EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

I/P ENGINE, INC.,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
V.	)	2:11cv512
	)	
AOL, INC., et als.,	)	
	)	
Defendants	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

June 5, 2012

(MARKMAN HEARING)

Before: THE HONORABLE RAYMOND A. JACKSON
United States District Judge

Appearances:

DICKSTEIN SHAPIRO
By: JEFFREY K. SHERWOOD, ESQUIRE
FRANK C. CIMINO, JR., ESQUIRE
CHARLES J. MONTERIO, JR., ESQUIRE
and
JONATHAN FALKLER, ESQUIRE
and
CRENSHAW, WARE & MARTIN
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Counsel for AOL, Inc.

QUINN EMANUEL URQUHART OLIVER & HEDGES
By: DAVID A. PERLSON, ESQUIRE
ANTONIO R. SISTOS, ESQUIRE
JOSHUA SOHN, ESQUIRE
and
KAUFMAN & CANOLES, P.C.
By: STEPHEN E. NOONA, ESQUIRE
Counsel for Google,Inc.

* * *

(Court convened at 10:05 a.m.)

THE DEPUTY CLERK: I/P Engine, Inc. versus AOL, et al, civil action 2:11cv512.

Mr. Snow, are the plaintiffs ready to proceed?

MR. SNOW: We are.

THE DEPUTY CLERK: Mr. Noona, are the defendants ready to proceed?

MR. NOONA: We are.

THE COURT: Good morning, ladies, gentlemen. We are here this morning for a Markman hearing. Last week I had a telephonic conference call with local counsel. I wasn't able to reach primary counsel, so I just wanted to get a message to local counsel that I had some concerns about what you were asking me to construe in this case. I have spent a great deal more time looking at what you submitted and what you have asked the Court to construe, and the Court has reached a conclusion that there are some terms that the Court does not intend to construe in this case.

First, before I do that, let me find out whether you, after my call, have modified what you want me to construe before I tell you what I will not construe.

Speaking for I/P Engine, who will be taking the lead?

MR. SHERWOOD: Your Honor, Jeff Sherwood for I/P

Engine.

THE COURT: Okay. And Mr. Perlson?

MR. PERLSON: Yes, your Honor.

THE COURT: Okay. After my conversation have you narrowed the list of what you have submitted for construction, or do you still have the same list?

MR. PERLSON: Your Honor, we had filed a motion to actually limit the number of terms to be construed to ten and I was prepared to address that motion with the Court this morning. Basically, my proposal is, if we start at the top of Schedule C --

THE COURT: You can have a seat now, Mr. Sherwood --

MR. PERLSON: Okay.

THE COURT: I mean, Mr. Perlson, until he finishes and let's see where he's going here.

MR. PERLSON: Yes, sir.

MR. SHERWOOD: My proposal, your Honor, is that we start with the first term that appears in Exhibit C of the joint claim construction statement, which is the defendants' list, and then we count down 10.

Now, I appreciate the Court has already told us that there are some terms that the Court doesn't intend to construe, so obviously my proposal is subject to what the Court has already decided.

But, as I think the Court is probably very well aware, we filed a motion on this, and, frankly, where we started in this discussion with the defendants is they started with a much, much larger number of terms.

THE COURT: Well, you know where the Court started. If you read my order, I said ten terms, and I fully expected the parties to come together and to come up with just ten terms to be construed.

MR. SHERWOOD: Yes, your Honor, I do understand. We proposed four, two of which have been agreed to by the parties.

THE COURT: So that leaves two?

MR. SHERWOOD: So that leaves only two from our point of view, yes, your Honor, that's right.

THE COURT: So these other 16 or 17 I'm looking at, are these all, you are saying, from the defendant?

MR. SHERWOOD: Yes, your Honor, that's correct.

THE COURT: Well, I'm sure that's not the case. Not that you are wrong, but I'm sure that they have narrowed that. I will be waiting to hear that because if you are only asking the Court to construe two and the others that are mostly in dispute are from the defendant, I'm sure the defendant understands the Court means just what it said, it will construe ten. That leaves eight.

MR. SHERWOOD: Well, your Honor, if we look at

Exhibit C, the joint claim construction statement, which is their list of terms -- this is their document, your Honor, not ours.

THE COURT: Hold up one second.

All right. Go on.

MR. SHERWOOD: If you look at this document, we can see that -- if you just look at the item numbered 1, there are two terms there. They have grouped them together, but there are no words in common between those two terms, there are no record citations in common between those two terms, and the Court is going to have to do a different analysis with respect to each of them. So my point is that if you start at the top of this list and you work your way down, you will go well past ten.

As I said to the Court a minute ago, we only proposed four, two of which have been agreed to. Scanning network and combining are the two that we propose are still outstanding for the Court to decide.

THE COURT: Scanning network and what?

MR. SHERWOOD: Combining.

THE COURT: Okay. I think I expressed some concern on the phone about combining.

MR. SHERWOOD: I understand you did, your Honor, yes.

THE COURT: Okay.

MR. SHERWOOD: So my proposal is that we don't do any more than the first ten that appear here, your Honor.

THE COURT: Well, the Court is going to have to decide which ten it's going to be.

MR. SHERWOOD: I appreciate that, your Honor. Thank you.

THE COURT: You are proposing only the first ten and ignoring the numbers on the page?

MR. SHERWOOD: Right. In other words, these have subparts, but we know subparts count as separate issues.

THE COURT: Well, that would mean we would go probably no farther than No. 7 on this page.

MR. SHERWOOD: Your Honor, actually if we went to No. 7, we would still have 12, and let me point out to you why that's the case.

If you look at No. 4, this has addressed two different claims in two different patents. So it's the separateness of systems in the '420 Claim 10 and then another claim in another patent, claim in the '664. So it's actually two issues, not one, and the same with item No. 6, your Honor. So I would propose to the Court that the Court cannot construe Item 6 at all.

The term "user" has been agreed to between the

parties. So all we are talking about is whether the jury can understand, first, an individual.

THE COURT: Well, Mr. Sherwood, just maybe I can facilitate things by telling you what the Court looked at to see what the Court said it was not going to construe and let's see where we are.

MR. SHERWOOD: Okay. That would be fine, your Honor.

THE COURT: Please stand up, Mr. Perlson.

The Court looked at a couple of them and I understand you wanted certain things construed here, Counsel, but the Court looked at it and the Court is of the opinion that a person with ordinary skill in the art ought to be able to read this claim and be able to function and understand what it means without the Court construing the claim. One of those the Court indicated it will not do is individual user/first user. It's not going to construe that.

The separateness of the claim system, the Court is not going to construe it. It's not going to do it.

Information relevant to a query, No. 7B, the Court is not going to construe it.

Combining. I understand your arguments. The Court is not going to construe combining, either. That's one, two, three, four that the Court is not going to

address, and I will go through there and see where you are now, sir, with electing the number that you will raise.

Now, I don't know what that takes care of on your list. I will have to go back and take a look, but those are the four the Court has determined it will not construe, despite the argument of counsel. The Court read your argument. The Court even took the time to go through the claims to give it it's best understanding of where it's going, but the Court is just not going to do it.

Okay. Now, you heard the argument that he raised and you certainly understood the concern the Court had about construing ten terms, and the Court was concerned when it read all of these subparts in here. I mean, subparts, it's a part, which means it counts as an individual claim. So you exceeded what the Court said it would do.

Now let's see where are you now with what you want to construe, understanding what the Court will construe.

MR. PERLSON: Understood, your Honor. What I was going to suggest was that you don't construe combining, which you have already indicated you won't, and that we don't construe the antecedent basis terms

which are in No. 9, and I think that that should resolve the Court's concerns regarding the number of terms at issue, taking in mind what you have already ruled.

THE COURT: Okay. You take out No. 9 and you take out those I have indicated, and that should cut you back down. Is that your position?

MR. PERLSON: I think so, yes.

THE COURT: All right. Any issues with that, Mr. Perlson?

MR. SHERWOOD: Sherwood.

THE COURT: Sherwood, I mean.

MR. SHERWOOD: It's all right.

THE COURT: All right. I think maybe we are pretty close to the ten.

MR. SHERWOOD: Your Honor, I have no problem with Mr. Perlson's proposal. I would propose to the Court that the order of steps issues which they have raised, also the Court not construe those. There are actually several issues there. It involves two different claims and several sequencing issues.

THE COURT: Well, I will be candid with you, Mr. Sherwood. The Court has some concerns about the order of steps also. I have gone backwards and forward on the order of steps, and it appears as though it should be common sense, but the Court decided to wait to see

what you gentlemen had to say about it this morning, but do not be surprised if you get a memo back from the Court where the Court refuses to construe it because the Court has some concern about it.

I didn't know what else you had to offer other than what was in your memo, but the concern you express is something the Court has had about the order of steps on this thing, but I will leave it open and give the defendants a chance to say what they want to say about it and see what is the question.

MR. SHERWOOD: That's fine, your Honor.

May I ask one other question of the Court?

THE COURT: Sure.

MR. SHERWOOD: And that is, does the Court have a structure or a format with respect to this morning's hearing that you want us to follow?

THE COURT: What I thought I had made clear what I would do is to give you a chance to present in a few minutes any type of introductory explanation you wish to offer regarding the patents, and then after that we would turn to the plaintiff and hear what the plaintiff has to say about the terms it wishes to have construed in its view, and then from there we would go to the defendant and have the defendant make its presentation, and then to the extent we have time, we will go back for any

rebuttal.

MR. SHERWOOD: Very good, your Honor.

THE COURT: And the Court is not anticipating that there will be any extrinsic evidence here this morning, so we will be, basically, going based on intrinsic evidence, your argument, your pleadings.

MR. SHERWOOD: Thank you, your Honor.

THE COURT: All right. In terms of time, at this juncture the Court hasn't slapped any limitation on anyone, but we need to be reasonable. I think that each side ought to be able to get out what it has to say within probably an hour or hour and a half. You ought to be able to do it.

You have got two terms, and you have got probably about seven. You ought to be able to do it in far less time than that. I'm just saying we have time.

MR. SHERWOOD: Thank you, your Honor. Just one point of clarification. So you would expect us to present just on the two terms that we proposed, or on all of them?

THE COURT: Oh, no. You can present on those they have, too. I am trying to get a full understanding of what your view is on the terms. So, no, I'm not going to limit you to talking just about the two you have. I'm interested in a full education here.

MR. SHERWOOD: Okay. I have split our presentation up with my partner, Mr. Cimino, your Honor, if that pleases the Court.

THE COURT: Fine. The Court has no problem with that.

All right. That being the case, I'm prepared to go forward with any type of presentation you wish to make, Mr. Cimino, regarding the operation, description, efforts, etc., of these patents.

MR. CIMINO: Good morning, your Honor. Frank Cimino for I/P Engine. The way we structured the presentation based on the Court's comments on Friday was to do a brief overview of the patents and a tutorial for the Court to try and focus in on the technology that is going to form the backdrop for the claim constructions the Court will be considering. Hopefully, we have done a good job to simplify that as much as possible for the Court. And then we thought that defendants would be able to do their tutorial, and then we would go into argument on the claim terms.

Is that how the Court understood?

THE COURT: That's fine. We are on the same --

MR. CIMINO: Same page?

THE COURT: Yes, sir.

MR. CIMINO: All right, your Honor. The

patents-in-suit, I/P Engine alleges that Google and others infringed two asserted patents, U.S. Patent No. 6,314,420 and --

COURT REPORTER: Slow down for me, please.

MR. CIMINO: I'm sorry. And 6,775,664. I'm Italian. It's hard to talk slow.

THE COURT: You are going to have to; otherwise, you are going to have nothing but jibberish in the record.

MR. CIMINO: Yes, your Honor. Here are the two inventors, your Honor. The U. S. Patent and Trademark Office awarded these patents to Mr. Andrew Lang and Mr. Tom Kosak. They were top technical people in the search engine company, Lycos, in the late '90s.

