction Message to the Media 11:58:40
 17 Interface for publication. Do you see that? 11:58:44
 18 A. I do. 11:58:46
 19 Q. The Transaction Message includes the 11:58:47
 20 advertisement; do you agree with that? That's 11:58:51
 21 what's being published? 11:58:55
 22 MR. BRANDON: Objection, form. 11:58:56
 23 A. They refer to it as the -- as the 11:59:08
 24 presentation, but I believe that that is the -- what 11:59:10
 25 is being published. And it -- it has advertising 11:59:17

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1 content of the seller. 11:59:20
 2 Q. (BY MR. LUMISH) 11352 on figure 4f 11:59:24
 3 shows the Media Interface receiving the Transaction 11:59:27
 4 Message, correct? 11:59:30
 5 A. The Media Interface, capital M, 11:59:34
 6 capital I, No. 6000, that's what's identified there. 11:59:38
 7 Q. That thing receives the Publication 11:59:41
 8 Transaction Message, right? 11:59:43
 9 A. Yes. 11:59:44
 10 Q. And then it uses its Transaction 11:59:45
 11 Processing Program to process that transaction? Do 11:59:48
 12 you see that in 11353? 11:59:51
 13 A. Yes. 11:59:53
 14 Q. And following the rest of the flow, the 11:59:54
 15 Media Interface then presents through that 11:59:57
 16 Transaction Processing Program the advertisement or 12:00:02
 17 presentation to the potential buyers, 11358. Is 12:00:05
 18 that a correct way to read this diagram, 4f? 12:00:10
 19 A. Well, you used a word that's -- I don't 12:00:16
 20 see in the vocabulary here. You said "presents." 12:00:18
 21 If you take a -- if it's a printed media, it says it 12:00:23
 22 prints and prepares publication for distribution in 12:00:29
 23 11357. 12:00:32
 24 Q. Well, how about I'll -- I'll ask my 12:00:36
 25 question again with distributes. I think that's 12:00:37

1 probably a -- something you'll agree with. 12:00:40
 2 Let me ask it this way: So the rest 12:00:44
 3 of the flow of figure 4f after 11353 shows the 12:00:45
 4 Transaction Processing Program distributing the 12:00:50
 5 advertisement or presentation to the potential buyer 12:00:55
 6 shown as 11358? 12:00:58
 7 A. If it's -- if it's a printed media. 12:00:59
 8 What it says it does on the other half going to 12:01:03
 9 11356 is that it's -- the way I read that, it -- is 12:01:07
 10 it schedules the presentation to be distributed to 12:01:13
 11 the buyer at a -- I think with like a future time or 12:01:18
 12 date in some way. 12:01:23
 13 Q. But still ultimately distributes the 12:01:27
 14 presentation or advertisement from the Media 12:01:28
 15 Interface to the buyers? 12:01:31
 16 A. Yes. 12:01:32
 17 MR. LUMISH: We have to change the 12:01:34
 18 tape, and it's about noon. We can talk about 12:01:35
 19 breaking for lunch, too. 12:01:38
 20 THE VIDEOGRAPHER: This is the end 12:01:39
 21 of tape 2. Off the record, 12:02. 12:01:40
 22 (Recess Taken From 12:02 p.m. To 1:11 p.m.) 12:01:43
 23 THE VIDEOGRAPHER: This is the 13:10:54
 24 beginning of tape 3. Back on the record, 1:11. 13:10:58
 25 THE WITNESS: Mr. Lumish, over lunch 13:11:03

1 part of an interface? 13:12:14
 2 A. I -- I don't have any reason to say no 13:12:15
 3 to that. I don't know that I would commonly make 13:12:17
 4 that reference; that -- that could be the case. 13:12:21
 5 Q. Let me talk about your report. If you'd 13:12:31
 6 look at page 12, please. 13:12:34
 7 A. All right. 13:12:37
 8 Q. This is Exhibit 84 again. 13:12:37
 9 A. Uh-huh. I'm there. 13:12:39
 10 Q. So this is one example where there's a 13:12:43
 11 discussion of the selection of the media venues. Do 13:12:45
 12 you see that in the second entry of your table? 13:12:49
 13 A. Dealing with -- where I dealt separately 13:12:51
 14 with the "whereby clause." 13:12:55
 15 Q. Exactly. 13:12:56
 16 A. Okay. 13:12:57
 17 Q. And the "whereby clause," that's the 13:12:57
 18 language at the bottom of claim 1 of the '045 13:12:59
 19 patent? 13:13:04
 20 A. It's what I consider to be the last 13:13:10
 21 limitation -- or I don't know if it's a limitation. 13:13:12
 22 It's the last part of the claim where there's a 13:13:14
 23 "whereby clause," but that's correct. 13:13:16
 24 Q. All right. In your -- looking at the 13:13:18
 25 construction you have under Function Media -- 13:13:19

