Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC, Plaintiff, v. AOL, INC., et al., Defendants.	Lead Case No. 2:10-cv-01385-MJP JOINT CLAIM CONSTRUCTION AND PREHEARING STATEMENT **JURY DEMAND**

The parties in the above-styled case hereby submit this Joint Claim Construction and Prehearing Statement, pursuant to Local Patent Rule 132 and this Court's Scheduling Order (Dkt. # 178). The patents-in-suit are attached hereto as Exhibits A ('507 Patent), B ('682 Patent), C ('652 Patent) and D ('314 Patent). Relevant excerpts from the prosecution history are attached hereto as Exhibits A1 – D1, corresponding to the like exhibit number by patent (e.g., relevant excerpts from the prosecution of the '507 patent are attached as Exhibit A1, for the '682 patent as B1, for the '652 patent as C1 and for the '314 patent as D1). For the Court's convenience, the prosecution history pages have been assigned production numbers that appear in the lower right corner of the page.

A. Undisputed Claim Terms

The parties have reached agreement on the construction of the following terms:

PATENT	TERM	AGREED CONSTRUCTION
'507	Instruction	A statement that specifies a function to be performed by a system and that identifies data involved in performing the function

PATENT	TERM	AGREED CONSTRUCTION
'507	determining the degree of similarity between the subject matter content of the uncategorized segment and the subject matter content of each of the previously categorized segments	determining how similar the subject matter content of the uncategorized segment is to the subject matter content of each of the previously categorized segments
'507	subject matter categories	topics (e.g., international, national, regional, business, sports, or human interest) describing the subject matter content of a segment
'507	body of information	collection of acquired information
'682	intensity rank	A value associated with an item that represents the level of current interest in that particular item relative to other items
'682	from a source other than	From a user other than
'682	[receive / receiving] in real time	[receive/receiving] immediately or almost immediately after the indication.
'652	"means for controlling aspects of the operation of the system in accordance with a selected control option"	FUNCTION: controlling aspects of the operation of the system in accordance with a selected control option STRUCTURE: One or more digital computers programmed to perform one or more of the following actions in response to a request from the user: (1) terminate the operation of the attention manager, (2) begin display of the next scheduled set of content data, (3) begin display of the previous scheduled set of content data, (4) remove a set of content data from the display schedule, (5) prevent a set of content data from being displayed until it has been updated, (6) modify the display schedule in response to a user's identified satisfaction with a set of content data, (7) establish a link with an information source, (8) provide an overview of all of the content data available for

PATENT	TERM	AGREED CONSTRUCTION
		display by the attention manager, (9) maintain display of the current set of content data, or (10) remove the control option interface and structural equivalents.
'652	"means for scheduling the display of an image or images generated from a set of content data"	FUNCTION: scheduling the display of an image or images generated from a set of content data STRUCTURE: One or more digital computers programmed to (1) determine whether sets of content data are available for display, and (2) determine if, when, and for how long an image or images generated from the set of content data will be displayed and structural equivalents.
'652	"means for selecting a displayed control option"	FUNCTION: selecting a displayed control option STRUCTURE: A keyboard, mouse, touch screen, or voice recognition system and structural equivalents.
'652 and '314	"engaging the peripheral attention of a person in the vicinity of a display device"	engaging a part of the user's attention that is not occupied by the user's primary interaction with the apparatus
'652	"means for displaying one or more control options with the display device while the means for selectively displaying is operating"	FUNCTION: displaying one or more control options with the display device while the means for selectively displaying is operating STRUCTURE: One or more digital computers programmed to provide a dialog box that includes a list of one or more of the following control options: perform at least one of steps 501 (Want to display the next set of content data in the schedule?), 502 (Want to display the previous set of content data in the schedule?), 503 (Want to remove the current set of content data from the schedule?), 504 (Want to prevent display of the current set of content data until that set of content data has been updated?), and 505 (Want to specify a satisfaction level for the current set of content data?) and structural equivalents.
'652	"control options"	user-selectable options to control the operation of the attention manager

PATENT	TERM	AGREED CONSTRUCTION
'314	"the content provider may provide scheduling instructions tailored to the set of content data to control at least one of the duration, sequencing and timing of the display of said image or images generated from the set of content data	The [method/system/computer readable medium] must allow the content provider to provide "scheduling instructions" tailored to the set of content data
'652	"data acquisition apparatus that enables acquisition of a set of content data"	The parties agree that this term should be construed as a means-plus-function term pursuant to 35 U.S.C. § 112, ¶ 6 and that such construction should be consistent with the construction of the disputed term "means for acquiring a set of content data from a content providing system" in claim 4 of the '652 patent.
'652	display apparatus that effects selective display on the display device, in an unobtrusive manner that does not distract a user of the display device or an apparatus associated with the display device from a primary interaction with the display device or apparatus, of an image or images generated from the set of content data	The parties agree that this term should be construed as a means-plus-function term pursuant to 35 U.S.C. § 112, ¶ 6 and that such construction should be consistent with the construction of the disputed term "means for selectively displaying on the display device, in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus, an image or images generated from the set of content data" in claim 4 of the '652 patent.

