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HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC, et al.,

Defendants.

Case No.: 2:10-cv-01385-MJP

MOTION FOR RECONSIDERATION  
AND CLARIFICATION OF COURT'S  
FEBRUARY 16, 2011, SCHEDULING  
ORDER, BY DEFENDANTS GOOGLE  
INC. AND YOUTUBE, LLC

Note on Motion Calendar:

March 2, 2011

MOTION FOR RECONSIDERATION AND CLARIFICATION OF  
COURT'S FEBRUARY 16, 2011, SCHEDULING ORDER, BY  
DEFENDANTS GOOGLE INC. AND YOUTUBE, LLC - 2:10-cv-01385-MJP

1 Pursuant to L.R. 7(h), Google Inc. and YouTube, LLC (collectively “Google”) seek  
2 partial reconsideration and clarification of the Court’s Scheduling Order of February 16, 2011  
3 (“Feb. 16 Order”) (Dkt. 178).<sup>1</sup>

4 **I. INTRODUCTION**

5 Google understands that motions for reconsideration are disfavored and do not make the  
6 present motion for purposes of delay, but request reconsideration of a few items from the Court’s  
7 Feb. 16 Order. Google’s request is based upon intervening legal authority (*In re Katz*, 2011 WL  
8 607381 (Fed. Cir. Feb. 18, 2011)) and to prevent a manifest error that would result in the denial  
9 of Defendants’ due process rights.

10 The Feb. 16 Order limits the parties to a total of 20 claim terms (10 terms per track), from  
11 all four patents-in-suit, to be presented for construction, while allowing the Plaintiff to pursue an  
12 unlimited number of claims. (Dkt. 178 at 3:10-17). As clarified by the Federal Circuit decision  
13 in *Katz*, a patent litigant’s due process rights are implicated to the extent claim selection  
14 mechanisms may force the litigant to abandon legitimate claims (or defenses). Thus, the  
15 limitation on the number of claim terms that Defendants may dispute, particularly without any  
16 limitation on the number of claims Plaintiff may assert, implicates Google’s due process rights  
17 because it may force Google to abandon legitimate defenses, and subject Google to claims for  
18 infringement of claims that are not construed. Google therefore requests that the Court  
19 reconsider and/or clarify its Feb. 16 Order to (a) limit the number of claims Plaintiff may assert<sup>2</sup>  
20 and (b) remove the cap on the number of potentially disputed claim terms that that parties may  
21 present for construction.

22 As *Katz* makes clear, it is appropriate to limit the number of claims the Plaintiff may  
23 assert and doing so now will narrow the case and help reduce the number of disputed claim  
24 terms. *Katz*, 2011 WL 607381 at \*4. It is not appropriate, however, to effectively preclude

25 \_\_\_\_\_  
26 <sup>1</sup>While Google recognizes that some of the potentially disputed claim terms may be resolved, given the fourteen day  
time limit for seeking reconsideration, Google files the present motion today.

27 <sup>2</sup> Interval is currently asserting 67 claims, but has already indicated that once it had Defendants’ invalidity and non-  
infringement contentions it would be able to narrow the number of asserted claims. See Supplemental Joint Status  
Report Dkt. 167 at 22:8-10).

1 Defendants from raising legitimate defenses to the asserted claims by limiting the number of  
2 terms the Court will construe. *Id.* at \*4 & n. 9; see also *02 Micro Int'l Ltd v. Beyond Innovation*  
3 *Tech, Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) (“When the parties present a fundamental  
4 dispute regarding the scope of a claim term, it is the court’s duty to resolve it.”). The  
5 combination of no limit on the number of claims the Plaintiff may assert with a limit of 10 terms  
6 per track that parties may present for claim construction presents the very real possibility that  
7 Google will be denied the opportunity to present invalidity and non-infringement defenses that  
8 depend, at least in part, on claim construction.

## 9 **II. ARGUMENT**

10 The claim construction limitation in the Court’s Scheduling Order will unavoidably force  
11 Google to risk a trial for infringement of claims that have not been construed, in violation of the  
12 principle that claim construction is a necessary first step in an infringement analysis. More  
13 immediately, the limitation will prejudice Google’s ability to present certain legitimate § 112  
14 invalidity defenses (as well as other invalidity or non-infringement defenses), because those  
15 defenses inherently require construction of terms in the relevant claims.