1 I found the section that I was trying to find that 13:11:06
 2 deals with the Presentation and Configuration 13:11:08
 3 Program. Just for the record, it's at column -- I 13:11:10
 4 was going the wrong direction. It's at column 27, 13:11:13
 5 line -- beginning at line 55. 13:11:17
 6 Q. (BY MR. LUMISH) This is in '045, 27? 13:11:22
 7 A. Yes, sir. 13:11:26
 8 Q. Line 55 you said? 13:11:26
 9 A. Uh-huh. This is with respect to the 13:11:28
 10 seller interface, and it says, "The Presentation and 13:11:30
 11 Configuration Program 4715 is both the gateway to 13:11:34
 12 the present invention and the controlling software 13:11:36
 13 interface for the seller." That's the parallel 13:11:40
 14 language that I previously cited with respect to the 13:11:43
 15 media venue. So anyway, that's -- 13:11:46
 16 Q. Particularly, it says "software 13:11:50
 17 interface," right? 13:11:51
 18 A. Uh-huh. Yes. I'm sorry. Keep saying 13:11:52
 19 uh-huh. Yes. 13:11:54
 20 Q. And there are software and there are 13:11:56
 21 hardware interfaces? 13:12:00
 22 A. I think that a common definition for 13:12:02
 23 interface is software or hardware. 13:12:06
 24 Q. And isn't it true that you can refer to 13:12:08
 25 the software part of an interface and the hardware 13:12:11

1 actually, let me ask you that, too. You said before 13:13:21
 2 that you looked at the constructions proposed by the 13:13:24
 3 parties. Did you attempt to come up with your own 13:13:26
 4 constructions or were you trying to decide whether 13:13:29
 5 Function Media's were better than Yahoo!'s or 13:13:31
 6 Google's or something else? 13:13:34
 7 A. I had been involved for quite some time, 13:13:35
 8 I mean a month or more, in -- in the definition of 13:13:38
 9 the Function Media construction. So I think of them 13:13:43
 10 as being mine. I was presented, as I mentioned to 13:13:46
 11 you, several opportunities whereby I could comment 13:13:49
 12 on them, and I did, and there were changes to them 13:13:55
 13 based on -- 13:13:58
 14 MR. BRANDON: Let's -- let's not get 13:13:59
 15 into any further substance -- 13:14:00
 16 THE WITNESS: I'm sorry. Okay. 13:14:00
 17 MR. BRANDON: -- with respect to any 13:14:02
 18 communications you had with Function Media's 13:14:03
 19 counsel. 13:14:05
 20 A. I think of them as being our 13:14:06
 21 constructions. 13:14:07
 22 Q. (BY MR. LUMISH) Now, let me talk about 13:14:09
 23 this "whereby clause" and its placement and the term 13:14:11
 24 a little bit. We've talked around this a few times, 13:14:14
 25 and I don't know I want to get all the way into it 13:14:18

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1 yet. But you said your position is the "whereby 13:14:21
 2 clause" is a separate limitation from the means for 13:14:22
 3 the seller to input information, right? 13:14:25
 4 A. Yes. 13:14:26
 5 Q. And if I understand your position, 13:14:27
 6 that's based on the fact that there's a semicolon 13:14:28
 7 separating the language with the word whereby and 13:14:32
 8 after from the means for the seller into put 13:14:35
 9 information; is that true? 13:14:37
 10 A. That's at least one aspect of what I 13:14:38
 11 considered to be a multi-aspect reason that I think 13:14:40
 12 my approach is correct. 13:14:42
 13 Q. Do you think your position will be 13:14:45
 14 stronger if the word "and" came after that 13:14:47
 15 semicolon? 13:14:51
 16 A. No. 13:14:51
 17 Q. Wouldn't change anything? 13:14:52
 18 A. No. 13:14:56
 19 Q. Whether there's an "and" before that as 13:14:56
 20 far as signifying it's the last on the list wouldn't 13:14:58
 21 matter to you one way or the other? 13:15:00
 22 A. I -- I don't think it would affect my 13:15:04
 23 view of how that claim should be interpreted at all. 13:15:06
 24 Q. Excuse me. In the function for the 13:15:10
 25 means for seller to input information at the top of 13:15:18

