Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC, Plaintiff, v. AOL, INC., Defendant.	Case No. 2:10-cv-01385-MJP **PLAINTIFF INTERVAL LICENSING LLC'S LOCAL PATENT RULE 134(a) OPENING CLAIM CONSTRUCTION BRIEF ('652 AND '314 PATENTS TRACK)**
INTERVAL LICENSING LLC, Plaintiff, v. APPLE, INC., Defendant.	Case No. 2:11-cv-00708 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. GOOGLE, INC., Defendant.	Case No. 2:11-cv-00711 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. YAHOO! INC., Defendant.	Case No. 2:11-cv-00716 MJP Lead Case No. 2:10-cv-01385-MJP

Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

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Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

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Rules

Pursuant to Local Patent Rule 134 and the Court's Scheduling Order (Docket No. 248), Interval Licensing LLC ("Interval") submits this Opening Brief on Claim Construction. In accordance with the Court's Scheduling Order and the Court's Order on the Motion for Reconsideration (Docket No. 195), the parties have identified for construction 19 terms for U.S. Patent Nos. 6,034,652 ("the '652 patent") and 6,788,314 ("the '314 patent").

I. Introduction and Overview of the Patented Technology

The primary dispute between the parties here is that over and over again, Defendants have attempted to construe terms that need no definition and add language to terms that have a well-established meaning in the specification in order to change the scope of the claims from the specification or limit the claims to the preferred embodiment, which the Federal Circuit specifically disallows. Interval's proposed definitions are consistent with the specification and file history.

The four patents asserted in this case are directed to inventions developed at Interval Research Corporation, a private research company founded by Paul Allen and David Liddle in the early 1990's. The rapid development of the Internet in the 1990's made an enormous quantity of information available to the public. The inventions described in the asserted patents were aimed at helping users navigate and use this massive universe of information more quickly and easily. Each patent offers a unique solution to the problem of "information overload."

The '652 and '314 patents, which are addressed in this brief, are directed to providing information to a user in non-distracting ways that do not interfere with the user's primary activity on a device such as a computer In this manner, the inventions improve users' ability to take advantage of available information in circumstances where the users might not otherwise be motivated to expend the time and effort necessary to actively obtain the content. These patents describe two primary ways in which this can be accomplished. First, the information can be

Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

provided when the user is not actively using the computer or other device. One example of this embodiment would be a screensaver that presents useful information when the computer has not been actively used for a certain period of time. Second, the system can provide information while the user is actively using the computer or other device, but in a location of the display screen that is not being used by the user's primary interaction.

II. Relevant Law

The relevant law is set forth in Interval's Opening Brief on Claim Construction for the '507 and '682 Patents Track, filed concurrently herewith.

III. Terms for Construction[1]

As set forth in Exhibit A, pp. 1-5, the parties have agreed to constructions for the following terms:

1. "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"
2. "means for scheduling the display of an image or images generated from a set of content data"
3. "engaging the peripheral attention of a person in the vicinity of a display device"
4. "control options"
5. "means for controlling aspects of the operation of the system in accordance with a selected control option"
6. "means for selecting a displayed control option"
7. "means for displaying one or more control options with the display device while the means for selectively displaying is operating"
8. "data acquisition apparatus that enables acquisition of a set of content data"

[1] The '652 and '314 patents are related and share a common specification. For convenience and brevity, citations will be provided to the '652 patent specification. The cited passages also appear in the '314 patent, although the column and line numbers may not correspond exactly.

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

9. "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"

10. "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"[2]

The parties continue to dispute the constructions of the 19 terms identified and discussed below. For the reasons set forth here, Interval respectfully requests that the Court adopt Interval's proposed constructions and reject those proposed by of Defendants.