I'm not sure if the Court remembers the company Lycos, but at the time of the invention, at the time they filed for these patents in 1998 Lycos was one of the dominant search engines on the market.

As you can see here, Mr. Lang was the chief technical officer of Lycos and is currently the chief technical officer and the CEO of I/P Engine.

Mr. Kosak, he was the director of engineering at Lycos, also held the position of chief technical officer and is currently a technical consultant for I/P Engine.

1998, just to put this into perspective, when

they filed for the patent that's one of the patents-in-suit, Lycos.com was the seventh most visited web site. In 1998 to 2002, they sort of went on a shopping spree purchasing more than two dozen web companies on the Internet.

Then in 2000 because of its filter technology, among other things, for producing search results, Lycos was acquired by Terra Networks for $12 billion.

Okay. Patents-in-suit, the first one is the '420, entitled collaborative/adaptive search engine. The second one is the '664 patent. It's entitled Information filter system, and method for integrated content-based and collaborative/adaptive feedback queries. It's quite a mouthful.

These are foundational search engine patents, your Honor. At a high level, they involved improving search results. So what do I mean by improving search results?

In search engines that we use today, you usually have a box where you put in your search request. It's called a query. When you put in your search request, you are provided back with certain links. Those are the search results.

What happens in between the search query and the results is the methodology that produces for you the most

relevant results to your query. The goal of the search engine is to come up with a methodology that will find the best sites that are of interest to the person who put in the user query.

A lot of times, almost all the time, the only information that you have about what the user is looking for is the query itself. So, again, in my example if I use the word "grill" in a search engine because I'm looking to buy a new barbecue, I will get links, hopefully, that are related to what I am looking for, barbecue grills, maybe grills on sale, maybe how to grill.

The claims in the '420 and the '664 patent relate to combining two specific measures in that methodology that happens in the search engine, two specific measures to improve search results. Those specific measures are content and collaborative data.

Here's sort of an abstraction, your Honor, to try and illustrate the core essence of what Mr. Lang and Mr. Kosak invented.

On the left you have content. Generally speaking, in a search engine environment this is how well a piece of information matches the search query. So, again, if I'm looking for grill, what I mean by content data, is that the information that I am looking for, the

web page, for example, is a content matching my query. What do I mean? Does it have the word "grill" in it? Key words are a popular form of content data. What if it has the word "grill" in it 15 times? When you are determining how well something matches the query with content-based data only, you can judge how well it matches by the number of times the word you are looking for appears. If it appears once, maybe you have a low relevance level for content. If it appears 15 or 20 times, then you have a high level of content data. And you if have some type of threshold in deciding with the server, you can see that in a content-based filtering system only, you would provide the user with the one that has 15 hits rather than the one that has one hit.

Okay. On the other side here, we have collaborative feedback. That's another filtering technique. Collaborative analysis evaluates feedback received from other users with similar interests or needs.

What's that mean in the search engine world? So I'm about to search and look for the word "grill" and see what I get back. Ten people before me might have done a search for a grill. They have similar interests. They have a similar need. They are looking for a grill. When the web site results show up, in the past it was ten

times, people click on things. The system remembers what people looked at when it looked at the word "grill." It can capture that collaborative data and use it in deciding what to provide the next user who looks at grill.

So let's say I search for grill and I get ten results. The first result in a collaborative filtering scheme is the link that the last ten people clicked on, the one that people clicked on the most when they are provided their results and they see stubs about their results and say this one looks best.

A quick illustration. Say I own a web site for selling patio furniture and I understand someone is looking for a grill, I also want to get patio furniture. So I take my web site and I put the word "grill" all over it. So when someone is searching for grill on a content base, my score will be high. It's got grill written in there.

So when the web site comes up, if the person actually changes his mind and decides to leave looking for grill and say, hey, let me impulse buy patio furniture, I did a good job.

The benefit of Mr. Lang and Mr. Kosak's invention is most of the time if you looking for grill, you won't click on patio furniture. It won't develop

collaborative data associated with the search query grill. But there may be another web site that doesn't have as high a content. Grill is not all over the web site, maybe once, maybe that's a sale on grills. That, and everyone's clicking in the best. That moves it up to the top. So the one that is content based with grill all over it, if people actually don't like it, it will move down in the list and sometimes be filtered out.

So what Mr. Lang and Mr. Kosak did was said let's do a combination of content data, how well it satisfies the user query, with collaborative feedback data, what users who look for the same thing clicked on at the time, combine it together and come up with an overall relevance to the query system and then let's filter and select based on that.

Let me show you quickly where this concept is embodied in the claims, and then I will walk through an example and show your Honor how this works in the specification.

So here's Claim 25 from the '420 patent. The first thing we have here is a content analysis, how well the item matches the search query. You can see it says content profile data, how closely that web site you are looking at or document you are looking at matches the content in the search query.

Next we have collaborative data that's embodied in the claim, and here you can see it combines the feedback data with the content data in filtering what they call here informon, and I will get to that in a second. It's a coined term, if the Court hasn't picked that up yet, that the inventors use to mean, basically, information. So we have got content, collaborative and combined both, filtering.

Claim 26 of the '664 patent is similar, searching for information relevant to a query. That's the content analysis. It doesn't have the word you are searching for in it.

Receiving information found to be relevant to that query by other users. That's the feedback.

And combining, you combine that to determine what you are going to serve the actual user.

Okay. If I can for a second, your Honor -- excuse me for a second. If I would like to take a step back, the patents-in-suit are actually improvements over a prior work by Mr. Lang and Mr. Kosak. Prior to their time at Lycos they worked on software for filtering news articles and other content.

The '799 patent here is the parent application to the patent-in-suit. It was filed in 1996. This patent also talks about filtering items based on content

and collaborative information, but here the difference was they were looking for articles that were matched through a user profile.

User profile is a type of information retrieval system that's different from a demand search engine. So back in 1996 they received information from various networks and information sources you would sign up and tell them what you like. You would tell them I like sports. So over time it would serve the user with that profile, sports articles, but exclude other things.

So how do we get to the patents-in-suit? It works like this. The '799 patent was the parent that dealt with user profiles, content related to user profiles, and collaborative data.

Mr. Lang and Mr. Kosak were at their own start-up here called WiseWire at the time. They were focused on these types of user profile systems. They did a lot of collaboration with Lycos over the years and eventually Lycos purchased WiseWire and provided top technical positions for Mr. Lang and Mr. Kosak.

While they were at Lycos, Mr. Lang and Mr. Kosak adapted their core technology from the parent patent so that it could be integrated with search engines, which are quite different. The user profile systems would work over time. Once a week maybe an article would be written

that was relevant. It would send you that article once a week.

Demand search environment is more intensive. You put in a query and you would expect immediate results. So how do you get this system to work in a demand search environment? That was the key.

The '420 patent describes how to make this work. So I will walk you through this drawing, your Honor, from start to finish. Now, the drawing in the parts of the patent are pretty complicated, so I have tried to remove some of the nonessential parts and focus just on the key concepts for the Court to deal with the current Markman issues.

The specification describes a search engine system that makes searches for what the inventors called informons. That's a coined term. If the Court is familiar with the lexicographer exception in construing claim terms, here's the perfect example. They define it in the new patent to be news articles, web sites, other information such as advertisement.

Fig. 9 is an example of embodiment, but it provides good context for showing how the system works. It combines collaborative data and content data. So I have highlighted the important structures here. The claims in the case involve demand searches, which are

one-time searches for user information. Demand searches are contrasted in the patent with what's called wire searches, which are continuous or ongoing searches.

The ongoing or continuous search embodiments, your Honor, are not involved in this case so we've dehighlighted some of the technology used to make those work.

Okay. So in a demand search when a user shown here decides he wants to get information from the search engine, he initiates a search. Here, for example, he says, I want to look for a grill. The system first passes a query into a content-based filter structure which then passes the query over to the spider system which scans the network. The spider system, the example here, scans the network to find informons that are related to the query. It's looking for what's in the ballpark. Get me close. I'm just trying to see what's the universe of documents that will potentially be relevant. The patent refers to this in some places as raw informons.

Two things to note about this green part, your Honor, where it's pulling the raw informons from, specifically the patent describes an alternate embodiment where instead of going out to the network and pulling these raw informons, the system could search in advance

and store it in that box there that says memory.

So you do the search ahead of time and store things in memory. Then when you do a demand search, you don't have to go out to the network again; you can search in that memory.

The patent also talks about there are networking on any type of network. This is an embodiment for the Internet in this drawing, but it goes on to say that there are at least three examples of the network this search engine would work with: the Internet, an enterprise-wide network sometimes called a wide area network, or an intranet, sometimes called a local area network. What this means is the system can be adapted to work on the Internet, a corporate network, or a network database and still provide the same useful, better search results.

Okay. After the items are collected, the relevant informons are passed to the search return processor shown here in red.

Now, down here in the search return processor, this is where the important stuff happens. It brings in the raw informons and it figures out which ones to actually turn into user results. How does it do that? It takes the content data for each informon that's been developed and the collaborative data for each informon

that's been developed and combines that information into what the patent calls a complete rating predictor.

Items that are sufficiently relevant are returned to the user from the search processor and there the user is happy. You can go to grills.com, or Best grills 1998, or whatever. And the use of that complete rating predictor in combination with content and collaborative data is what pushes the best results to the top of the page, your Honor.

Now, I said in the red box that's where the combining happens. Let me show you exactly how that happens. So the specification says that that search return processor will combine content and collaborative data in accordance with the structure shown in Fig. 6. Another very complicated drawing that I have tried to simplify to the bare basics, your Honor.

Fig. 6 describes how content data and collaborative data can be combined. We won't go into all the details here, but the general idea is that content data described in the figure here is structured feature information -- that's what it's called in the spec -- is used to come up with a rating predictor, which is a rating based upon how well the content of that document matches the query.

So let's say, just for simplicity purposes,

that's a 7, the rank rating is a 7. Fig. 6 also shows the collaborative data input at 415. The same things happens there, it moves over and you get a rating predictor. Let's say again for simplicity 5.

So now we know that we have a document that content matches the 7, collaborative matches the 5. What does the patent say to do?

It says that these rating predictors are combining for some folk combination function. The combination function is described in the specification as anything from a simple, weighted, additive function to a far more complex neural network function. We will stay simple, just average.

6 is the overall complete rating predictor. So, you see, by combining these two pieces of data, you change the value and the ranking of the document or article.

Let me back up a second and put this in sort of practical terms. Here let's assume the threshold for producing the document to the user for providing it to the user is 7. Under content analysis only, your Honor, this document will make it. It's a 7. A 7 or better, it goes. But maybe this document is not so good. Content-wise it's like the example I gave earlier where it's patio furniture, but I know people looking for

grills might purchase my patio furniture so I stick grill all over the web site. So from the collaborative what you see, it's low. People don't really like this that much. It's not one of the top choices.

So when you use Mr. Lang and Mr. Kosak's invention it changes from 7 in a content-only world to a predictor of 6. We are now under the threshold of 7. This document will be excluded. Where in the content-only world it would be served up, here it gets excluded.

Let me flip that around and show you the other way. Let's assume here that the threshold is 6, a 6 or above. Here the content is not so good but people really seem to like this link. It's got a lot of collaborative feedback. When you do the combination, it pushes me up the scale so that the collaborative feedback help balance out the low content. I mean, obviously, you have to have high content and high collaborative, but this helps people get the best results based on the information that's out there. So Lang and Kosak through their invention came up with an improved way to filter search results combining the content analysis and collaborative feedback to provide superior results.

In this litigation, I/P Engine accuses each of the defendants of creating and using infringing apparatus

and using infringing methods to present relevant advertisements to users of the search engines by combining content data and collaborative data, and this is how some of the defendants generate, essentially, all of their income.