B. Disputed Claim Terms

Below is a table identifying the terms to be construed in connection with the initial *Markman* hearing currently scheduled for July 22, 2011 for each of the four asserted patents.[1] Attached as Exhibit 1 is a Joint Claim Chart setting forth the parties' proposed constructions for the disputed terms in the '507 patent, along with citations to intrinsic and extrinsic evidence. Attached as Exhibit 2 is a Joint Claim Chart setting forth the parties' proposed constructions for

[1] Consistent with the Court's February 16, 2011 Scheduling Order (Dkt. #178) and the Court's Order on Motions for Reconsideration (Dkt #195), Defendants reserve the right to seek construction of additional terms.

the disputed terms in the '682 patent, along with citation to intrinsic and extrinsic evidence. Attached as Exhibit 3 is a Joint Claim Chart setting forth the parties' proposed constructions for the disputed terms in the '652 and '314 patents, along with citation to intrinsic and extrinsic evidence. The chart for the '652 and '314 patents has been combined since these patents have the same specification and the disputed terms in some cases overlap both patents.

The parties may have additional terms for which they will seek construction depending on the resolution of the terms currently presented to the Court, but since some terms that are not presented here include overlapping claim language or otherwise common disputes, the parties may be able to resolve the construction of such additional terms based on the Court's construction of the terms presented herein.[2]

	DISPUTED TERM **(disputed term underlined if less than entire term)**	**PATENT(S)**
1	the display of the portion or representation of the second segment is <u>generated in response to the display of a first segment</u> to which the second segment is related	'507
2	<u>generating a display of</u> … [a first segment/a portion of, or a representation of, a second segment]	'507
3	acquiring data representing the body of information	'507
4	A method for acquiring and reviewing a body of information, wherein the body of information includes a plurality of <u>segments</u>, each <u>segment</u> representing a defined set of information in the body of information, the method comprising the steps of:	'507
5	comparing data representing a segment of the body of information to data representing a different segment of the body of information	'507
6	determine whether, according to one or more predetermined criteria, the compared segments are related	'507
7	wherein the step of determining the similarity of the subject matter of segments further comprises the step of performing a <u>relevance</u>	'507

[2] Consistent with the Court's Order on Motions for Reconsideration (Dkt. #195 at 2:6-9) and Federal Circuit precedent, Defendants have included disputes directed to ambiguous terms for which there can be no reasonable construction and to the construction of a claim as a whole as necessary to resolution of defenses such as defenses concerning non-patentable subject matter under 35 U.S.C. § 101 and/or whether the claims' full scope is enabled by the patent specification under 35 U.S.C. § 112.

	DISPUTED TERM (disputed term underlined if less than entire term)	PATENT(S)
	feedback method wherein the step of determining the degree of similarity is accomplished using a relevance feedback method	
8	identifying one or more of the previously categorized segments as relevant to the uncategorized segment	'507
9	acquiring audiovisual data representing at least a portion of the body of information, wherein the first and second segments are represented by audiovisual data	'507
10	Claim as a whole (patentable subject matter)[3]	'507
11	Claims as a whole (whether claim encompasses use of pure unaugmented video with no segment markers)	'507
12	"an indication that [an/the] item … is of current interest"	'682
13	[determine / determining] . . . an intensity weight value	'682
14	[determine / determining] an intensity value to be associated with the indication	'682
15	adjusting the intensity value based on a characteristic for the item provided by the source	'682
16	[inform / informing] the participant	'682
17	a computer configured to receive in real time . . . process the indication; determine an intensity value . .. and adjusting the intensity value . . . and inform the participant that the item is of current interest	'682
18	computer instructions for receiving in real time . . . processing the indication; determining an intensity value . .. and adjusting the intensity value . . . and informing the participant that the item is of current interest	'682

[3] For terms 10, 11 and 19, the Defendants have identified this dispute as the construction of the claim terms as a whole. These concern construction of claims as a whole to determine, for example, whether the claims recite non-patentable subject matter or include within their scope subject matter that Defendants will contend is not enabled. Additional details concerning these disputes may be found in the parties' joint claim charts. The parties understand based on the Court's Order on Motions for Reconsideration (Dkt. #195) that these do not count towards a limit on "disputed terms."