A. "in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 4, 5, 6, 7, 8, 11 "in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus" '314 all asserted claims (via claims 1, 3, 7, 10 and 13) "in an unobtrusive manner that does not distract a user of the display device or an apparatus associated with the display	during a user's primary interaction with the apparatus and unobtrusively such that the images generated from the set of content data are displayed in addition to the display of images resulting from the user's primary interaction	As written, this term is inherently subjective and therefore indefinite. Alternatively, this must be limited such that the images are displayed either when the attention manager [or system] detects that the user is not engaged in a primary interaction or as a background of the computer screen

[2] This term appeared as a "disputed term" in the parties' originally filed Joint Claim Chart (Dkt No. 240), but the parties now agree on its construction.

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

device from a primary interaction with the display device or apparatus"		

Interval's proposed construction of this term flows from the teaching of the specification, including an express definition of what the patent means by the "unobtrusive manner" language. There are three primary disputes between Interval's and Defendants' proposed constructions of this term: (1) whether it encompasses the display of information during idle times (i.e., after the system detects that the user is not engaged in a primary interaction); (2) whether it is subjective and indefinite; and (3) whether it is limited to displaying information "as a background of the computer screen." The answer to each question is "no."

First, the proper construction does not encompass idle-time display of information. The '652 and '314 patents teach ways to distribute information by engaging "at least the peripheral attention" of a user of a device such as a computer. '652 patent at Abstract. The patents use "peripheral attention" as an umbrella term to refer to the part of the user's attention that is not occupied by the user's primary interaction with the device.[3] Similarly, "attention manager" is a blanket term used to refer to a system that occupies the user's peripheral attention.[4] *Id.* The patents describe two preferred embodiments of the attention manager:

> Generally, the attention manager makes use of "unused capacity" of the display device. **For example**, the information can be presented to the person while the apparatus (e.g., computer) is operating, but during **inactive periods** (i.e., when a user is not engaged in an intensive interaction with the apparatus). **Or**, the information can be presented to the person during active periods (i.e., when a user is engaged in an intensive interaction with the apparatus), but **in an unobtrusive manner that does not distract the user from the primary interaction with the**

[3] The parties' agreed construction of "engaging the peripheral attention of a person in the vicinity of a display device" reflects this. *See* Ex. A at 2 ("engaging a part of the user's attention that is not occupied by the user's primary interaction with the apparatus").

[4] The construction of "attention manager" is disputed. See § III.E, *infra*.

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

> **apparatus** (e.g., the information is presented in areas of a display screen that are not used by displayed information associated with the primary interaction with the apparatus).

'652 patent at 2:7-19 (emphasis added); *see also id.* at 3:19-31, 6:34-45, 13:14-17. As this passage makes clear, the "unobtrusive manner" language describes the second embodiment of the attention manager, but not the first.[5] Defendants' "alternative construction," which expressly includes the idle-time display embodiment, is inconsistent with the clear teaching of the specification.[6] *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc) (noting that the specification "is the single best guide to the meaning of a disputed term").

Second, this term is not indefinite. "A claim will be found indefinite only if it is insolubly ambiguous, and no narrowing construction can properly be adopted." *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1319 (Fed. Cir. 2008) (quotation marks omitted). "If the meaning of the claim is discernible, even though the task may be formidable and the conclusion may be one over which reasonable persons will disagree, [the Federal Circuit has] held the claim sufficiently clear to

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[5] The differences between the various embodiments are also reflected in the claims. Some claims are directed to all types of "attention managers" (e.g., claims 13-18 of the '652 patent), other claims are directed only to attention managers that present information in an "unobtrusive manner" (e.g., claims 4-12 of the '652 patent and all claims of the '314 patent), and still other claims are directed only to attention managers that present information during an idle period (e.g., claims 2, 3, and 12 of the '652 patent).