Okay. That concludes my tutorial on opening statement, your Honor.

THE COURT: Thank you very much.

MR. PERLSON: Good morning, your Honor.

THE COURT: Good morning.

MR. PERLSON: I will try to -- plaintiff went over some of the similar concepts that we were going to go over and I will try to avoid repetition as much as I can, although there probably will be at least a little bit.

Here, just as an overview, we have the two patents at issue filed in December of 1998. One thing I would just note is that these patents share the same specification and so I think you will probably hear from both of us just referring to one of them, not both of them.

As plaintiff had indicated, the patents concern a search engine system that combines collaborative-based filtering with content-based filtering and the patent does this with either a demand or a wire search. And as

plaintiff has indicated, only the demand searches are relevant here.

The patent describes what content-based filtering is. It says, "Content-based filtering is a process of filtering by extracting features from the informons, e.g., the text of a document, to determine the informon's relevance.

Then additionally it describes this collaborative filtering which uses the reactions of other users with similar interests and needs. It says, "Collaborative filtering, on the other hand, is the process of filtering informons, e.g., documents, by determining what informons other users with similar interests or needs found to be relevant."

And another concept that is relevant for the patent is the scanning or spidering method the patent refers to. In plaintiffs discussed Fig. 9 in slide 11 of their presentation, one of the things they referenced was the spider that goes through and it does the scanning, and this is sort of a visual explanation of what a spider does and how it crawls. Basically what it will do is it will go out -- if you put in the search term Jaguar, it will go out and it will look at a bunch of different web sites, and then it will go and, essentially, crawl from each of the different pages of the web site, and then it

will move on to the next one, and the next one, and the next one. So that's what the scanning process entails.

Then what you would come up with is a bunch of sites. You have a bunch of sites that likely will have at least Jaguar in some way.

Then the patents refer to the content filtering, and so what you need to do is -- so you have got a bunch of sites back, but, you know, maybe some of them only had Jaguar in there once and you want something that has it like 10 or 15 times to make sure that it's, you know, really relevant to this search term Jaguar, so you cut out some of them.

But the problem with that is that while useful content filtering can't do everything because you have, for example, Jaguar can refer to multiple things. It's a big cat, it's Jacksonville Jaguars, or a car. So with content filtering it only gets you so far. So here what the inventors did is that they sought to combine content-based filtering with collaborative filtering to try to improve the results of searching, and so collaborative filtering, again, determines what informons other users with similar interests or needs find to be relevant and it uses that in connection with the search.

How it does that is that, essentially, it assigns people to certain groups, and here it is sort of

shown visually we have the person who likes cats, someone who likes the Jacksonville Jaguars, and someone who likes the cars. And, you know, these are sort of -- the patent talks about putting people in these various communities, as we have referred to here.

And then what happens is that the car lover will get results -- the filter will be applied so that they get results that other car lovers liked. So that way other car lovers who are searching for Jaguars, they wanted their Jaguars and so they have JAGUARS.com and CARS.com.

Then similarly you have if someone likes cats, other people who like cats, you know, they have liked CUTE-CAT.net or maybe NATIONALGEOGRAPHIC.com. So that's the stuff that they get. So that's how, basically, you have the situation where you have some users who -- or one community, they would get a certain set of results based on Jaguar and then users in another community would get others, and that's how the collaborative filtering is applied here.

Again, there's these two types of searches. There's the demand search, which is just a regular search engine query, as the patent says, and then you have wire search, which is just a sort of this continuous search which, again, is not at issue here.

And then the final thing I'll note, your Honor, is that when these patents were issued, the PTO found that search engines had already used content-based filtering and collaborative filtering, that that had already been done, and it said that it allowed the patents on the basis of their existence of the wire, and it said this in an office action in the first patent. Of course, not all the patents actually require a wire, and the applicants didn't indicate to the PTO that that was the case. And then another patent issued, again, with little back and forth with the patent office. So that will be something that we will be addressing probably later in the case.

THE COURT: Okay. Thank you very much.

MR. SHERWOOD: Your Honor, since we have disposed of a few claim terms, and in particular I was going to talk for a minute about the agreed upon claim terms because I think they would inform the Court with respect to the construction of terms that the Court, I think, has decided not to construe. So I am going to pass by that and move on to the first term that I would like to talk about, which is one of the defendant's terms, and that's collaborative feedback data. This slide shows, I think, fairly what the essence of the disagreement is between the two parties.

If I may have the Court's indulgence, I have a board here that just contains the claim language itself that I think might help to illustrate one of my points, and that is that the term that is being construed here as it resides in this claim is collaborative feedback data.

I think we can all agree that data is information. Whether you want to call it data or information, I think that that's a neutral dispute. The plaintiff made a point about that in their briefs. We thought data information was a little more user friendly term, but I don't think there's a big deal there. But what the claim language says is that that data comes from somewhere. It comes from system users.

Now, when you look back at my slide, what you can see is that they are writing additional limitation into this claim. They are saying that it comes from users with similar interests or needs. So, we would have two source limitations here, your Honor. It would be from users with similar needs and interests, according to the defendant; and then according to the claim language that comes after the term that's being construed, it would be from system users.

Now, I would submit to the Court that it's either nonsensical, nobody would write that way, or it's leaving certain language out of the claim because we

would only need to have a one-source limitation, not two.

IPE's construction, on the other hand, your Honor, does not propose a second source limitation. But instead, what it does is it proposes to explain collaborative feedback data is the information concerning what informons users with similar interests or needs found to be relevant. So the point here is we are still just talking about data or information. We are not talking about where it's coming from. This fits harmoniously and appropriately within the claim language itself, your Honor.

I should point out, we have the same -- it's exactly the same with respect to Claim 25, also collaborative feedback data as the term to be construed with a separate source limitation that resides outside the claim term, your Honor. And this term only applies to the '420 as well. It's not applicable to the '664.

So, your Honor, interestingly, both parties point to the same language in the specification to support their constructions, and what I would point out to the Court with respect to this specification language which appears here at the bottom of the slide is that it is referring to the same thing that I'm talking about here, which is the informons that the other users with similar interests or needs have found to be relevant.

Now, this is a demand search environment, as I think the Court just heard, and I think maybe I should explain the importance of that here just briefly.

The patents actually have two different systems that are in them, and we are only asserting the demand search claims. We are not asserting wire search claims.

So when we want to know what somebody else thinks is relevant, we don't have a profile, as Mr. Perlson alluded to in his presentation, where we might know something about the user. These are all one-time searches that somebody just goes to the web and they randomly decide they want to search for something. Nobody knows anything about them. All they know is the query that they entered. So the point is that when we look to see who has similar needs or interests, what we are looking at is who else made that same search? Who else made the same query? Who asked for grills? Who asked for Jaguar? And what did they click on? What did they find relevant to their query? That is the collaborative feedback data that is described in these two claims here, your Honor.

As I say, there's no source limitation with respect to the information. Every system user is going to be making clicks, doing queries and clicking on things that are results of their queries, and that is going to

be the source of the data, but it's the source of the data because that's what the claim says, it comes from the system users.

So, your Honor, this next slide we have tried to illustrate what the difference is between the two parties' constructions. The specification language both parties rely upon appears in the left under the blue heading, and the key part we have put in brackets at capital [A], the language, that's really what's being construed. "What informons other users with similar interests or needs found to be relevant."

And you will see the plaintiff's proposal tracks that language very closely. We used information instead of data. As I said, we are agnostic about that. If the Court feels that data is a better term to use, we have no problem with that.

What we propose is that this term be construed to mean information concerning what informons other users with similar interests or needs found to be relevant.

Now, the defendants' proposal imports some of that into their claim construction, but as I have already pointed out by highlighting this claim language, they put in additional source limitation, your Honor, which is not appropriate. It either renders the claim language, as I said, nonsensical or superfluous.

Your Honor, I have a couple of things I wanted to point out from the plaintiff's slides which I just saw this morning, so if the Court would bear with me for one second here.

The defendants make the argument, and you will hear this when they get up to present their materials, repeatedly that IPE's construction does not include the collaborative element. What I just want to point out to the Court is the collaborative element is that which you collect from the other system users who made the same query as to what they found relevant to that query, and our claim construction contains all of that without muddying up the claim language with additional source limitation.

If I may now, your Honor, I would like to turn to the next claim term, unless the Court has any questions?

THE COURT: No, that's fine. The Court understands it.

MR. SHERWOOD: Thank you.

And we see a similar kind of issue here with respect to the '664 and the two claims that are at issue here. The language is different because patent lawyers, I have learned over doing these cases, like to express the same concepts in different ways. We could probably

cut down the number of patents we have in our system if they didn't do that, but that's what they do.

And so here what we are talking about, again, is a feedback system for receiving information found to be relevant to the query by other users. Our first position with respect to this term, actually, your Honor, is that we don't think the Court needs to construe it. The Court has already declined to construe the term "relevant." We have an agreement with respect to the meaning of the term "relevance," which I suspect is going to inform the parties with respect to the meaning of the term "relevant." And we have an agreement with respect to the term "users," and we have an agreement with respect to the term "query." So it seems to me there's not really a whole lot left for the jury to have to figure out, just some plain words that reside in between those words that we already have an agreement for.

But, in any event, if we look at the defendant -- actually, your Honor, let me point one other thing out to you. This patent drawing that we have down at the bottom of this slide is from Fig. 9 of the patent and it illustrates the system of receiving what I'm going to call feedback or collaborative data. And what you can see is that down at the bottom left there's a box that says other user and it shows an arrow going up to the

feedback processor that Mr. Cimino talked about earlier.

All that this claim term here is describing is the receipt into that processor of the informons that the other users found to be relevant to the query. It's nothing more than that, your Honor. And as I have pointed out, there's a separate source limitation here, too, just as there is in the '420 patent for this information. There's no need to have two source limitations here, any more than there is in the '420 patent.

The defense wants to layer on here by saying that the information can only come from certain users. It can only come from other users, which is what we see in the patent, but they want to add that it can also only come from users with similar interests or needs. But we already know it's coming from users with similar interests or needs because, in fact, they are the ones who clicked on the search results. That's what we are analyzing, and the patent and the claim construction that the plaintiff has proposed are very clear with respect to that, I think, your Honor.

There's some additional issues with respect to the defendants' construction. They put in the word "determining," as the Court can see. The claim language is receiving. Receiving and determining are not

synonymous, your Honor. There's no suggestion in the patent that they are the same, and I think we can tell, again, from just plain English usage that they are, in fact, very different things.

In addition, as I have already alluded to, they would equate other users with users with similar interests or needs. Those two are not the same, and I would suggest to the Court, in fact, that it's redundant because we know that these are users with similar interests or needs because of the fact that they have clicked -- they have entered similar queries and they have clicked on informons that the system is going to determine are relevant to the query.

It's a noninfringement position which defendants are pretty honest about, which is they are saying in our system we don't keep track of information about the users. We don't know whether their interests are similar or their needs are similar. That's the profile system. Those are other claims in the patents which we are not asserting.

The only way to know whether people have similar interests or needs, just as is explained in the patent, is to look and see what they click on, and that's exactly what this claim construction would entail.

Your Honor, I would reserve my remarks on that

claims term with respect to their slides for any rebuttal the Court permits --

THE COURT: Okay.

MR. SHERWOOD: -- and go on to the next term, which is demand search.

The first slide we have here sets forth the parties competing constructions, and here I think there's a real difference in point of view between the parties. This isn't one where we are just parsing language that's connecting agreed terms.

Can I have the next slide, please?

THE COURT: Excuse me. Did you skip one, scanning network?

MR. SHERWOOD: Yes, your Honor. Mr. Cimino is going to address that one. Our order got a little bit jumbled as the result of where we are this morning.

THE COURT: All right. That's fine.