	DISPUTED TERM (disputed term underlined if less than entire term)	PATENT(S)
19	Claims as a whole (patentable subject matter)	'682
20	"selectively displaying on the display device . . . an image or images generated from the set of content data" "selectively display. . . an image or images generated from a set of content data" "selective display on the display device. . . of an image or images generated from the set of content data"	'652 and '314
21	"images generated from a set of content data"	'652 and '314
22	"in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus" "in an unobtrusive manner that does not distract a user of the display device or an apparatus associated with the display device from a primary interaction with the display device or apparatus"	'652 and '314
23	means for selectively displaying on the display device, in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus, an image or images generated from the set of content data;	'652
24	"each content provider provides its content data to [a/the] content display system independently of each other content provider and . . . "	'314
25	"user interface installation instructions for enabling provision of a user interface that allows a person to request the set of content data from the specified information source"	'652
26	"during operation of an attention manager"	'652
27	"means for acquiring a set of content data from a content providing system"	'652
28	"content provider"	'314
29	"display instructions for enabling display of the image or images"	'652
30	"content data scheduling instructions for providing temporal constraints on the display of the image or images generated from the set of content data"	'652
31	"sequencing instructions that specify an order in which the images generated from a set of content data are displayed"	'652

	DISPUTED TERM (disputed term underlined if less than entire term)	PATENT(S)
32	"saturation instructions that constrain the number of times that the image or images generated from a set of content data can be displayed"	'652
33	"instructions for providing one or more sets of content data to a content display system associated with the display device"	'314
34	"content data update instructions for enabling acquisition of an updated set of content data from an information source that corresponds to a previously acquired set of content data"	'652
35	"content display system scheduling instructions for scheduling the display of the image or images on the display device"	'652
36	"audit instructions for monitoring usage of the content display system to selectively display an image or images generated from a set of content data"	'652
37	"instructions for acquiring a set of content data from a content providing system"	'314
38	"instructions"	'652 and '314
39	a set of instructions for enabling the content display system to selectively display, in an unobtrusive manner that does not distract a user of the display device or an apparatus associated with the display device from a primary interaction with the display device or apparatus, an image or images generated from a set of content data; instructions for selectively displaying on the display device, in an unobtrusive manner that does not distract a user of the display device or an apparatus associated with the display device from a primary interaction with the display device or apparatus, an image or images generated from the set of content data	'314

C. Length of Claim Construction Hearing

The parties would like the Court to budget a full day for the claim construction hearing as provided in the Court's Standing Order for Patent Cases (Dkt. # 26).

D. Proposed Order of Presentation at Hearing

The parties believe that it will be most effective to start the *Markman* hearing with the tutorial. The parties will provide a more detailed plan to the Court as to how they wish to proceed at the hearing at least three days before the hearing, as required by the Scheduling Order.

E. Live Testimony

Other than as described below in subsection F, the parties do not plan to present live testimony at the hearing, but may reference declarations or deposition testimony of certain experts in their briefs and/or at the hearing.

F. Tutorial

The parties believe that a tutorial on the subject matter may be beneficial to the Court. The parties propose that the claim construction hearing commence with the tutorial, and the parties will provide a plan to the Court as to how they wish to proceed at the hearing at least three days before the hearing, as required by the Scheduling Order.

G. Pre-Hearing Conference

The parties do not believe a pre-hearing conference is necessary.

H. Independent Expert

The parties do not believe the Court should appoint its own independent expert.

I. Plaintiff's Infringement Contentions

Interval's infringement contentions are filed herewith as Exhibit 4 (without the charts comparing the claim elements to the accused devices because such charts are voluminous).[4]

Interval objects to defendants' below Invalidity Contentions. First, defendants purport to incorporate by reference the bases for invalidity that they included in their Requests for Reexamination filed with the PTO. The Local Patent Rules set forth the sole method by which a

[4] In addition to the allegations of infringement included in Interval's infringement contentions, it also alleges that features of Google's Android Market website infringe the same claims of the '507 and '682 patents that Interval already is asserting against other Google functionalities. Interval provided Google with claim charts on May 17, 2011 setting forth the accused infringement, and the parties are currently meeting and conferring as to whether Google will agree to a stipulated motion to supplement Interval's infringement contentions or whether Interval will file an opposed motion to supplement.

party may supplement its invalidity contentions: "Amendment of the Infringement Contentions or the Invalidity Contentions may be made only by order of the Court upon a timely showing of good cause." LPR 124 (emphasis added). Defendants have not moved this Court for leave and have not shown good cause. It is improper for defendants to circumvent that process by attempting to amend their invalidity contentions to add over 700 pages of arguments presented in their petitions for reexam. Defendants also fail to explain why their original invalidity contentions failed to include the material that they submitted to the PTO.