[6] During prosecution, there was some confusion about the relationship between the idle-time display embodiment and the "unobtrusive manner" embodiment. *See* '652 patent file history, 7/9/1998 Response to Office Action, at 13-14 (Ex. B). However, these statements should not be given controlling weight because the prosecution history is subordinate to the clear teaching of the specification. *See Boss Control, Inc. v. Bombardier Inc.*, 410 F.3d 1372, 1378 (Fed. Cir. 2005) ("Neither the dictionary definition nor the prosecution history, however, overcomes the particular meaning . . . clearly set forth in the specification."). Additionally, statements made during prosecution are most often relied upon during the claim construction process to prevent patentees from narrowly interpreting their claims before the examiner in order to gain allowance, only to broaden those interpretations once in litigation. *See, e.g., Spectrum Int'l, Inc. v. Sterilite Corp.*, 164 F.3d 1372, 1378 (Fed. Cir. 1998) ("[E]xplicit statements made by a patent applicant during prosecution to distinguish a claimed invention over prior art may serve to narrow the scope of a claim."). This concern is not present here, where the applicant took an overly **broad**

Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

avoid invalidity on indefiniteness grounds." *Exxon Res. & Eng'g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001).

The "unobtrusive manner" language is not subjective and/or indefinite because the specification provides a clear, objective definition of what it means:

> According to another further aspect of the invention, the selective display of an image or images **occurs while the user is engaged in a primary interaction with the apparatus, which primary interaction can result in the display of an image or images in addition to the image or images generated from the set of content data** ("the wallpaper embodiment").

'652 patent at 3:25-31; *see also id.* at 2:17-19 ("e.g., the information is presented in areas of a display screen that are not used by displayed information associated with the primary interaction with the apparatus"). This definition is reflected in Interval's proposed construction. Because the patentee acted as its own lexicographer by providing an objective definition of the "unobtrusive manner"-type of display, one of ordinary skill in the art would understand the meaning of this term. *See Phillips*, 415 F.3d at 1321 ("[T]he specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication." (quotation marks omitted)). Accordingly, there is no ambiguity at all with respect to this term—let alone sufficient ambiguity to meet the high standard necessary for indefiniteness. *See All Dentx Prods., LLC v. Advantage Dental Prods., Inc.*, 309 F.3d 774, 780 (Fed. Cir. 2002) ("Only after a thorough attempt to understand the meaning of a claim has failed to resolve material ambiguities can one conclude that the claim is invalid for indefiniteness.").

Third, this express definition is broad enough to cover embodiments beyond those that display information as part of the background of a computer screen. Defendants attempt to limit the claims to a preferred embodiment—namely, display as part of the background wallpaper on a

(… cont'd)
interpretation of the "unobtrusive manner" language in an Office Action response.

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Seattle WA 98101-3000

computer screen—should be rejected. *See Phillips*, 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.").

B. "images generated from a set of content data"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
All Claims "images generated from a set of content data"	audio and/or visual output that is generated from data within a set of related data	audio and/or visual output defined by the content provider within a collection of related data

The primary dispute between the parties with respect to this term is whether the audio and/or visual output must be "defined by the content provider." This additional limitation is improper for two reasons. First, the specification provides definitions for both "image" and "content data," and neither definition requires that the output be "defined by the content provider":

- "The term 'image' is used broadly here to mean any sensory stimulus that is produced from the set of content data, including, for example, visual imagery (e.g., moving or still pictures, text, or numerical information) and audio imagery (i.e., sounds)." '652 patent at 6:60-64.

- "Herein, 'content data' refers to data that is used by the attention manager to generate displays (e.g., video images or sounds, or related sequences of video images or sounds)." '652 patent at 9:51-54

Second, it is unclear what it means for the audio and/or visual output to be "defined by the content provider." To the extent Defendants intend to argue that this limitation imposes a requirement that the content provider take an active role in the creation of the content, that interpretation is incorrect for the reasons discussed below with respect to the term "content provider." *See* § III.G, *infra*.