16 The Federal Circuit has recently clarified the due process analysis as it applies to limiting  
17 a party’s ability to contest claims as part of case management. In *Katz*, the patentee argued that  
18 the District Court’s refusal to permit the assertion of claims beyond a certain total number was a  
19 violation of its due process rights. *Katz*, 2011 WL 607381 at \*2. The Federal Circuit affirmed  
20 the limitation on the number of asserted claims, but explained that a patent litigant can be  
21 improperly deprived of due process when a Court’s claim selection limitation prevents the  
22 litigant from contesting claims that present “unique issues as to liability or damages.” *Id.* at \*4.  
23 While the Federal Circuit was addressing a patentee’s due process rights, the reasoning is even  
24 more applicable to a defendant who has not had the benefit of choosing what claims will be  
25 asserted against it or the pre-filing investigation of the claims. Thus, the due process concerns  
26 considered in *Katz* are even more acute here because the limit on the number of terms to be  
27 construed at this early stage of the litigation, particularly with no limit on the number of asserted

1 claims, will deprive Defendants of the ability to present legitimate defenses to the extent they  
2 depend on claim construction. *Id.* at \*4 & n.9. Moreover, these limits disproportionately harm  
3 Defendants insofar as Plaintiff remains free to assert the claims without meaningful limitations  
4 on what the terms mean or whether they are supported by the patents' disclosure.

5 While Google understands that the potentially disputed claim terms are to be exchanged  
6 and potentially narrowed through the meet and confer process, and thus the parties have not  
7 determined exactly what will be in dispute, Google's preliminary identification of potentially  
8 disputed claim terms below demonstrates that a limit of 10 terms per track, particularly with no  
9 limit on the number of asserted claims, will deprive Defendants of the due process rights. For  
10 example, Defendants' invalidity contentions, served on February 28, 2011 (submitted herewith  
11 without claim charts as **Exhibits A and B to the Jost Declaration**) include § 112 defenses for a  
12 number of claims of each of the patents-in-suit, particularly since many of the claim limitations  
13 are hopelessly vague and indefinite, lack any support in the specifications and/or are means-plus-  
14 function terms that have no supporting structure disclosed. These § 112 defense inherently and  
15 inescapably involve claim construction.

16 For example, in the '507 patent, based upon Plaintiff's infringement contentions,  
17 Defendants' invalidity contentions and even just Google's non-infringement contentions, it  
18 appears that there may be as many as seventeen terms that are subject to a dispute over the  
19 meaning of the claim term/phrase. Specifically, the following terms (or portions thereof) may be  
20 in dispute:

- 21 • "a body of information"
- 22 • "segment"
- 23 • "each segment representing a defined set  
24 of information in the body of  
25 information"
- 26 • "acquiring data representing the body of  
27 information"
- "generating a display of a first segment  
of the body of information"
- "comparing data representing a segment  
of the body of information to data  
representing a different segment of the  
body of information"
- "predetermined criteria"
- "generating a display of a portion of, or  
a representation of, a second segment of  
the body of information"
- "the display of the portion or  
representation of the second segment is  
generated in response to the display of a  
first segment"
- "a first segment to which the second  
segment is related"
- "determining the similarity of the subject  
matter content of a segment to the  
subject matter content of a different  
segment"

- 1 • “subject matter category/subject matter categories”
- 2 • “relevance feedback method”
- 3 • “a computer readable medium encoded with one or more computer programs”
- “substantially coextensive in time”
- “[predefined] degree of similarity” and
- “identifying one or more of the previously categorized segments as relevant to the uncategorized segment.”

4 Similarly for the ‘682 patent, there may be as many as eleven terms in dispute, without  
 5 counting the several means-plus-function terms that either lack support in the specification  
 6 and/or need to have the function and structure construed. Specifically, the following terms (or  
 7 portions thereof) may be in dispute:

- 8 • “an indication that an item . . . is of current interest”
- 9 • “real time”
- 10 • “process the indication”
- 11 • “determine an intensity value to be associated with the indication”
- 12 • “determine . . . an intensity weight value”
- 13 • “adjusting the intensity value”
- 14 • “based on a characteristic for the item provided by the source”
- “inform the participant that the item is of current interest”
- “processing the indication comprises determining the intensity value for the indication . . . the intensity value representing the weight that will be given to the indication”
- “calculating an intensity rank for the item . . . the intensity rank indicating the level of current interest of the item relative to other items” and
- “attribute of the indication.