MR. SHERWOOD: In fact, this is the last one that I'm going to address because the Court has declined to construe others that I would have addressed.

What I think the Court can see from this slide is the I/P Engine proposed construction is fully supported in the specification. The language that's quoted here, in fact, comes from the abstract, as you can see, and that language refers to a demand search as a

one-shot or a demand search.

The two terms, "one-shot" or "demand" are being used synonymously here. In other words, we are being told they mean the same thing. And, by the way, this is the kind of search that people typically do these days. We don't have profile systems as described elsewhere in the patent. We do one-time searches. And we may do many of them, but they are all unique, individual, one-time searches. And so our claim construction is intended to reflect that reality as shown in the patent with respect to demand searches.

The claim construction that IPE proposes also demonstrates that the search is being done upon a user request. So we understand from this claim construction that the user has made a search request, has made a query, and the search engine is doing the request. That's what's understood and comprehended by a demand search.

The defendants' construction is not nearly so tidy and easy to understand, your Honor. For one thing, it's not clear whether the user or the search engine is performing the action here because the way that they phrased this is a search engine query. A search engine to me is modifying what the search engine is doing, but the demand search is what the user does and how the

search engine responds to the user's request.

In their briefs, the defendants talk a good deal about what a normal search engine would do. I don't know what that means, a normal search engine. That concept does not appear anywhere in the patent. It begs for further claim construction beyond that which the Court is already going to do. And it's not even defined by the defendant's presentation.

I also have some concerns about the confusion that this construction could create relative to the other parts of the patent that are not being asserted. That's an issue that the defendants raise. They say, well, we are not asserting -- plaintiffs are not asserting the wire search claims; therefore, it doesn't matter whether this claim construction draws distinction between a demand search and a wire search.

Well, your Honor, I think, first of all, that's not really giving all of the terms in the patent full and fair clarity and meaning.

Second of all, when we get to trying this case, if we do, we are going to have various passages and phrasings from the patent that will be quoted and presented to the jury, and in the end the jurors are going to get the patents and they are going to see and be confused because there are two different types of queries

in these patents and the defendants' construction is making no effort to distinguish between the two of them while the IPE construction makes that distinction very clear.

And with that, your Honor, I will seek to defer to my colleague, Mr. Cimino --

THE COURT: All right.

MR. SHERWOOD: -- unless the Court has any questions about a demand search.

THE COURT: No.

MR. CIMINO: Your Honor, I'm going to present scanning a network. The issue with scanning a network is the word "scanning." The phrase also contains the word "network." There doesn't appear to be much dispute that a network is a group of two computers, two or more connecting computers as proposed by I/P Engine. We submitted ordinary meaning evidence in our opening briefs about network, or a significant amount of it. We also cited the specification examples that it could be the Internet, it could be a corporate extranet, it could be a corporate intranet to show that it could be a wide area network, a local area network. And in its reply, the defendants really don't take any issue with that.

So what we are really talking about is a single question about what scanning means, and in particular it

seems as if the two sides have set up the argument as follows: The scanning gets construed to be its ordinary and customary meaning as proposed by I/P Engine, which they interpret it to be a specialized device used on the Internet called a spider or a crawler which is an example in the specification of how you scan a network in the Internet environment, as defendants propose.

So in our analysis here, I believe it's pretty straightforward. You could find the answer right in *Phillips* case. In *Phillips* the Federal Circuit said to give words their ordinary and customary meaning at the time of the invention. For everyday English words like scanning the Court went on to say that claim construction in such cases involves little more than application of widely accepted meaning of commonly understood words. That case is cited in our opening brief.

So what's the ordinary and customary meaning of scanning? In its ordinary sense it means to look for something, to search for something. Maybe we are not looking as hard or as diligently as if we are searching. Maybe scanning is a little less diligent than searching, but it's still looking for something.

If you scan a newspaper looking for an article of interest, you flip through the pages. If someone, for example, for me, tells me that there's a good article

about the Baltimore Ravens, I will search it diligently until I find it. So it's the difference between how hard you may be looking for something, but in both cases you are talking about looking for something.

Here's two quick examples of the ordinary usage of the word "scanning." They are scanning the beach for a red umbrella. They are looking for that red umbrella. Similarly if you are scanning a page to look for a word, if you are scanning a page to find a word, you are looking for that word. If you are scanning the Internet to look for relevant documents to find relevant documents, you are looking for those documents.

The ordinary meaning of the word "scan" is looking for. We cited some dictionary evidence in our brief to give the Court some objective evidence of the plain meaning of the word "scan" and "scanning" at the time the patent was filed, and particularly we cited those dictionaries to show that it does not mean spidering or crawling. Not any of the dictionary evidence that we have cited to support the ordinary and customary meaning of the word "scan" or "scanning" says spider or crawler. The dictionaries there all define the word "scan" in a way that, basically, is looking for. It used words like examine, observation, glancing, all words that connote looking for, all show that the ordinary

definition of the word "scanning" is looking for.

We have a couple others for the Court's interest. Here's the American Heritage Dictionary which was published at the time they filed for the invention. You can see here that the definition of scanning for information is to look, "To look over quickly and systematically." The second definition: "To look over or leaf through hastily." Again, to look for.

The Computer Science dictionary down at 6 is particularly interesting. It says the plain and ordinary meaning in the computer science arts is "To search (stored data) automatically for specific data." Again, not a spider.

THE COURT: I take it, you are concluding by going to these extrinsic sources that there's insufficient information in the claim to explain to a person with ordinary understanding and skill what scanning means?

MR. CIMINO: I think that scanning means as an ordinary meaning in 1998 and the example provided by the specification, as I will show you, when the plain meaning is consistent with -- the plain meaning of scanning is used consistently by the patentees when they describe what scanning network says shows that they actually used the plain and ordinary meaning in 1998.

THE COURT: So we really don't need to go over to the dictionary, if that be the case.

MR. CIMINO: Yes, that's true, your Honor. I wanted to provide -- I mean, I think scanning has the normal meaning, but, you know, my meaning, just so the Court knows, I was objective in figuring out what I thought scanning meant, but I wanted to cite an objective source that was time lined at the time of the invention. *Phillips* authorizes us to do that as evidence for the plain and ordinary meaning.

Quickly, defendants cited the dictionary also. They cited the dictionary for the word "search," and they basically said, hey, search means look for. You are really equating search and scan.

So the interesting thing about defendants' dictionary, we actually bought the dictionary and cited the definition of scan, which wasn't provided in their briefs. If you take a look, again, there's nothing in here about spider. It's all consistent with look for. But if you take a look down at the synonyms here in the Random House Unbridged Dictionary, it actually uses the word "search" as a synonym for scan.

All the way in the right-hand column, last line there. We must have missed the red underlining there. So the same dictionary that they cite to say search

doesn't mean scan, when you look at the definition for scan it actually gives an express synonym that search and scan are the same.

Okay. So that's the plain and ordinary meaning. *Phillips* says to look at that first. Cite a dictionary definition simply to give an objective source to understand what we all understand that term to mean.

Let's look at the specification now, as *Phillips* says, to see if the word "scan" is used consistently for meaning or whether they have imparted some specialized meaning to the word "scanning."

Look at the main quote that both parties have cited for the purposes of how scan is used in the specification. The specification says, "A spider system scans a network to find informons for a current demand search." So the use of the word "scan" here is simply saying that the spider system is looking for information. You could substitute looking for as a synonym and it's still consistent.

Interestingly it says that you are scanning in order to find information. You find things by looking for them. Again, that ordinary usage of the word "scan" is consistent.

The spider system is an example of the type of acknowledging you would use to look for that information

on the network. So defendants' proposed construction. Defendants propose that scanning means spidering or crawling. Again, that is the example of how you scan a network in Mr. Lang and Mr. Kosak's invention.

They do not equate the word in any place in the specification. For them to have the word "scanning" means spidering, they have to do one of three things, and only two are relevant. First they have to show that scanning, the plain and ordinary meaning of scanning is spider. They can't do that. There's no evidence in the record for that. Now, I just showed the Court some of the evidence of the plain and ordinary meaning that shows us what to look for.

They basically concede that, your Honor. In their briefs they say the specification essentially redefines the word "scanning" to be spidering. That's the second way you can do it. The third way is with a prosecution history disclaimer, but there's no argument that the prosecution history is relevant here.

So the one way to get scan equal to spider is to show that there was the lexicographer exception. The specification defines scanning to be spidering. They can't do that. There's no clear redefinition of the word "scanning." Certainly this doesn't do it. It's just describing how a spider works.

And importantly, your Honor, these inventors, they knew quite well how to invoke the lexicographer exception when they wanted to. For example, they say in Column 3 of the '420 patent, "As used herein, the term "informon" comprehends an information entered in the potential or actual interest to a particular user." They define informon.

As also used here also in Column 3, "The term "user" is an individual in communication with the network." They define user.

Same thing for relevance. I won't bore the Court with the actual definition. Same thing with content-based filtering, they say that that is the purposes of the patent. Collaborative filtering, they say that that is in the patent. Content filtering, they say that that is in the patent.

Where they wanted to invoke a special definition under the lexicographer exception, they didn't. They knew how to do it. They did not do it for spider; they did not do it for scanning. So plain meaning controls. The fact that they knew how to do it but didn't do it for scanning is persuasive evidence of their intent not to use anything but the plain and ordinary meaning.

What then is happening here is that the defendants are seeking to narrow the claim for the

purposes of a noninfringement defense. They want spidering to be in the claim.

Another point to look at in terms of what scanning means is the actual words chosen by the inventors in their claims. They talked about a spider as an example in the specification, and the purpose of it is to scan a network in their example. But in the claims, they had a choice. Do we claim a spider system, do we claim something that spiders the Internet, or do we claim something that scans the numbers so we are broader?

THE COURT: Is it your view that the reference to spidering or crawling from the specification is being used to limit the claim language?

MR. CIMINO: My view?

THE COURT: Yes.

MR. CIMINO: It does not limit the claim language, your Honor, if I understand the question correctly. It is an example of one way to scan a network.

You know, at the end of the patent the inventors actually say in Column 26, lines 54 to 59, "It must be understood that the illustrated embodiments have been set forth only for purposes of example and it should not be taken as limiting the invention as defined by the following claims." If they wanted to have spider in the

claim and have their claims limited to spider, they knew how to do it. They specifically chose the word "scanning" to mean looking for information so that you could use a spider or use anything else.

One other point on the spidering. The defendants have submitted the definitions of what a spider does. Every one that I have looked at relates to the Internet. Spidering is how you search the Internet.

If the Court recalls, there is an express reference in this patent about networking. The network can be the Internet, or it could be a corporate network, or it could be an intranet. There's no evidence in any of the documents that they cited that a spider was known to search corporate databases in 1998. It would be inconsistent with the definition of network. It would essentially require network to become Internet if you read spider into the claim.

Okay, your Honor. There's a second scanning issue from a different claim. This claim doesn't say scanning a network. It says a scanning system for doing something.

Defendants interpret it in accordance with the contextual claim language as suggested by *Phillips*, and I will show you that in a second, your Honor.

The defendants have basically, I guess, a

two-step goal in their construction. First they want a scanning system to be a system that scans the network. And then hoping they win their claim construction on scanning a network, then say this claim also requires spidering. So it's a two-step process to get spidering into the claim when there's no basis for reading that in or any intent by the patentees for having the claims be so limited.

The contextual language in the claim really makes this an open-and-shut claim construction issue. It defines what the scanning system is. It's a system used to search for information.

Let's look at the full claim language. So we use scanning system as shorthand for the Court's benefit to identify claim terms, but it's probably not correct to do so. We are not talking about a scanning system in abstract. This is one of those claim terms, your Honor, that actually defines what the system is supposed to do in the claim itself. So the actual language is a scanning system for searching for information relevant to a query.