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

C. "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"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claims 4, 5, 6, 7, 8, 11 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;	FUNCTION: 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 STRUCTURE: One or more digital computers programmed to perform at least steps 521 (identify the next set of content data in the schedule) and 105 (display the next set of content data in the schedule in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus) of Figs. 1 and 5, and structural equivalents	As set forth above, this term includes a phrase that is indefinite within the recited function; thus this term is indefinite. Function: "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" [as construed herein] To the extent there is any structure disclosed that could fulfill the recited function, it is: Structure: A conventional digital computer programmed with a screen saver application program, activated by the detection of an idle period, or a wallpaper application program, that "selectively displays … image or images generated from the set of content data" [as construed herein]

The parties agree on the function associated with this means-plus-function limitation. Additionally, the parties have separately proposed constructions for almost all of the terms within this phrase. *See* Ex. A, at 4 (agreed construction of "selectively displaying on the display device"); § III.A ("in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus"); § III.B ("images generated from a set of content data"). The only additional issue raised by this term is the identification of the structure associated with

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

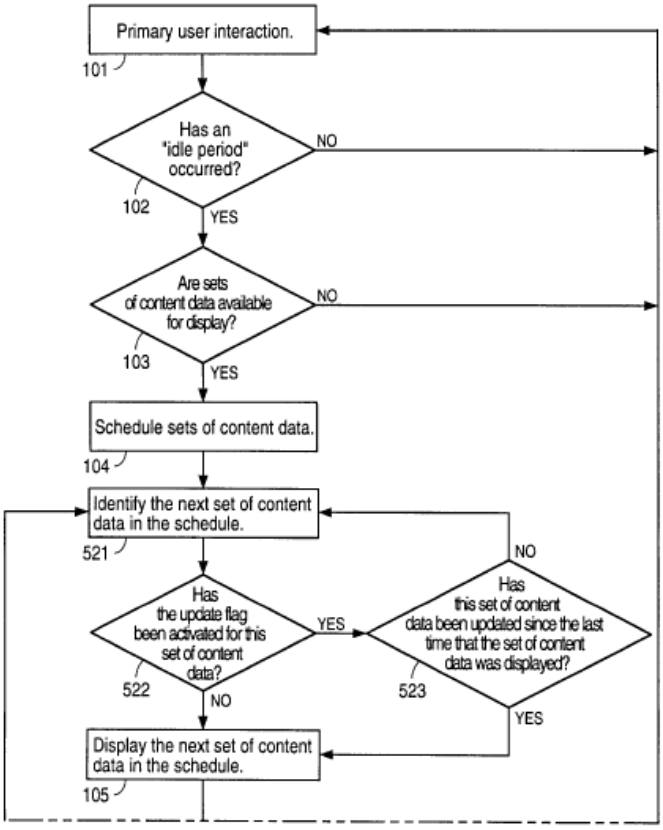
the function.

The specification teaches that the selective display of sets of content data is accomplished in the following manner:

> A set or sets of instructions for enabling a display device to selectively display an image or images generated from a set of content data are also made available for use by the content display systems. Typically, the instructions enable images generated from content data to be displayed automatically, without user intervention, in a predetermined manner, thereby enhancing the capability of the invention to occupy the user's peripheral attention.

'652 patent at 2:35-42. Fig. 5A of the patents and the accompanying description in the specification set forth an algorithm that includes steps for accomplishing this function:

FIG. 5A



In step 521, the system determines which set of content data is to be displayed next. In step 105, the next set of content data is displayed. Interval's proposed construction properly identifies the

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

structure that performs this function as a digital computer programmed to perform these steps to display the content data in an unobtrusive manner that does not distract a user of the apparatus from a primary interaction with the apparatus, where the "unobtrusive manner" language is construed according to Interval's construction set forth above in § III.A.

Defendants' proposed structure is incorrect for three reasons. First, it confusingly and unnecessarily limits the construction to "conventional" digital computers. A portion of the specification that expressly discusses Fig. 5A, however, refers to all "digital computers" without using the "conventional" language:

> Like the method 100 (FIG. 1), the method 500 is performed by a content display system 203 according to the invention which can be implemented, for example, **using a digital computer** that includes a display device and that is programmed to perform the functions of the method 500, as described below.

'652 patent at 24:61-66 (emphasis added).

Second, Defendants' proposed construction erroneously includes the idle-time display embodiment which, as discussed above in § III.A, does not display information "in an unobtrusive manner" as required by this claim limitation.