Second, Interval objects to defendants' lengthy legal arguments concerning issues under 35 U.S.C. § 101. Section 101 allegations are not relevant to the *Markman* hearing, and the Prehearing Statement is not the proper place to include extensive legal arguments relevant only to § 101 issues. The only apparent purpose in including legal arguments in the Prehearing Statement is to circumvent the Court's page limitations for legal briefs. Defendants' § 101 arguments are meritless, but Interval will not respond to those legal arguments in the Prehearing Statement. Instead, Interval will respond to these arguments should defendants properly raise them in a dispositive motion after the *Markman* hearing.

J. Defendants' Invalidity Contentions

The Defendants Invalidity Contentions, including "any grounds for invalidity based on indefiniteness, enablement, or written description under 35 U.S.C. § 112" pursuant to this Court's Standing Order for patent cases (Dkt # 26) are filed herewith as Exhibits 5 and 6 (without the charts comparing the prior art to the asserted claims since such charts are voluminous). Defendants' contentions have generally been amended to reflect information included in the Requests for Reexamination that were provided to Interval on March 16 and 17, 2011. Defendants informally served these contentions on Interval on May 26, 2011 and requested Interval's consent to the amendment as the changes are not extensive and Interval has been on notice of these same allegations for more than two months based on the Requests for Reexamination. Defendants await Interval's response. Defendants' also incorporate by reference the bases for invalidity included in the Requests for Reexamination filed with the PTO for each of

the patents-in-suit, but do not include those requests here due to their volume.

Defendants understand that this Court's Standing Order in Patent Cases (Dkt. # 26 at 3:18-19) requires the Defendants to include their invalidity contentions with this Prehearing Statement. Defendants' additional contentions regarding invalidity under 35 U.S.C. § 101 are summarized below. Contrary to Plaintiff's allegations, Defendants are not attempting to make such arguments herein, but only to avoid a later claim by Plaintiff that such defenses were not disclosed. Defendants may also allege that one or more asserted claims of the patents-in-suit are invalid for failure to disclose the best mode or for improper inventorship, but have yet to obtain substantial discovery from Interval upon which such allegations might be based.

1. Defendants' Allegations under 35 U.S.C. § 101 for the Asserted Claims of the '507 Patent

Each of claims 20-24, 27-28, 31, 34, 37, 39, 40, and 43 of asserted U.S. Patent No. 6,263,507 ("the '682 Patent") is directed to an abstract, mathematical idea and for that reason are invalid as a matter of law under Section 101 of the Patent Act.

For example, each of claims 39, 40 and 43 encompasses abstract mental steps that do not mandate that any particular machine or device, or machine or device at all, be used. To the extent these claimed methods can be performed at all, they can be performed by a human using no machine or device, just by listening, talking, and doing calculations in one's head. In other words, these claims are directed to use of an abstract algorithm for receiving, processing and conveying information in a particular field of use, without restricting that algorithm to any particular machine or restricting it to any particular transformation of a particular article.

The same is true of the remaining claims identified above. While independent claim 20 and its above-identified dependent claims recite steps involving "acquiring," "storing" and displaying information, such insignificant post-solution activity and pre-solution activity do not make the claimed abstract idea less abstract, under *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), and the *en banc* Federal Circuit ruling affirmed thereby (*In re Bilski*, 545 F.3d 943, 961-62 (Fed. Cir. 2008) (en banc).

These claims were granted by the Patent Office at a time when the Patent Office applied a permissive and now-discredited test for patent eligibility. The leading, albeit non-exclusive, test for policing this abstractness exclusion to patentability is the "machine-or-transformation" test. Specifically, if a patent claim reciting an abstract idea fails to restrict that abstract idea to a particular machine or particular transformation of a particular article, that is "a useful and important clue" that the claim in effect patents that abstract idea and thus is invalid under 35 U.S.C. § 101. *Bilski v. Kappos*, 130 S. Ct. at 3227.

None of the above-identified claims requires any particular machine to perform any of its steps. Further, these claims do not require any transformation of a physical article or substance or any visual representation thereof, and thus they fail the "particular transformation" prong of the analysis. The claims do not require that any "segment" represent any physical article.