The word "scanning" here, as we talked about, means simply looking for. But when you go to figure out what scanning system does, the claim tells you that. It is for searching for information. It's not for

spidering; it's for searching for information. This limitation, your Honor, says nothing about a network. I'm not sure where we get network into this claim. They purposely decided not to say where they are going to search, only what they are searching for. Patentees are allowed to do that. They have claimed their invention in multiple different ways to make sure they obtain the best and fullest scope of claims they can. There's no basis in this claim to read in scanning a network and then subsequently reading a spider.

So why would they call this a scanning system? They could have called it a searching system or just a system. This is another patent claims drafting technique that is used, basically, to label this element. I'm sure the Court is familiar when you refer to elements later in the claim, you would say said searching system or said scanning system. If they didn't put a label in front of this one, scanning system, you would become very worried. It would make patent claims worse than they already are.

It would say -- you would refer to it later by saying said system for searching for information relevant to a query every time you reference this element. So what people do is put this phrase before system so it's an indicator of what I am referring back to later. So

when they see said scanning system later in the claim, you know you are talking about the system for searching for information. It's a scanning system for searching for information.

What if they said first system, another popular way of differentiating what elements, a first system for searching information. It doesn't mean it has to be the number one system. The claim language itself, the functional part of the claim language defines what this element must do.

So here's the defendants' proposal. "A system used to scan a network." I see three problems with their proposal. The first problem with defendants' proposal is their way of getting spider back into the claim without any justification. The same argument as the last argument apply, your Honor. There was no special lexicographer exception. Spider is an example of how to scan a network. So even if this was interpreted to be scanning the network, it should still simply be looking at the network for information, whatever the claim says the function is supposed to be.

The second problem is the location limitation I mentioned a second ago. If you look at the claim, your Honor, it says, "a scanning system for searching for information relevant to a query associated with a first

user in a plurality of users." Where does network come from? You can search anywhere. This term allows you to search anywhere.

The third problem is that the doctrine of claim differentiation, or here a basis of understanding the intent of the patentee to claim one thing in one place and another thing in another place. That's why I have shown the pending Claim 24 here. The pending Claim 24 relies upon all limitations of Claim 1 and adds more. And how these claims are supposed to work is the independent claim is broader, the dependent claim was narrower. So if there's something claimed in a dependent claim, to make sure that the claim has a different scope, the independent claim is supposed to be broader. So Claim 24 is actually instructive here, your Honor, to show that scanning a network should not be pushed into Claim 1 because it's separately claimed later.

So the first and the main claim, you have searching for information as a function. Then we state the search system of Claim 1 further comprises scanning a network. That tells you that Claim 1 does not have scanning a network in it. Otherwise, if it did, the two scopes of the claim would be the same and you would have a problem with the pending claims.

But even without claim differentiation, which

importantly, the Fifth Circuit has said is a guide not a rigid rule, even without this the difference in wording between these two claims is informative. It shows that for Claim 1 the patentees did not want to claim a network limitation, where in 24 they did. So it also helps to look at these claims asserted and unasserted to see the difference in scope to help you understand what the patentee was trying to claim. That is also from the *Phillips* case, your Honor. And what we see here is that second limitation in Claim 24 is what they have added to their construction.

That's all I have on scanning, your Honor.

THE COURT: All right.

MR. CIMINO: I'm going to move past the PowerPoint provided and get to different systems, or the order of steps. Different systems is off the table.

Order of method limitations, yes. So, your Honor, I guess to start with, generally speaking, method claims do not have to be performed in the order recited. The defendants appear to concede that and have not argued to this Court that every step, A, B, C and D, has to be performed in that specific order, but they have parsed through the claims and have found words that they say must happen before other words and, therefore, conclude that one step must happen before another step.

The words aren't really ambiguous. It's not a typical claim construction issue. They were relying merely on a sort of antecedent basis where one word refers to another, and then logic where something is using a metric, you must already have calculated that metric, things like that. We propose no construction is necessary for this. This is, obviously, a noninfringement position for them and it seems most appropriate to have the order of limitations hashed out in context when experts are analyzing the infringement issues.

If an expert takes the position that something happens prior to another step when that makes no sense, that expert is going to have a tough time, obviously. So we believe that this is not a good use of the Court's resources and that it should be left for expert discovery.

That said, I do want to point out a couple of things that I believe are wrong with defendants' position. This is a figure from their brief and I believe it's intended to show which elements must have been done beforehand to show which steps happened before other steps. They say that step A must happen before step B, steps B and C must be performed before step D.

For two reasons that second part of the phrase

is not true. Steps B and C do not have to be performed before step D. If you take a look here, the claim talks about filtering in two different places. In step B it says you are filtering the informons on the basis of applicable content profile data for relevance to the query. Then in D, which the defendants say must happen second, it says, combine feedback data with content profile data in filtering the informons.

There's nothing in this claim that prevents you from doing the filtering as one step. It doesn't suggest a second filtering process. It says in doing your filtering, you can add collaborative content data together. And if that happens, these two arrows are not correct.

Secondly, your Honor, this is a process that takes -- if you recall, the environment for this is a search engine. You are pulling all of these raw informons down out of the Internet with the network or the database and then you are analyzing to see which ones to put up. One step could be gathering informons while the informons that have already been gathered are being filtered for content and data. This doesn't have to happen instantaneously. It could be an iterative process as you go through more than one informon. That's a second reason why the steps don't have to be done in the

order suggested by defendants.

And, again, those two issues might not even be relevant for infringement purposes and the better choice, we submit, is to simply let the experts deal with the order of method limitations.

Here's the other claim, your Honor, from the '664 patent, Claim 26.

They say step c1 must be performed before step c2, again showing the arrows of which pieces of information or which claim element relates to other elements that you need based on what they say logic or grammar.

This claim talks about combining from c1 and filtering in c2. While they can be separate processes, there's nothing in the specifications that suggest that they can't be done simultaneously. You can combine and filter at the same time.

Fig. 6 that we went through on the tutorial shows the combining and the filtering happening all in the search return processor. So while they happen exactly the same time, well, if there's more informons coming in and being processed, yes, one informon will have its information combined and filtered, but you will be taking information from a second piece of information at the same time. So these don't have to be done at the

same time.

And, again, this is a place where experts will be useful, and it would also be useful to have the context of the specific noninfringement positions being taken by experts to figure out whether it makes sense or not.

And my last one was different systems, so I think I am finished, your Honor.

THE COURT: All right.

MR. CIMINO: Thank you.

THE COURT: I thank you.

Before you respond, we are going to take about a ten-minute break and then we will come back and we will go forward with your presentation.

MR. CIMINO: Thank you, your Honor.

(A recess was taken at 11:35 a.m., after which court reconvened at 11:55 a.m.)

THE COURT: Okay, Mr. Perlson.

MR. PERLSON: I'm going to start with query found in the feedback system for receiving information found to be relevant to the query by other users. The terms that are shown here in the constructions, and the plaintiff indicated that they don't think that there needs to be a construction of this term, and we would submit, your Honor, that there absolutely needs to be.

There clearly is a dispute here, as exemplified by the argument.

Here the dispute is whether the other users that are referred to here are users with similar interests or needs. As the intrinsic evidence makes clear, that's what the defendants provide or whether it can include any users with any interests.

So the first point I want to make, and there really doesn't seem to be much dispute here on this, is that the collaborative element is a critical aspect of the claim. Again and again the patent talks about it in terms of the present invention. It's the title of the patent. It's all over the abstract, and I think that even the plaintiffs in their slide 5 and then again in their brief, again and again and again, as shown in our slide 24, has indicated that collaborative feedback or collaborative filtering has to be part of any claim of this patent.

So now that we know that, we have to then say what does that mean? So, you know, so how is that important for this term? Well, the specification says what collaborative filtering is. It explicitly says it. It says, "Collaborative filtering, on the other hand," and it's distinguishing content-based filtering. It says collaborative-based filtering, "is the process of

filtering informons, e.g., documents, by determining what informons other users with similar interests or needs found to be relevant."

That is absolutely critical to the collaborative filtering. If that's not there, then it's not collaborative filtering. And we know that collaborative filtering is critical to the invention, so there really should be no dispute that that is appropriately here, especially because there's no dispute that the collaborative aspect has to be in the claims.

And, in fact, there also should be no dispute that these other users are the users with similar interests or needs. It's in their opening brief. They said it. They said, "Collaborative filtering, on the other hand, determines relevance based on feedback from other users - it looks to what items other users with similar interests or needs found to be relevant." This is from page 3 of plaintiffs opening brief. It's our slide 26. So they said this explicitly and, of course, they said it appropriately. They cited the specification, that same thing that we said. That's the definition. So there really shouldn't be any dispute here. This is the meaning we are trying to get in here and that's the meaning and what the claim term says.

And both of the parties' constructions for

collaborative feedback do include this similar interests or needs, you know, but they don't want to include it here. So, you know, there's no dispute that the claims have a collaborative element and there's no dispute that the collaborative element requires users with similar interests or needs. So, just as a matter of common sense, the other users in the feedback system for receiving information found to be relevant to other users must be the other users with similar interests or needs. And we would submit, your Honor, that without this, if the notion of other users of similar interests or needs is not a part of this, then the collaborative filtering is gone, that it no longer requires collaborative filtering, which would be contrary to all the intrinsic evidence.

So I will give you an example. So here this sort of harkens back to what we were discussing in the overview. You know, we have our three users with the three different interests all searching for Jaguars, and this is on slide 28.

Now, if you have their filter, you use the collaborative filtering, the person who liked cats gets a web site about cats, the person who likes Jacksonville Jaguar football gets their football, and the person who likes cars gets cars, and that's because they are in

these groups. And the person who likes cats gets it filtered down to a cat site because other people who like cats had indicated an interest in that web site. The same is true for Jacksonville Jaguars. Other people who like football indicated they liked the Jacksonville Jaguar site. And then for the cars, other people who liked cars have indicated they like this CARS.com site.

But if you don't have this grouping, these communities that the patent talks about, you would essentially get what's just content-based filter. You get the situation where the cat person might get the result about the football team, the CARS.com get the football person's interest, and person who likes cars may get their cats.

Plaintiff, one of the things that they had indicated in their statement is all you need to do in terms for collaborative filtering is just look at what somebody clicked on in reference to this query of cats and that that's what this collaborative filtering is all about, and that's all you need to show a user of similar interests or needs.

Well, first of all, your Honor, the patent never said that. They never pointed to the specification in connection with that. It never says that at all, ever. And they didn't cite to anything that says that.

And this shows, this slide shows that that just cannot be the case because if all collaborative filtering required is that somebody in the past had clicked on it, then your cat user would be able to get Jaguar because some football lover clicked on Jaguar, then the football lover would get cars because a car lover clicked on it, and so on. So that is not what the patent is talking about. What the patent is talking about very clearly are that people are put into groups.

I think one of the other things that the plaintiff said is that there's no notion of user profiles, or something like that, in the patent and that you just are doing all of these searches on the fly and that you don't know anything about any of the users, and that's just, again, completely contrary to what the patent says.

If you look at Column 3 from line 50 to Column 4, line 4, it explicitly talks about these profiles, and I will read some of it. It's a bit long, but I think it's important. It first refers to a user, but then it says, "Because an individual user can be interested in multiple categories of information, the user can be considered to be multiple clients, each having a unique profile or set of attributes. Each member client profile is representative of a particular group of preferences.

Collectively the member client profiles associated with each other is the user profile."

And then it goes on to say, "that the present invention can apply the learned knowledge of one of the users member clients to others of the member users member clients so that the importance of the learned knowledge, e.g., the user's preference for a particular author or one interest area as represented by the member client can increase the importance of that particular factor."

And I won't go on to read the whole thing, but it -- and then later on it says, starting in Column 3, line 66, it goes on to say, "a community is a group of clients called member clients that had similar member client profiles, i.e., that share a subset of attributes or interests."