Third, Defendants' construction is incorrectly limited to display by a "wallpaper application program." Again, Defendants improperly attempt to limit the claims to a particular embodiment. *See Phillips*, 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments."). As discussed above, the type of display contemplated by this limitation occurs whenever the display is "during a user's primary interaction with the apparatus and unobtrusively such that the images generated from the set of content data are displayed in additional to the display of images resulting from the user's primary interaction." *See* § III.A.

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Seattle WA 98101-3000

D. "each content provider provides its content data to [a/the] content display system independently of each other content provider"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'314 all claims "each content provider provides its content data to [a/the] content display system independently of each other content provider and . . . "	no construction needed; in the alternative: each content provider provides its content data to the content display system without being influenced or controlled by any other content provider	Each content provider transmits its content data to [a/the] content display system without being transmitted through, by or under the influence or control of any other content provider

The parties' difference in this construction is that Defendants want to add a requirement that the data not be "transmitted through [or] by" another content provider. This proposed additional limitation is not required by the claim language and contrary to the prosecution history.

First, all that is required is that each content provider provides the content data "independently," which has a plain and ordinary meaning of "free from the influence, control, or determination of another or others." Webster's New World College Dictionary, 4th ed (2010), at 725 (Ex. C). So long as this requirement is met, it is immaterial whether the data transmission happens to be routed through another content provider.

Second, during prosecution the patentee expressly removed the requirement of "direct" transmission from the content provider to the content display system as part of the amendment in which the language of this disputed term was added. This claim was rejected based on U.S. Patent No. 5,819,284 ("Farber"), which taught aggregating content from multiple content providers at a single server prior to providing the content to the content display system. '314 patent file history, 10/28/2003 Response to Office Action, at 9 (Ex. D). The claim was narrowed in certain respects to distinguish this prior art patent, but that amendment also broadened the

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

claim in other respects. Specifically, before this amendment, the claims included a limitation requiring that the content providers provide the content data "directly to the display device." *Id.* at 2-8. As part of this amendment, the "directly to the display device" language was removed from the claims, while the language disputed here was added. Defendants' proposed construction, which precludes the possibility of content data being transmitted "through" or "by" another content provider, is wrong because it reintroduces a requirement of "direct" transmission that was expressly removed during prosecution.

E. "during operation of an attention manager"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 15-18 "during operation of an attention manager"	during the operation of a system for engaging at least a part of the user's attention that is not occupied by the user's primary interaction with the apparatus	During operation of a computer program that displays images to a user either when the program detects that the user is not engaged in a primary interaction or as a background of the computer screen

The patents define what is meant by an "attention manager": "An attention manager presents information to a person in the vicinity of a display device in a manner that engages at least the peripheral attention of the person." *See* '652 patent at Abstract. *See Phillips*, 415 F.3d at 1321 ("[T]he specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication." (quotation marks omitted)). The parties have agreed that "engaging the peripheral attention of a person in the vicinity of a display device" means "engaging a part of the user's attention that is not occupied by the user's primary interaction with the apparatus." Ex. A, at 2. Accordingly, Interval's proposed construction of this term is correct. Defendants' proposed construction is improper because it attempts to limit the construction of "attention manager" to two preferred embodiments. *See Phillips*, 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention,

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

we have repeatedly warned against confining the claims to those embodiments.").

F. "means for acquiring a set of content data from a content providing system"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 4 "means for acquiring a set of content data from a content providing system"	FUNCTION: acquiring a set of content data from a content providing system STRUCTURE: A digital computer programmed to perform at least the following steps: (1) providing a user with an interface to directly request a particular set of content data, (2) indicating to the content provider the particular set of content data requested by the user, and (3) obtaining the particular set(s) of content data requested by the user at the content display system, and structural equivalents	Function: acquiring a set of content data from a content providing system Structure: A digital computer connected to a content providing system via a network and programmed to perform the steps described in connection with 401-406 of FIG. 4, namely: (1) providing a user with an interface to directly request a particular set of content data, (2) indicating to the content provider the particular set of content data requested by the user, (3) receiving a set of instructions at the content display system that identify the site from which the set of content data is to be acquired, (4) downloading the particular set(s) of content data requested by the user at the content display system.