15 The means-plus-function terms in the ‘682 patent also present somewhat unique issues insofar as  
 16 they are “computer-implemented” and thus require a disclosure of a supporting algorithm or  
 17 other specific description of the “steps and operations” of used by any software that to perform  
 18 the recited function (not merely a repetition of the function); otherwise the claims, as asserted by  
 19 Defendants in this case, are invalid as indefinite. See e.g., *Aristocrat Techs. Austl. Pty Ltd. v.*  
 20 *Int’l Game Tech.*, 521 F.3d 1328, 1333-35 (Fed. Cir. 2008); see also Ex. A (Defendants’ Invalidation  
 21 Contentions for the ‘507 and ‘682 Patents) at 39-40. There are approximately five such means-  
 22 plus-function terms in the asserted claims of the ‘682 patent. Assessing whether there is any  
 23 structure supporting these terms, and what that structure might be, is necessarily bound up with  
 24 claim construction.

25 Similarly, for the ‘652 and ‘314 patents, there may be as many as fifteen terms in dispute,  
 26 without counting the several means-plus-function terms that either lack support in the  
 27

1 specification and/or need to have the function and structure construed. Specifically, the  
2 following terms (or portions thereof) may be in dispute:

- 3 • “peripheral attention [of a user]”
- 4 • “attention manager/during operation of an attention manager”
- 5 • “establish(es) a link”
- 6 • “set of content data”
- 7 • “selectively displaying”
- 8 • “in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus”
- 9 • “control option(s)”
- 10 • “temporal constraints on the display”
- 11 • “scheduling/scheduling instructions”
- 12 • “[audit instructions for monitoring /auditing the] usage of the content display system to selectively display an image or images generated from a set of content data”
- 13 • “without the content data being aggregated”
- 14 • “content providing system”
- 15 • “acquire/acquiring a set of content data”
- 16 • “image or images generated from a set of content data” and
- 17 • “providing a set of content data.”

18 There are approximately twenty means-plus-function terms in the asserted claims, many of  
19 which are not supported by an adequate disclosure. See Ex. B (Defs.’ Invalidation Contentions for  
20 the ’652 and ’314 Patents) at 13-16; 28-30. Assessing whether there is any structure supporting  
21 these terms, and what that structure might be, is necessarily bound up with claim construction.

22 Although the number of disputed terms may be narrowed as the process proceeds, it is  
23 clear that the present limit of 10 terms per track would deprive Defendants of their due process  
24 rights because it may prematurely impair Defendants ability to present legitimate defenses.

#### 25 Availability of Additional Markman Proceedings

26 According to Local Patent Rule 132(c), “The Court will construe a maximum of ten  
27 claim terms at the *initial* Markman hearing, unless the Court determines otherwise. Prioritization  
should be guided by the twin goals of narrowing the issues and choosing the ten claim terms for  
which claim construction would be most productive in terms of setting the groundwork for  
possible settlement” (emphasis added). This rule, along with LPR 135, implies that the Court  
may conduct serial Markman hearings to address an aggregate total of more than 10 claim terms.  
In contrast, the Feb. 16 Order appears to limit each track to 10 claim terms total. Thus, in the  
alternative to the relief requested above, Google requests clarification that, to the extent there are  
more than 10 terms in dispute, the Court permit the parties to present additional terms for claim  
construction and that the limits not be applied to prevent the Defendants from arguing that

1 certain claims are invalid under Section 112 because the terms are indefinite, lack a written  
2 description or are not enabled.

3 **III. CONCLUSION**

4 For the foregoing reasons, Google seeks partial reconsideration of the Scheduling Order  
5 to (a) limit the number of claims Plaintiff may assert and (b) remove the cap on the number of  
6 potentially disputed claim terms that that parties may present for construction; or in the  
7 alternative for clarification that the Scheduling Order does not preclude additional Markman  
8 proceedings, if necessary, or prevent the Defendants from arguing that certain claims are invalid  
9 under Section 112, whether construed as part of the original Markman hearing or not.

10 DATED this 2nd day of March, 2011.

11 STOKES LAWRENCE, P.S.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on March 2, 2011, I caused the foregoing Motion for Reconsideration and  
3 Clarification of Court's February 16, 2011, Scheduling Order, by Defendants Google Inc. and  
4 YouTube, LLC to be:

5  electronically filed with the Clerk of the Court using the CM/ECF system which will send  
6 notification of such filing to the following:

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