One or more Defendants may assert that the "computer readable medium" claims in the '507 patent are invalid under 35 U.S.C. § 101 as being directed to unpatentable subject matter. Asserted claims 63-67, 70, 71, 74, 77, 80-83 and 86 are generally directed to "computer readable media," but do not restrict the computer readable media to non-transitory storage. As such, these claims are invalid under 35 U.S.C. § 101. *See e.g., In re Nuitjen*, 500 F.3d 1346, 1356-57 (Fed. Cir. 2007) (transitory embodiments are not directed to statutory subject matter); see also *Subject Matter Eligibility of Computer Readable Media*, 1351 Off. Gaz. Pat. Office 212 (Feb. 23, 2010) (available at http://www.uspto.gov/patents/law/notices/101_crm_2010012 7.pdf); *In re Kelkar*, Appeal No. 2009-004635 (Board of Patent Appeals and Interferences, Sept. 24, 2010) at p. 5 (rejecting claims directed to "program products stored on a recordable medium" as directed to unpatentable subject matter).

2. Defendants' Allegations under 35 U.S.C. § 101 for the Asserted Claims of the '682 Patent

The nominal "method" claims 3-20 of asserted U.S. Patent No. 6,757,682 ("the '682 Patent") are directed to an abstract, mathematical idea and for that reason are invalid as a matter of law under Section 101 of the Patent Act. To the extent these claimed methods can be

performed at all, they can be performed by a human using no machine or device, just by listening, talking, and doing calculations in one's head. In other words, these claims are directed to use of an abstract process for receiving, processing and conveying information, without restricting that process to any particular machine or to any particular transformation of a particular article.

Claims 3-20 cover a mathematical algorithm for collecting data, performing some calculations using that input data, and then reporting information. The claims do not require any particular machine to perform any of these steps. The patent identifies its field as relating to "dynamic content accessible via a communications or computer network" ('682 at 1:24-28), but none of claims 3-20 requires any particular communication and computer network. Significantly, none of these claims requires the participant or anyone else to use the recited network for anything. No step requires use of a network. The patent describes using an application server computer and a Web server computer (e.g., Fig. 1), but none of these claims requires such server computers.

Claim 3 does not specify who or what performs any of its steps. It does not, for example, recite that a programmed general-purpose application server computer or any other type of computer performs any of these steps. Claims 4-20 depend from Claim 3 and add additional nominal method steps but, like Claim 3, do not specify who or what performs any of these steps. For example, claim 5 recites "calculating an intensity rank," but does not specify who or what performs this calculation. These claims do not, for example, recite that a programmed general-purpose application server computer or any other type of computer performs any of these steps.

Claim 3 refers to a "network" in its preamble, but does not recite that network being used in any positively recited step of the claim. Rather, the preamble merely recites that the participant could access the item via an unspecified network, without requiring that the participant actually access the item via the network. Thus, the claims do not require any particular network.

Claim 17 recites storing information "in a database," without specifying any particular machine for establishing or holding that database. Reciting the storage of data in conventional ways does not rescue from invalidity under Section 101 a claim directed to an abstract idea. Cf.

Bilski v. Kappos, 130 S. Ct. at 3230 ("Flook rejected '[t]he notion that post-solution activity, no matter how conventional or obvious in itself, can transform an unpatentable principle into a patentable process.'")

Further, these claims do not require any transformation of a physical article or substance or any visual representation thereof, and thus they fail the "particular transformation" prong of the analysis.

One or more Defendants may assert that asserted claim 2 in the '682 patent is invalid under 35 U.S.C. § 101 as being directed to unpatentable subject matter. Claim 2 is generally directed to "computer program product" embodied in a "computer readable medium," but does not restrict the "computer program product" or "computer readable media" to non-transitory storage. As such, these claims are invalid under 35 U.S.C. § 101.

3. Defendants' Allegations under 35 U.S.C. § 101 for the Asserted Claims of the '652 Patent

One or more Defendants may likewise contend that asserted claims 15-18 of the '652 patent are invalid under 35 U.S.C. § 101 as being directed to unpatentable subject matter. Claims 15-18 are generally directed to "computer readable media," but do not restrict the computer readable media to non-transitory storage. As such, these claims are invalid under 35 U.S.C. § 101.

4. Defendants' Allegations under 35 U.S.C. § 101 for the Asserted Claims of the '314 Patent

One or more Defendants may likewise contend that asserted claims 3-4 and 13-15 of the '314 patent are invalid under 35 U.S.C. § 101 as being directed to unpatentable subject matter. Claims 3-4 and 13-15 are generally directed to "computer readable media," but do not restrict the computer readable media to non-transitory storage. As such, these claims are invalid under 35 U.S.C. § 101.

Dated: May 27, 2011

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I hereby certify that on May 27, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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