The parties' proposed constructions of this term raise four disputes concerning the corresponding structure: (1) whether the digital computer must be "connected to a content providing system via a network" as an independent limitation, as Defendants contend; (2) whether the Defendants are correct that the construction should reference "401-406 of FIG. 4"; (3) whether the corresponding structure must be programmed for "receiving a set of instructions at the content display system that identify the site from which the set of content data is to be acquired"—the third part of Defendants' proposed construction; and (4) whether the content data must be "downloaded," as Defendants argue, rather than simply "obtained." The

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Seattle WA 98101-3000

answer to each question is "no."

First, Defendants' proposed requirement that the digital computer be "connected to a content providing system via a network" improperly requires a network connection independent of the recited steps, which include—under either party's construction—"indicating to the content provider the particular set of content data requested by the user" and "[obtaining/downloading] the particular set(s) of content data requested by the user at the content display system." These two steps require a connection between the content provider and the content display system. Defendants' proposed construction, however, suggests that a connection must be maintained even at times when these two steps are not being performed. This proposed new limitation is not required in order to perform the function of "acquiring a set of content data from a content providing system." For example, the user interface could be presented to the user (part (1) of either party's construction) before a connection with the content provider is established. *See* '652 patent at 18:60-61 ("Any appropriate user interface can be used for enabling a user to directly request a particular set of content data."). Because a permanent connection to the content provider is not necessary to perform the recited function, Defendants' attempt to incorporate this limitation is improper. *See Micro Chem., Inc. v. Great Plains Chem. Co.*, 194 F.3d 1250, 1258 (Fed. Cir. 1999) ("Nor does the statute permit incorporation of structure from the written description beyond that necessary to perform the claimed function.").

Second, Defendants' proposal to expressly reference steps 401-406 of Figure 4 is misleading and would serve only to confuse the jury. The majority of those steps identify functionality that neither party identifies as part of the structure corresponding to this limitation, such as steps 402 through 405, which relate to an embodiment that ensures that the content display system has a current and compatible version of application instructions. As the parties'

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Seattle WA 98101-3000

proposed constructions recognize, these steps are not part of the corresponding structure because they are not necessary to perform the function of "acquiring a set of content data from a content providing system." *See id.* ("Nor does the statute permit incorporation of structure from the written description beyond that necessary to perform the claimed function.").

Third, Defendants' proposed construction improperly includes the step of "receiving a set of instructions at the content display system that identify the site from which the set of content data is to be acquired," which is not necessary to perform the claimed function. *See id.* The fact that this step is not necessary to the performance of the function of "acquiring a set of content data from a content providing system" is demonstrated by its omission from Figure 4, which the patent describes as showing "a method . . . for acquiring and updating sets of content data." '652 patent at 5:62-64; *see also* Fig. 4. As Fig. 4 indicates, it is possible for the content display system to acquire a set of content data without an intervening step of receiving a set of instructions that identify the site from which the content data is to be obtained. For example, as described in the specification, the system could function by presenting the user with a button on a web site which, when selected, indicates to the web site that a set of content data was requested and initiates the transfer of the content data. *See id.* at 18:61-19:2. Indeed, during prosecution the applicant identified an example of a "means for acquiring a set of content data from a content providing system" that functioned in this manner without requiring the additional step of "receiving instructions that identify the site from which the set of content data is to be acquired." *See* '652 patent file history, 6/14/1999 Response to Office Action, at 14 (Ex. E). Specifically, the applicant pointed to an embodiment of the invention described in a declaration filed by one of the inventors:

> . . . I developed a computer program, an Applescript source code listing of which is attached hereto as Exhibit 1, that, together with the capabilities of conventional

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

> Internet browser software, acquired content data from a World Wide Web site and displayed an image generated from the content data as "wallpaper" on a display device of the computer ("content display computer") on which the computer program was executing. **The browser software included a capability that allowed a user to select an image displayed at a Web site so as to cause the content data representing the image to be transferred from a data storage device of the Web site to the content display computer** and stored at a user-designated location of a non-volatile data storage device of the content display computer.

