UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC	§	
	§	
vs.	§	CASE NO. 2:07-CV-371-CE
	§	
GOOGLE INC., ET AL.	§	

ORDER

The court issues this order to supplement its June 18, 2010 *Markman* opinion (Dkt. No. 369). Recently, the parties have raised an issue regarding the required order of steps in claim 28 of the '947 patent. Claim 28 reads:

> The method of claim 26, further comprising the steps of:
> (b1) classifying the electronic message as at least one of (i) being able to be responded to automatically; and (ii) requiring assistance from a human operator; and
> (c) retrieving one or more predetermined responses corresponding to the interpretation of the electronic message from a repository for automatic delivery to the source when the classification step indicates that the electronic message can be responded to automatically.

The defendants Google, Inc. ("Google") and Yahoo! Inc. ("Yahoo") contend that the steps of claim 28 must be performed in order, i.e., step (b1) must occur before step (c). In response, the plaintiff Bright Response, LLC ("Bright Response") concedes that step (b1)(i) must occur before step (c). But Bright Response argues that step (b1)(ii) may be performed after step (c). In support of its argument, the plaintiff cites the following language in step (c): "when the classification step indicates that the electronic message can *be responded to automatically*." According to Bright Response, this "when the classification step . . . " language imposes an ordering requirement only to the automatic response step–step (b1)(i).

Based upon the plain language of claim 28, the court holds that step (c) is conditional; that is, the method requires "retrieving one or more predetermined responses" *only* "when the

classification step indicates that the electronic message can be responded to automatically." In contrast, if the classification step indicates that the message cannot be responded to automatically, the retrieving predetermined responses step is not required. Thus, the court concludes that when the electronic message is classified as being able to be responded to automatically, then one or more predetermined responses must be retrieved to satisfy claim 28. On the other hand, if the electronic message is classified as not being able to be responded to automatically, then claim 28 may be infringed without retrieval of predetermined responses.

Based upon the court's holding that step (c) is conditional, there is no order requirement imposed on step (b1)(ii). If the message is classified as being able to be responded to automatically, step (b1) is satisfied, and then the system must retrieve one or more predetermined responses in step (c). Any additional steps after retrieval of predetermined responses, such as classifying as requiring human assistance, does not affect the infringement analysis of claim 28. Likewise, if the message is not classified as being able to be responded to automatically, claim 28 is satisfied, as step (c) does not have to be performed; any additional steps, such as classifying as requiring human assistance, does not affect the infringement analysis.

SIGNED this 4th day of August, 2010.

CHARLES EVERINGHAM IV
UNITED STATES MAGISTRATE JUDGE