And then it goes down -- later on in Column 4 is where we see the definition of collaborative filtering, line 26. "Collaborative filtering, on the other hand, is the process of filtering informons, e.g., documents, by determining what information other users with similar interests or needs found to be relevant." That is what the collaborative filtering is about, your Honor. And if we don't have similar interests or needs, then it's just gone. It's meaningless.

Now, plaintiff argues that we don't need to

construe this because it's the plain words of the claim, and we would say, your Honor, that the intrinsic evidence makes absolutely clear that the other users that are being referred to here are the users with similar interests or needs. They don't want it. They say, you know, we are, I guess, setting up a noninfringement argument, but this is their patent. That's what the patent talks about, and we would submit that if you don't have that language in there, if you don't have the similar users, interests or needs, then there is no collaborative filtering.

And we know, and there's no dispute, that it must be present in each of these claims. One of skill in the art would absolutely read this to require it and would understand that that's exactly what the patent is talking about in this phrase.

Now, you know, plaintiff, they make an argument about determining and receiving. You know, I don't think that's an argument at all. That's never been something that we've really determined. I think we put it in there. They never -- before the briefing we didn't know that that was an issue, and we would submit, your Honor, that it's not. So unless you have any questions on that, I will go on to collaborative feedback data.

So here the dispute is somewhat similar

although I would submit, your Honor, that it is somewhat also related to what this collaborative feedback data is. So here the dispute is whether collaborative feedback data must come from users with similar interests or needs, as we say, or whether it can just concern such users in some unknown way. So one of the things that plaintiff had referred to is that the patent talks about how the collaborative feedback data comes from users. I mean, there's no dispute that it comes from users, and the patent talks about that it comes from system users.

We would submit, your Honor, that the contents of that, what we are talking about are those users of similar interests or needs that we all agree are providing this collaborative feedback data.

Now, plaintiff argues that the system users, I guess, are a different set of users. So I'm not sure who these system users are, unless they are the users with similar interests or needs. And so there really shouldn't be any dispute that this data is coming from the users with other similar interests or needs. Again, if it didn't, then I don't really know what the point of collaborative feedback is.

THE COURT: Both parties appear to be saying somewhat the same thing in a different way.

MR. PERLSON: Somewhat. I mean, I guess the

dispute is that -- frankly, your Honor, I'm not entirely sure what concern means when they say that it's data concerning other users. The patent makes clear in both the claims, and then again in the specification, as we point out on slide 37, that this collaborative feedback data has to come from these other users with similar interests.

I don't know what it means to have it concern these other users. I mean, what does that -- I think that's just some loosey-goosey language that plaintiff wants wiggle room down the road.

And, notably, there is no support whatsoever for plaintiff's construction. Never have they pointed to anything in the intrinsic evidence that suggests that you can use this concerning language. So you can contrast that with ours, which has language that's consistent with the claims, with the from users aspect. It's stated in the specification, as we put here, and we would submit, your Honor, that that is the most appropriate construction.

THE COURT: Okay. Thank you.

MR. PERLSON: Now, I think the next dispute here to talk about is the scanning terms, and the disputes are related. I think that they are grounded in some degree in the first term here. The key dispute, I think, is

really whether scanning should be construed as spidering or crawling, as the intrinsic evidence shows, or whether scanning just means the same thing as searching, looking for items. So there's really no dispute here that every single reference to scanning in the specification is in regards to spidering.

THE COURT: Let me ask you something. How do you define scanning? How do you define the term "scanning"?

MR. PERLSON: Just alone?

THE COURT: Yes.

MR. PERLSON: Crawling or spidering.

THE COURT: In this patent.

MR. PERLSON: Oh, I'm sorry.

THE COURT: Define the word "scanning." In ordinary parlance, twelfth grade education, Joe Blow never went to college, never did engineering, scanning, how do you define it?

MR. PERLSON: Well, I don't know, your Honor. It would depend on the context as shown by the 12 different definitions that plaintiff showed you earlier, right? There's like 12 or 13 different definitions, and words, like any other word in English, depends on your context. I don't think that there is one singular plain meaning of scanning, and that's why, your Honor, in

Phillips, what *Phillips* says, is that -- I think they quoted some of this, but I don't think that they really gave you the whole thing, is what *Phillips* says is that "The words of the claim are generally given their ordinary and customary meaning, the meaning that the claim term would have to a person of ordinary skill in the art in question at the time of the invention."

And we would submit, your Honor, that the ordinary person of skill in the art in this patent related to Internet search would absolutely view the scanning to be the spidering in light of the disclosure of the specification.

Now, what plaintiff wants to do, because they want to broaden this to be anything, is that they want to go back to before *Phillips*. They want to go to the *Texas Digital* line of cases where you did just what they are doing, that you go to a common dictionary, you find the absolute broadest construction that you can have, and then you apply it. But *Phillips* says we are not supposed to do that anymore. And so, your Honor, I think that you had asked in connection with the dictionary and why they are using extrinsic evidence? That's absolutely why they are using extrinsic evidence. You don't need extrinsic evidence here because --

THE COURT: We don't need what?

MR. PERLSON: Extrinsic evidence on this claim because the patent makes very clear that scanning is spidering, and that's the only thing that ever is referenced. There's no suggestion in any way that it can be anything else.

THE COURT: Take me back to the claim language here. I'm going back to the patent. Take me back to one of those usages of spidering. Take me back to one of them.

MR. PERLSON: From the specifications?

THE COURT: Yes. Take me back to the specification page, and etc.

MR. PERLSON: Yes. This is slide 45, your Honor, of our deck. I think this is what you are referring to? This is from references from the specification.

THE COURT: All right. Now take me to the one on crawling. You used the term "crawling."

MR. PERLSON: Your Honor, crawling is a synonym for spider. If you want to remove crawling and just have spider, that's fine.

THE COURT: Okay. I don't remember reading crawling in there anywhere.

MR. PERLSON: Okay. Fair enough. I actually don't think that there's any dispute that spidering and

crawling are the same thing, but if you wanted to take out crawling, that's fine.

THE COURT: Well, I don't know that crawling and spidering in common parlance mean the same thing. Your comment doesn't spider around, does it?

MR. PERLSON: I suppose it would definitely depend upon the parlance that we are talking about.

THE COURT: Okay. We will just forget about crawling here.

MR. PERLSON: That's fine, your Honor.

THE COURT: Okay.

MR. PERLSON: So, now, you know, I don't think that we need them, but I think that even some of these dictionaries that plaintiff refer to talk about this scanning being, you know, sequential, looking for things sequentially. That's the spidering. That's what we are talking about.

If you can go to the spidering on -- I guess it's slide 6. So this is -- you know, we talked about this in the technology overview, this going from, you know, web site to web site, this just sequential looking at all -- you look at these various different web sites and the pages on the web sites. That's the spidering. I don't think there's really -- and it's sequentially. You go one by one by one by one. I don't think there's

really any dispute that that's what that means.

Now, one of the things, plaintiff indicated that spidering was not appropriate because spidering is used in reference to the Internet and that the patent is not limited to the Internet. But the patent talks about that it's applicable to networks. So what does the patent say regarding what you do with networks? Well, if you go to Column 6, lines 37 to 49, it talks about the networks and it says that the main embodiment here is related to Internet search engine, but then it also goes on to say starting at line 43, and this is in Column 6, that "a skilled artisan would recognize that apparatus can be used with other types of networks, including, for example, an enterprise-wide network." It says, you know, or "intranet," that sort of thing. But it doesn't provide a different way of scanning for those. Instead it's referring to using the same things in columns that are referred to in Fig. 8 and 9 just above, and those talked about spidering. So, absolutely, the invention contemplated that any of these networks could be spidered, which is, of course, true, and that one of skill in the art would have known.

And as plaintiff, itself, had acknowledged, certainly if you were not able to spider an intranet or a network, plaintiff would have said, hey, don't use spider

in here, but they didn't because they knew that you could.

Now, plaintiff, they are saying scanning is looking for items, which is just searching. I mean, I think that there really can be no dispute that they are saying that scanning is used in the same way as searching here, and I think plaintiffs, basically, acknowledge that.

Looking for items, that never shows up in the specifications, certainly. And it also doesn't require even the sequential item-by-item looking that, you know, some of their own definitions require. So we would submit, your Honor, that the best meaning here is spidering. And, in fact, the claims make clear that scanning is really a subset of spidering. I mean, I'm sorry, the other way around. Scanning is a subset of searching. So, for example, if you look at Claim 26 and 38, and this is in our slide 50, Claim 26 recites the step of searching for information and then dependent Claim 38 says, "wherein the searching step comprises scanning a network." I don't think it would really make a lot of sense if it wasn't something that was more narrow than that, and it also shows that they knew how to use both of these terms.

You know, sometimes they use searching and

sometimes they use scanning. Searching was used in a broader sense, and that was intentional. So they really should not be construed to be the same, especially when scanning is always used in the context of spidering in the specification and search is used more broadly.

Now, plaintiff, rather than focusing on the in intrinsic evidence, they talked about how, you know, someone is scanning the beach or scanning a newspaper. You know, this patent is not about scanning a beach or scanning a newspaper, and *Phillips* says that you look at what the ordinary person in the art, in light of the specification, would interpret this term to mean, and here scanning is spidering.

And, again, I would submit that what plaintiff is doing is trying to go to that *Texas Digital* case where you try to find the broadest definition that you can.

Now, the next step here is scanning system. I think the disputes, as plaintiff, I think, correctly noted, is additionally, again, whether scanning can be any search for information or whether it's the scanning that we are talking about in the patent, in the context of the patent, and, additionally, whether we are scanning a network.

THE COURT: So you define a scanning system as a system used to scan the network, right?

MR. PERLSON: Right, your Honor.
THE COURT: When you scan the network, what are you doing?
MR. PERLSON: You are spidering.
THE COURT: So, in effect, you are saying a system used to spider the network?
MR. PERLSON: Correct. It's a spidering system. It's a system that spiders the network.
THE COURT: Now, why would you be spidering the network?
MR. PERLSON: I'm sorry?
THE COURT: Why would you be spidering the network? What are you doing when you are spidering the network?
MR. PERLSON: Well, you are doing exactly what the patent says you are doing.
THE COURT: Well, what are you doing?
MR. PERLSON: Well, it's -- let me go back to the --
THE COURT: What are you doing when you are spidering the network?
What are you doing when you are spidering the network?
MR. PERLSON: Well, I'm not really spidering the network, your Honor, but I understand.

THE COURT: No, but you know what I'm talking about.

MR. PERLSON: Well, it's exactly what's right here. You are setting out a computer program that goes out and then it looks for page after page after page.

THE COURT: It's looking for something?

MR. PERLSON: (Laughter)

THE COURT: It's looking for something? Searching for something?

MR. PERLSON: That is not all it's doing. It's doing it in a very particular way and it's doing it in the meaning that comes up with spidering in that's it's looking throughout the network page by page by page.

THE COURT: Spidering is searching the network?

MR. PERLSON: It is a type of searching, but it is not -- they are not one in the same. It's a much narrower version of searching.

THE COURT: That's interesting.

Go on.

MR. PERLSON: Okay. If we can go back to 55, please.

In terms of whether we are scanning a network, I mean, this is what the patent is about. The patent says, "The present invention relates to information processing systems for large or massive networks such as the

Internet..." So the scanning system of the patent, that's what it's doing. It's spidering the network. Otherwise, if you just had your laptop or your phone, it's not a huge network, so you wouldn't need to spider it, and so that's why the patent -- the whole point of the patent is you are looking at this vast network for vast amounts of information.

Even the claims themselves, like, for example, Claim 25, it talks about the first element is scanning a network, and then it refers back saying, "from the scanning system."