'652 patent file history, Second Piernot Declaration (6/14/1999), at ¶ 2 (emphasis added) (Ex. F). This description makes no mention of the additional step proposed by Defendants. Because it is not necessary to perform the recited function, this step should not be incorporated in the structure identified during claim construction. *See Micro Chem.*, 194 F.3d at 1258 ("Nor does the statute permit incorporation of structure from the written description beyond that necessary to perform the claimed function.").

Fourth, Defendants' proposed use of the term "downloading" rather than "obtaining" would only serve to confuse the jury. The specification repeatedly refers to "acquiring" and "obtaining" sets of content data. These words have plain and ordinary meanings that are easily understood by a lay jury. *See Brown v. 3M*, 265 F.3d 1349, 1352 (Fed. Cir. 2001). The specification provides no reason to replace these easily understandable words with "downloading," a term that does not appear in the specification and is less likely to be familiar to the jurors.

G. "content provider"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'314 all claims "content provider"	No construction necessary; in the alternative: a system that provides a set of content data	An entity that creates "sets of content data"

By requiring content providers to "create" sets of content data, Defendants seek to add a

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

limitation that is inconsistent with both the specification and the prosecution history. The specification provides several examples of types of content that can be used with the attention manager:

> As indicated above, the sets of content data represent sensory data, i.e., data that can be used to generate images as defined above. Typically, the sensory data is either video or audio data. The kinds of content data that can be used with the attention manager are virtually limitless. For example, video data that might be used as content data includes data that can be used to generate advertisements of interest to the user, moving and still video images which can be real-time or pre-recorded (e.g., nature scenes, pictures of family members, MTV music segments, or video from a camera monitoring a specified location, such as ski slopes or a traffic intersection, for conditions at that location), financial data (e.g., stock ticker information) or news summaries. Audio data that might be used as content data includes data that can be used to generate, for example, music or news programs (e.g., radio talk shows).

'652 patent at 7:23-38. One example provided in the specification that highlights the error in Defendants' proposed construction is "MTV music segments." It makes no sense to suggest that a server operated by MTV would be a "content provider" when it provides a particular video "created" by MTV, while a licensed affiliate or distributor (e.g., the website of a band to which the video pertains) providing the same video would not be a "content provider" within the meaning of the claims.

A declaration filed during prosecution of the '652 patent confirms that a website need only provide a set of content data in order to be a "content provider":

> . . . I developed a computer program . . . that . . . acquired content data from a World Wide Web site and displayed an image generated from the content data as "wallpaper" on a display device of the computer . . . . The browser software included a capability that allowed a user to select an image displayed at a Web site so as to cause the content data representing the image to be transferred from a storage device of the Web site to the content display computer . . . .

'652 patent file history, Second Piernot Declaration (6/14/1999), at ¶ 2 (Ex. F); *see also id.*, 6/14/1999 Office Action Response, at 8 ("The 'set of content data' recited in Claim 1 was

embodied by the content data representing an image displayed at a Web site (as also discussed in paragraph 2 of the second Piernot declaration).") (Ex. E). As this passage makes clear, an image file stored on a website server is an example of a "set of content data." The website that provides that image file is a "content provider" regardless of whether it was the creator of the file.

H. "instructions"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 patent: 15, 16, 17, 18 '314 patent: 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15 "instructions"	Either (a) data related to the accomplishment of a function and/or (b) a statement that specifies a function to be performed by a system and that identifies data involved in the function	A statement in a programming language that specifies an operation to be performed by a computer and may identify data involved in performing the function

Interval's proposed construction reflects the fact that the specification and prosecution history of the '652 and '314 patents expand the scope of the term "instructions" beyond the plain and ordinary meaning of the term, which is reflected in part (b) of Interval's proposed construction. Part (b) is the construction the parties agreed to with respect to the term "instruction" as it appears in the '507 patent. *See* '507 Amended Joint Claim Chart, Dkt. No. 241-1, at 1. Part (a) of Interval's construction reflects that the intrinsic record of the '652 and '314 patents expanded the term to also include data related to the accomplishment of a function.[7]

The specification expressly states that data can be "instructions" within the meaning of the patents. Several figures in the patents, including Fig. 3A below, identify types of "instructions":

[7] By construing "content data scheduling instructions" to include "files," Defendants' effectively concede that Interval's construction of "instructions" is correct and their construction is too narrow. *See* § III.I.3, *infra*.