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1 page 12, you say it's "enabling a seller to input 13:15:21
 2 information." 13:15:24
 3 A. Yes. 13:15:26
 4 Q. And then the structure is computer 13:15:27
 5 software. How would a seller be enabled to input 13:15:29
 6 information without a keyboard or a mouse in the 13:15:34
 7 Function Media patents? 13:15:36
 8 MR. BRANDON: Objection to form. 13:15:41
 9 Q. (BY MR. LUMISH) Or a monitor? 13:15:44
 10 A. Well, there's a difference between 13:15:45
 11 enabling someone and actually requiring that they 13:15:47
 12 input. In other words, I can -- I can enable a 13:15:52
 13 seller to input information by providing software 13:15:57
 14 when executed capable of provide -- I won't read the 13:16:01
 15 structure here into the record, but it's the 13:16:06
 16 software that enables it, and enabling it is -- is a 13:16:10
 17 thing you can do. And then having it enable that, 13:16:13
 18 then seller can input information. Those are 13:16:19
 19 separate things. 13:16:22
 20 Q. But doesn't enabling mean is able to? 13:16:23
 21 A. Yes. 13:16:26
 22 Q. How would a seller be able to input 13:16:26
 23 information -- if they weren't doing it, how would 13:16:29
 24 they be able to input information in the context of 13:16:32
 25 the Function Media patents without a monitor, a 13:16:35

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1 keyboard or a mouse? 13:16:38
 2 MR. BRANDON: Objection, form. 13:16:39
 3 A. I don't know why you say a monitor for 13:16:41
 4 input. When they do the step of inputting it, they 13:16:43
 5 will need a keyboard and a mouse. But if I were to 13:16:47
 6 disconnect the keyboard and the mouse but have that 13:16:55
 7 software executable, that software would be there 13:16:57
 8 and would be providing the enablement for the input 13:17:01
 9 of the information if the other things are required 13:17:05
 10 to actually input the information. 13:17:10
 11 Q. (BY MR. LUMISH) If you -- if you 13:17:11
 12 disable the keyboard or the mouse or both, would the 13:17:14
 13 seller be able to enter -- to -- to input 13:17:17
 14 information as you say in the function? 13:17:21
 15 A. It would not be able to perform the act 13:17:23
 16 of actually inputting information. 13:17:25
 17 Q. And to the extent the patents -- the 13:17:27
 18 Function Media patents have this information input 13:17:30
 19 by either clicking on drop-down menus or typing into 13:17:34
 20 a box, how would you do that without being able to 13:17:38
 21 see them on a monitor? How would a seller be 13:17:40
 22 enabled to do that without being able to see them? 13:17:43
 23 A. You -- you could type without being able 13:17:45
 24 to see it. Okay. As far as pulling down a menu, 13:17:47
 25 if -- if that's the implementation for which you 13:17:52

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1 would actually input the data, you would have to 13:17:55
 2 have a monitor to see the -- the menu, unless you 13:17:57
 3 just had -- had enough knowledge to know what was 13:18:00
 4 going on. And I can think of a few instances where 13:18:03
 5 because of a glitch in my computer or something, 13:18:06
 6 I've essentially had a blinded screen, and I was 13:18:08
 7 still able to do enough to input the information to 13:18:12
 8 maybe reboot the system or things like that because 13:18:15
 9 I had knowledge of what -- what the key strokes 13:18:18
 10 would accomplish if I did them regardless of what I 13:18:21
 11 might see on a monitor. 13:18:24
 12 Q. Is it your position, then, that a seller 13:18:25
 13 in the Function Media patents is able to input 13:18:28
 14 information in the form of a text-box entry where 13:18:31
 15 they have to type in the words, even if they can't 13:18:35
 16 see the text box? 13:18:38
 17 A. I don't think that would be a normal 13:18:40
 18 situation in which you would expect them to type 13:18:42
 19 into a text box, but I still make the 13:18:44
 20 differentiation between enabling them and having 13:18:46
 21 them actually do it. I mean, there's a -- if the 13:18:49
 22 claim said "entering information," that's -- that's 13:18:51
 23 a different step to me from enabling the ability to 13:18:55
 24 input information. 13:19:00
 25 Q. Then looking down at the "whereby 13:19:01

1 clause" construction that you offer here under 13:19:05
 2 Function Media, it says, quote, "Whereby the seller 13:19:07
 3 may select one or more of the supported media 13:19:09
 4 venues." Excuse me. I take it from that that you 13:19:13
 5 agree that the seller is the one selecting the media 13:19:14
 6 venues? 13:19:18
 7 MR. BRANDON: Object to the form. 13:19:18
 8 A. Yes. 13:19:28
 9 Q. (BY MR. LUMISH) It's not the buyer? 13:19:29
 10 A. I think the buyer will ultimately do a 13:19:31
 11 selection, but I think this part of the "whereby 13:19:36
 12 clause" deals with the seller. 13:19:38
 13 Q. This -- this portion -- 13:19:40
 14 A. That that -- no, the -- only the words 13:19:42
 15 that you -- you gave me. Okay. "Whereby the seller 13:19:43
 16 may select one or more of the media venues." 13:19:46
 17 Q. Well, read whatever you want in your 13:19:48
 18 construction. I'm just trying to understand it. I 13:19:49
 19 think from those -- that first clause, you're saying 13:19:51
 20 that it's the seller -- we've talked about the other 13:19:53
 21 entities, such as seller, the buyer, controller, 13:19:55
 22 media venue. 13:19:59
 23 MR. BRANDON: Objection to form. 13:20:00
 24 Q. (BY MR. LUMISH) Going back to our 13:20:01
 25 earliest discussion today. Do you recall that 13:20:02