So this claim shows that the scanning system is something that scans a network. That's necessarily true from the claims. And, in fact, if it wasn't, then this wouldn't make any sense because there would be no antecedent basis for the scanning system. So the claim necessarily requires a scanning system is something that scans the network. Otherwise, this wouldn't make any sense.

Now, plaintiff had said that scanning system can be the same as searching, and then he points at Claim 24 that they have this claim differentiation argument. But, actually, this claim adds that the scanning network is upon a demand search request. So what's added is not just scanning a network. You are adding the limitation

of "upon a demand search."

And if you look down there further on the slide, they only directed you to the scanning aspect of it, but in actuality what the claim is really doing is presupposing that the scanning system scans the network and then adds a limitation of demand search. So the limitation of scanning a network is not what's being added there.

And finally, your Honor, I guess I would note that plaintiff's construction really seeks to eliminate scanning entirely. If you look at -- this is 59, slide 59. They basically said that a scanning system is a system to search for information.

So, you know, we saw on their slide 27, they sort of have their constructions -- this is their slide -- next to the claims, and the claim reads, "A scanning system for searching for information," but their construction is, "A system used to search for information." So they are essentially eliminating the meaning of scanning. Scanning is meaningless under their construction, and, again, we would submit that there is a different meaning for scanning then searching. They are not the same, and that scanning is a much narrower type of system than the patent describes as something that spiders, that spiders a network.

THE COURT: So scanning is not a form of search?
MR. PERLSON: I think you can search using a scanning system.
THE COURT: Just like spidering, according to you, is a form of searching.
MR. PERLSON: It is a way to search, yes, but it's not one in the same. I mean, so a spidering system can be used for searching, but not all search systems use spidering. So they are not synonyms. One is much narrower, and here the patent makes clear that the scanning that we are talking about is spidering and it's used to search the network, to look at -- you know, but it's not the same thing as just looking for items in any way. It's looking for it in a particular way, and that's what the intrinsic evidence makes clear and that's what one skilled in the art would view this patent as.
THE COURT: Has anyone here made clear what spidering really is? Spidering is a form of searching the network. You, in effect, said it's a form of scanning the network. How is spidering different from scanning?
MR. PERLSON: Well, you know, I think that --
THE COURT: Yeah, how is spidering different from scanning?
MR. PERLSON: Well, I would say in this patent,

I mean, they are used -- spidering is the scanning that's used in this patent. I mean, spidering is a term of art that has a very specific meaning that deals with what I just described above, that you are going out to the Internet and looking for and crawling -- that's actually why we probably used crawling because it's a little easier to use. It's, in effect, crawling from page to page to page looking at what's on that page, and you are looking at all of them sequentially.

THE COURT: Okay. So what do you do when you are scanning?

MR. PERLSON: I'm sorry?

THE COURT: What do you do when you are scanning?

MR. PERLSON: What do you do --

THE COURT: Yeah, when you are scanning, within the context of this patent?

MR. PERLSON: Well, you collect the information that you get from this sequential web site by web site crawl, and then you have that, and then you look at that, and then you have a set of results. The results, you have a series of web pages that you have now crawled and you have discovered, and then the patent talks about what you do next with them. And what you do next with them is apply this content-based filtering. And then after that,

you have the collaborative data filtering, because the crawling gives you a lot of results. It gives you a whole slew of results because you are going out and you are looking at all sorts of sites and you are looking at all sorts of pages on the sites.

I don't think there's any dispute about that's what spidering means, that I am describing it correctly. I don't think, actually, there would be any dispute among the experts as to what spidering is, because it's something with a very particular meaning.

THE COURT: All right. Thank you.

MR. PERLSON: So unless your Honor has any further questions, I will go on to demand search.

THE COURT: No. Go on.

MR. PERLSON: Okay.

So, your Honor, here the key that's used is -- the computer is faster than I am.

So, with demand search, the specification is clear as to what we are talking about. The specification shows that it's just a regular search engine query.

Now, plaintiff said up here that the specification does not describe a demand search as a normal search engine would. Well, I guess, it doesn't use the words "normal search engine query" but it certainly does say, "regular search engine query" as we

are shown here and as were shown in Column 63. It says, "On the other hand, a regular search engine is operated to make immediate or short-term "demand" searches."

And then in the next one here, this is from Column 24, line 3 to 8, says, "Otherwise, block 28C commands a demand search by a regular query engine."

And then further in Column 23, lines 32, it says, "In the operation of conventional search engines at portal web sites, user queries are searched on demand to find relevant information across the web." That's what we are talking about with the demand search, and so our construction is a search engine query.

Now, plaintiff says that you are not going to know what a search engine query is. Your Honor, I think that that is something that's a very easy thing for a lay jury to apply something that many of them might use in their day-to-day lives.

Now, let's contrast that with what plaintiff has suggested we use. Plaintiff says, "We say demand search a is one-time search performed upon a user request." I would submit, your Honor, that the jury is not going to have any idea what to do with that. A one-time search is going to be poorly confusing. If I do cats once, does that mean I can't ever do cats again or that nobody could ever do cats again? It makes no sense. The only context

in which it could possibly make any sense is to define what a wire is because a wire is different than a demand search.

THE COURT: Does a search engine query tell a jury who's making the inquiry or what the source of the inquiry is? A search engine query, we are talking about a search engine query. Now, is that the engineer operating the system, or something, conducting a query to make sure the system is working technically and properly? What is a search engine query? Does it tell the jury who is making the inquiry, the search?

MR. PERLSON: Sure. Well, we could say a search engine query performed upon a user request if that would resolve it.

THE COURT: A search engine query performed upon a user request --

MR. PERLSON: That's from the plaintiff's language.

THE COURT: How different is that, other than the one-time business from a search performed upon a user request that the plaintiff is suggesting?

MR. PERLSON: Well, I think that the key is that a demand search is a search to a search engine, and plaintiff is going to -- I think that the reason why they are resisting this search engine language, which is

directly from the specification again and again, is that they are going to try to point to something that is not a search engine query, your Honor. They are going to point to something that they are going to say is a database lookup in an internal system is a search engine query, even though again and again and again the patent makes absolutely clear that a demand search is a query of a search engine.

THE COURT: Can you have multiple demand searches?

MR. PERLSON: Well, sure, I mean, someone could make all sorts of demand searches. I mean, I'm sure they did at the time and, you know, people make search engine queries all the time. That's why it just doesn't make sense. I may search for cars one day and then search for cars the next day. Is that now no longer a one-time demand search? I don't know.

I can understand it from the context, I guess, of a wire. I mean, the wire is a continuous. So the only reason the one-time is in there is to actually give meaning to this notion of the wire that has no relevance in this case, and if we inject this --

THE COURT: You know where the language "one-time" came from. You did see it in the patent, right?

MR. PERLSON: Oh, yes, and they use that to distinguish wire searches from a demand search. We would submit, your Honor, that the search engine query is exactly what it says. It says that the demand search is a regular search engine query. I mean, that's what the patent says and that's all we are saying.

THE COURT: Well, isn't the search engine query a little vague also? I just ask you who is making the -- from the standpoint of a jury, you say it's a search engine query.

MR. PERLSON: I don't think so. I think that it would be very clear that you have your search box and you type in Jaguar, and that's your search engine query. I think that's a very easy thing for a jury to grasp.

THE COURT: All right.

MR. PERLSON: I will take order of steps next.

Now, your Honor, I know that you had indicated some concern regarding the order of steps and you are probably wondering why it is that we are asking you to do this. I think that, you know, I tend to agree that there really shouldn't be any dispute about something like this, but what we tend to find, frankly, is that what you get is that you have the plaintiff pointing to multiple disparate parts of the system that are done in, perhaps, a different order than put out by the claims, and that

despite the order of the claims that is very clear from the specification that it is not followed and so what we proposed is that, you know, let's agree on what the order of steps is here.

It's not like -- this is not some crazy, unusual thing that we are doing by seeking the construction of the order of steps.

THE COURT: Have the parties sat down to try to agree on what the order of the steps are? You have a difference on what the definition means, but have you tried to do what you just asked the Court to do? Have the parties sat down and figured out what the order of the steps are?

MR. PERLSON: We did -- I mean, I think in our meet and confer we certainly tried to make an effort to do that. We tried to engage and say, you know, what it is that they have a problem with regarding, you know, our explanation of why they should be in, and they didn't agree. I mean, you, know, we certainly tried.

THE COURT: I want to be clear on what you didn't agree on. You didn't agree on the fact that you should sit down and figure out the order of steps or you didn't agree on the order of the steps?

MR. PERLSON: I think initially we didn't agree on both of the points, and I think that plaintiff still

doesn't think that we should be even talking about it or any need to talk about it. They want to just punt it down the road to when their expert gets up and talks about it. But, you know, we would submit, your Honor, then this is a perfectly appropriate thing for a claim construction and that the Federal Circuit in the cases that we cite, in the *Loral Fairchild* and *Interactive Gift, have* construed the order of steps. It's a perfectly appropriate thing for claim construction.

THE COURT: You know, wouldn't that depend upon what type of patent case you are in and what type of steps you are dealing with? Whether it's appropriate for claim construction will vary from case to case; isn't that correct?

MR. PERLSON: I suppose that's possible.

THE COURT: Because the Court is not all that certain -- you cite a couple of Federal Circuit cases here. I don't know what the Court was construing there. Perhaps that construction of the steps would be appropriate in those cases, whereas in this case it may very well be unnecessary.

MR. PERLSON: Well, your Honor, I would say that we have a dispute here. I mean, *02 Micro* says that if there's a dispute, it should be resolved and, you know, let them explain why we are wrong. They accused us of

asserting logic, that there's some logic to the claims. Certainly, your Honor, I don't think there's anything wrong with injecting logic into this process. I mean, I just don't know how they can dispute some of these things, and so I would say probably the waste of dispute is their refusal to engage on something that there really shouldn't be any dispute about.

THE COURT: According to you, these steps are logical and obvious from the patent. Is that your position?

MR. PERLSON: Yes. I don't think that someone could read them in a different way than what we have said.

THE COURT: Okay. Because according to the plaintiffs, they appear to be saying the same thing, that the claim language doesn't need any construction because it is logically reflected in the claim language.

MR. PERLSON: Well, your Honor, they --

THE COURT: You both seem to be saying the same thing, but you don't want to say what it really is.

MR. PERLSON: Well, I think that we do say what it really is and that they are refusing to say what it really is because down the road they want to have wiggle room in case they want to say something different.

THE COURT: Though they say it's logically clear

from the claim.

MR. PERLSON: Yeah, but what is logically clear? Is it what we say, or is it something else? I don't know. And that's why we have a dispute, your Honor.

I mean, we could have a similar thing with they could say, your Honor, we don't need to construe any claim because we are going to read the patent like it says in the patent. Well, that's why we are here, your Honor, because, you know, there's these disputes.

THE COURT: Well -- I understand your position.

MR. PERLSON: Okay. So, you know, I will just go into this briefly because I don't think it really requires a heck of a lot of explanation here. I mean, you have steps A and B and we think they have to be performed before C and D. Before C, because C combines the output of A and B. So I don't know how there could be any dispute that when C is talking about combining what's in A and B, there's no way that A and B could happen after C.

And then similarly in the next one, we have this c1 and c2. C2 refers to what is combined in c1. Well, it has to happen afterwards because it's already been combined. You know, they say that it could happen at the same time. Well, you know, I suppose maybe in some other system it's conceivable that you could come up with that,

but that's not what they claim. They said that in c1 it's combining, and then in c2 you do something with what's combined.

And then again in the next one, in Claim 25, we have you're receiving in 2, you are receiving information from the scanning system. Again, referring back to scanning a network in the first claim. And then later on in terms of the other steps, once again we are referring back and referring back to something that was already done.

Just one real quick point. I think that plaintiff had talked about how there was filtering mentioned twice and, you know, we would submit, your Honor, that that's actually a different -- there's two steps going on here. There's a filtering that's going on in B with the content filtering and then there's D that's a further weeding out and filtering in relation to after it's been combined. So that's the resolution of that.

So I think, unless your Honor wants to hear any more on that particular issue, that's our presentation.

THE COURT: Well, thank you. You may be back.

I have a question, Mr. Sherwood.

MR. SHERWOOD: Yes, your Honor. I want to start with this last one he just discussed, order of steps.

MR. CIMINO: I can address that, your Honor.

THE COURT: All right. If you take the position that no construction is necessary, you know, because if you look at the language of the claim, it's logical as reflected in the claim language, what is your disagreement with these steps that defendant has laid out here? He says he's looked at the claim and laid them out step by step. What is your disagreement with that?

MR. CIMINO: So, the disagreement we have I mentioned when I gave my first argument. There is a filtering step and then there's a combining and filtering. That claim term can appropriately be talking about filtering at the same time. You could be doing filtering with the two pieces of data or the single piece of data sequentially. So that one we cannot agree to.

I don't know if it's going to have any meaning later on -- I suspect it won't -- but we cannot agree as a matter of law that you are required to go in order because I can see where you can do the combining step and the filtering step simultaneously.

I also mention to your Honor that you can do the whole process of the claim simultaneously because you have multiple informons. You could be collecting some informons and processing them while you are collecting other informons. So it happens in sort of a pipeline. So similar steps could be occurring while other ones are

occurring at the same time.

That view of the claim applies for both of the claims that they have identified, and we have which claim terms in our PowerPoint presentation the Court has to construe which terms can happen at the same time.

Now, just to go back a second, the process about sitting down, they originally wanted all of us to agree every step in the claim happens in order. We said no. First of all, they proposed 18 or something claim terms. It was well above the limit. We filed a motion to compel immediately, and we focused on negotiating with them on things that mattered.

Oh, we did agree to one. There was a letter back and forth. They said, well, this has to happen first. We said, yea, okay, that one we can see how that one wouldn't happen first. Their response back was, well, how about this one? How about this one? How about this one? One step after another trying to get us to concede without the benefit of any experts that these steps happen in order.

There is a flow to the claim, but it is legally permitted for these steps to happen simultaneously. And from a technical standpoint, I believe that they can happen simultaneously. Do I think defendants do it simultaneously? I'm not sure yet. We are still waiting

for discovery, and the experts are still waiting out there.

THE COURT: So you have not had the benefit of any kind of expertise to help you understand whether these steps can be performed simultaneously?

MR. CIMINO: We have talked to our own experts who agree that they can happen simultaneously. We didn't make any of that of record. But my point is, we haven't taken depositions yet of the defendants to see how their products work and have our expert take a look at infringement issues other than by written contentions. This to me, is where this whole issue will sort of shake out.

THE COURT: All right. Anything you want to say about anything else?

MR. SHERWOOD: Your Honor, may I speak briefly?

THE COURT: Sure. You can go back to crawling and spidering, if you would like?

MR. SHERWOOD: No. I think we have plowed that ground pretty well, your Honor. I don't have any intention of raising that. But I would like to talk about collaborative feedback data, and if I could just retrieve my board again.

We put the easel down, so I'm just going to hold this here, your Honor, and be real clear about what we

mean by collaborative feedback data. What the claim says is "Information found to be relevant to the query by other users." So using the plaintiff's example of Jaguars, in Jacksonville if you type in Jaguar into your search box, you are going to get a bunch of results and the people in Jacksonville are going to pick the football result. That's the information that is going to be most relevant to other users who typed in the same query.

And if we could have now slide 8, and if you look here, your Honor, at our proposed construction, it is exactly what we are proposing here: "Information concerning what other users found to be relevant to the query," what the people in Jacksonville thought was relevant to their query when they typed in Jaguar. It was football; it wasn't a cat and it probably wasn't a car. I'm not quite as sure about that. That's the feedback data. It's in our claim construction.

THE COURT: But how do you deal with the reference to the language of "other users with similar interests or needs?" How do you deal with that language that you find in the patent?

MR. SHERWOOD: Their similar interests or need, again, in the context of a demand search environment, which is what these claims are about, is reflected in the query. They were interested in knowing something about

Jaguar. They had a need to know something about Jaguar.

Just to take another example, somebody wants to know -- I mean, I actually do this. I commute on a bus. I want to know when the bus is going to come. I type in a search in which I will type in the name of the bus. That reflects the need or interest that I have.

THE COURT: Well, you know, the language is used in a claim for some reason. It's just not superfluous. It's there for a purpose. So from what you are telling me, you make no reference to the phraseology "other users with similar interests or needs."

MR. SHERWOOD: Well, your Honor, that's not in this claim language.

THE COURT: I know it's not in that claim language.

MR. SHERWOOD: It's not in the '420, either, your Honor.

THE COURT: Excuse me. I jumped back to something. Go on. You are right. Go right on. I will come back to that.

MR. SHERWOOD: Secondly, your Honor, Mr. Perlson made some reference to groups in his argument, and I would like the Court to understand that the specification that is in these two patents is actually in other older patents and there is no claim language in this patent or

in the '420 about groups. It's a complete red herring, your Honor. It has nothing to do with these two patents.

These specifications can be used to form a basis of multiple patents and so we would need to find some claim language in these claims before we start talking about communities, and groups, and other things that are disclosed in the specification that are not claimed here.

THE COURT: The Court sees how it got confused on the last question. We were talking about collaborative feedback, but up on my screen I had looked up at the top there and it had the definition of "feedback system for receiving information found to be relevant to queries." We had something different on the screen up here, though you had something else out there. So that's how that happened.

MR. SHERWOOD: I'm sorry for any confusion, your Honor.

THE COURT: That's all right. We have got it now.

MR. SHERWOOD: Then the last thing we would like to cover is our slide 6. Our proposed claim construction here appears in the middle, your Honor. Mr. Perlson raised an issue about using the word "concerning." I think it would be fine if we substituted the word "about." Because all we are saying is we want

information about what other people, other users found to be relevant to the query. Concerning is just simply a word that's connecting the rest of the claim construction. So if about is better, then that's fine. I think it is a nonissue.

Lastly, with respect to collaborative feedback data, I want to point out, your Honor, that there was never any argument directed to the problem of multiple source limitations, which I explained earlier in my argument and I won't go back through it again. It's in our briefs as well.

Quickly, with respect to demand search, the defendants seem to want to have some sort of concept like regular or normal built into their claim construction. In my years in the law, I am not sure that I have found those words, those adjectives like reasonable, like regular, like normal are going to add anything to the meaning of this term for the jury. I think, as the Court pointed out, they are actually confusing because you don't know who's doing what.

And the last point I want to make, your Honor, with respect to demand search is that the claim construction that IPE has proposed is designed to draw a distinction between a continuing search, which is also disclosed in this patent but it's in claims that are not

asserted, which is actually the query that's done by the search engine. So what would happen is you would say, I have an interest in Jaguars. Go out every week and find out what you can that would be of interest to me. You are not doing that search every week, but the search engine is doing it.

THE COURT: Let me go back to the one time. Certainly the term "one time" is used here, but you can repeat and have repetitive one-time searches, couldn't you?

MR. SHERWOOD: Yes, your Honor, absolutely.

THE COURT: Okay. So do you really need one-time there to explain that you are focusing upon a search performed upon a user's request in order to have a clear understanding of what's going on here, because that same user could make multiple inquiries?

MR. SHERWOOD: It's a good question, your Honor. Let me see if I can expand a little on what we mean by it. It is a unique, single request. So you go to the computer. You sit down. You type in your search. It's one event. That's the end of it. It has no further life to it.

THE COURT: So is maybe the better explanation a single search performed upon a user request as opposed to a one-time? I understand that it's used in the patent

here, but somehow or another I'm trying to figure out whether that's just as misleading as, perhaps, the term "search engine query" is in explaining what's going on here.

MR. SHERWOOD: Well, your Honor, I think raises a good point, which is to say that we are really looking here at a unitary event. It may be that single actually is the more descriptive adjective than one shot. It's not really a time thing. It's a one-time thing -- I say one time, one event.

THE COURT: One event.

MR. SHERWOOD: Yeah. It has no further life to it.

THE COURT: I have got you.

MR. SHERWOOD: Your Honor, I have nothing further.

THE COURT: Okay. I thank you, sir.

MR. PERLSON: A couple quick points, your Honor.

THE COURT: You want to improve on something he said?

MR. SHERWOOD: Yes, but I want to agree with him, your Honor.

THE COURT: All right. I will hear from you.

MR. PERLSON: Your Honor, just a few points. First, again, in reference to the fact that this

collaborative filtering looks at the prior query and like the Jacksonville Jaguar, it looks at the actual query itself and, again, the patent never, ever says that. It never says that collaborative filtering is focused on what the query is. That is what the patent talks about as content-based filtering. So that argument eliminates collaborative filtering.

Now, they criticize us for going to the detailed description of the embodiments at the very beginning of this notion that introduces the similar interests, and profiles, and such. Well, of course, that's what the collaborative filtering refers back to here, and this is, again, in Columns 3 and 4. And they reference the fact that this was a continuation of the '799 patent and that somehow we are supposed to ignore this very specific thing in the beginning.

Well, as even plaintiff said earlier, what this patent is, is building on the '799 patent and applying it to search. So when they are talking about content filtering, and collaborative filtering, and the other groups of people with similar interests, and they didn't talk about it in '799 in the context of search, but it's still applicable here because, as they have conceded, this patent is about combining content-based filtering with collaborative filtering and search.

So we would submit, your Honor, that it's absolutely appropriate to look at these portions of the specification. In fact, I'm not sure that there would be anywhere else that would provide you with the guidance on what we are talking about. And, indeed, if you look at the specification in Column 26 and the discussion of the demand search, and this is in the area where they added to what was originally there, they refer back to this stuff. They say, for example, in Column 26, line 25, "A feedback processor is structured like the mind pool system to provide collaborative feedback data for integration with the content-based data in the measurement of informon relevancy by the filter." I mean, they are referring back to the stuff that was before.

On the demand search, again, I think the claim itself, first of all, says where it comes from. If you look, it says it's a demand search from a user. So I think that that's really not an issue, but what is important is that it's a search engine query, as the patent says. Again, if it's not a search engine query, down the road plaintiff is going to say that some other thing that is not a search engine query, that is not a demand search under the patent, meets this limitation and that's why it's important that the construction include

the fact that it's a search engine query.

THE COURT: From the user.

MR. PERLSON: From the user. I mean, which the patent already says, your Honor.

And, finally, I will note for the order of steps, you know, I'm not sure why they need reference to our systems to determine whether there's an order of steps in this patent. We would submit that that is what really should be the issue here, not what our systems do.

THE COURT: Okay. Thank you, gentlemen.

All right. Gentlemen, the Court would recommend that you check with my court reporter about ordering up the transcript of this hearing. I think it may be useful for the Court. The Court has some notes, but the notes can get cold. That would be useful, and we will try to get back to you as quickly as possible. The parties usually hold off on filing any type of dispositive motions until they can get the claims construction opinion back and the Court will try to get it back as expeditiously as possible.

In the meanwhile -- I have to say this. In the meanwhile, if you see fit to go on and resolve this case without bothering with this Court again, that's fine with the Court, too. I want you to know that the Court always encourages you to talk to each other. Mr. Noona and --

where is local counsel?

MR. SNOW: Here, your Honor.

THE COURT: Okay. Local counsel will tell you that. So in the meanwhile, I'm sure you will move forward with narrowing the issues that you disagree on.

With that, there's nothing else until I get my hands on the transcript, and from there we will move as quickly as possible.

Thank you very much.

(This hearing concluded at 12:56 p.m.)

* * *

CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

X /s/ X

Sharon B. Borden, RMR, FCRR

X June 7, 2012 X

Date