1 generally? 13:20:04
 2 A. Yes. 13:20:04
 3 Q. So I'm asking now if based on that first 13:20:05
 4 clause, you agree with me that -- or if what you're 13:20:07
 5 saying here is that it's the seller entity that's 13:20:09
 6 selecting the media venues, not one of those other 13:20:12
 7 entities. 13:20:14
 8 MR. BRANDON: Objection, form. 13:20:18
 9 A. I guess I don't understand the context 13:20:19
 10 of my -- of your question and why my previous yes 13:20:21
 11 wasn't sufficient. Because I -- I don't -- if this 13:20:24
 12 is a different question, I don't understand the 13:20:29
 13 difference between the -- this and the one you asked 13:20:32
 14 me a minute ago where I said yes. 13:20:34
 15 Q. (BY MR. LUMISH) Well, I don't know if 13:20:35
 16 you did say yes. That simply is why I think I was 13:20:36
 17 asking for clarification. Maybe you did, and I 13:20:40
 18 missed it. But if we could just be clear on the 13:20:42
 19 record, you agree, yes, that it is the seller, not 13:20:44
 20 one of these other entities, that's selecting the 13:20:47
 21 one or more supported media venues -- 13:20:50
 22 A. Yes. 13:20:53
 23 Q. -- in the "whereby clause"? 13:20:53
 24 MR. BRANDON: Objection to form. 13:20:55
 25 A. Yes. But I just want to be sure that 13:20:57

1 the record's clear that we're talking about only the 13:20:59
 2 words of the "whereby clause" that you have quoted 13:21:02
 3 to me. That's all I did in terms of qualifying my 13:21:04
 4 yes. 13:21:08
 5 Q. (BY MR. LUMISH) And then the last 13:21:11
 6 clause you have says, quote, "and transmit each 13:21:12
 7 customized presentation to each respective media 13:21:15
 8 venue for publication. 13:21:18
 9 A. Uh-huh. 13:21:22
 10 Q. This is saying -- this -- this "whereby 13:21:22
 11 clause," taken as a whole, is saying that it's the 13:21:25
 12 seller that transmits the customized presentations 13:21:27
 13 to the respective media venue? 13:21:30
 14 MR. BRANDON: Objection, form. 13:21:32
 15 Q. (BY MR. LUMISH) Is that true? 13:21:33
 16 A. I -- I don't think that's the -- if -- 13:21:34
 17 if you read that clause in relation to the 13:21:35
 18 limitations that occur in the previous part of 13:21:38
 19 claim 1, I don't -- I can understand why somebody 13:21:41
 20 might naively make that reading; that the English is 13:21:44
 21 not the clearest I've ever seen, but when you look, 13:21:49
 22 for example, at the -- the first limitation atop 13:21:53
 23 column 64, "Providing means for transmitting said 13:21:59
 24 presentations to a selected media venue of the media 13:22:02
 25 venues," and you read the specification and 13:22:07

1 interpret this claim, I think in a sense, the seller 13:22:10
 2 is somewhat related to the transmission. But I 13:22:13
 3 think the means for transmitting is not the seller 13:22:16
 4 or not under direct control of the seller as you can 13:22:21
 5 see in my construction of that particular 13:22:24
 6 limitation. 13:22:27
 7 Q. But a seller could use a means for 13:22:27
 8 transmitting, right? They don't have to be the same 13:22:31
 9 thing? 13:22:33
 10 A. I don't understand that question. 13:22:33
 11 Q. If I understood your -- your objection 13:22:34
 12 there, a moment ago you were saying that the 13:22:36
 13 seller's not the means for transmitting. 13:22:38
 14 A. No. 13:22:38
 15 Q. Is that what you were trying to say? 13:22:40
 16 A. I don't think that the -- okay. I'll 13:22:42
 17 accept that. That's correct. 13:22:44
 18 Q. You're not disputing that a seller could 13:22:45
 19 use a means for transmitting to transmit, are you? 13:22:47
 20 A. I -- I don't even know how -- 13:22:50
 21 MR. BRANDON: Objection, form. 13:22:52
 22 A. Yeah. I don't even know how to relate 13:22:52
 23 to that question. I would have to see it in 13:22:54
 24 context. 13:22:56
 25 Q. (BY MR. LUMISH) Well, the context of 13:22:56