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1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

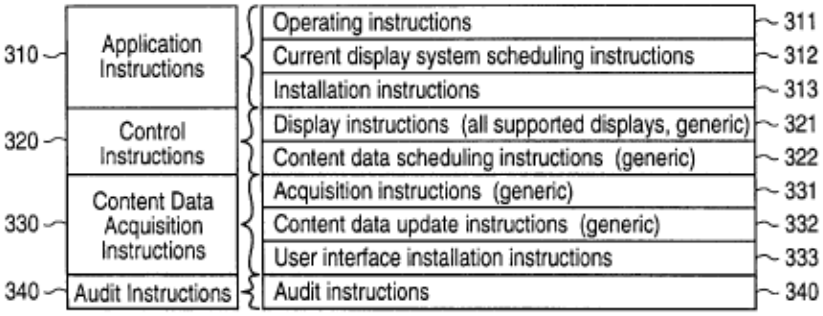

FIG. 3A

In discussing these figures, the specification teaches that either data or instructions (as conventionally understood) can be "instructions" within the meaning of Figs. 3A-3C:

> FIGS. 3A, 3B and 3C are schematic diagrams illustrating the functional components of the application manager 201, a content providing system 202 and a content display system 203, respectively, according to an embodiment of the invention. Each of the functional components are represented by a set of instructions and/**or data**. (**In particular, each of the sets of instructions may include, if appropriate, data related to accomplishment of the functions associated with the set of instructions**; similarly, a set of content data may include, if appropriate, instructions that enable generation of an image from the set of content data.) Each of these sets of instructions and/**or data** can be embodied in an appropriate computer program or set of computer instructions (the latter capable of including computer instructions and data), or an appropriate set of data configured for use by a set or sets of instructions (e.g., computer program) that must interact with the set of data in order to implement the attention manager.

'652 patent at 14:49-65 (emphasis added).

The prosecution history of the '314 patent confirms the correctness of Interval's proposed construction. During prosecution, the examiner relied on U.S. Patent No. 5,819,284 ("Farber") to reject claims that included a limitation that content providers "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 . . ." '314 patent file history, 6/25/2003 Office Action, at 2-3 (Ex. G). According to the examiner, Farber taught "having content providers continuously connected to the content display system" such that the content provider could "control when new content is displayed" by sending new content data. *Id.* The examiner reasoned that newly

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provided data thus constituted "scheduling instructions" within the meaning of the limitation. *Id.*; *see also id.*, 2/14/2003 Office Action, at 6 ("new information is an instruction to display new information") (Ex. H).

Defendants' proposed construction is incorrect because it does not reflect that the intrinsic record demonstrates that data related to the accomplishment of a function can be an "instruction" within the meaning of the patents.

I. Specific "instruction" terms

A number of the asserted claims are directed to a computer readable medium that comprises specific types of instructions. *See* '652 patent (claims 15-18); '314 patent (claims 3-4 and 13-15). These claims are sometimes called *Beauregard* claims in reference to *In re Beauregard*, a case in which the USPTO conceded that a tangible medium containing a computer program was patentable subject matter under 35 U.S.C. § 101. *See In re Beauregard*, 53 F.3d 1583, 1584 (Fed. Cir. 1995). Defendants assert that each of these "instruction" limitations is a means-plus-function limitation that is subject to the requirements of 35 U.S.C. § 112, ¶ 6. Because this issue is applicable to all of the disputed "instructions" terms, Interval globally addresses the applicability of § 112, ¶ 6 to these limitations. Interval's proposed constructions and responses to Defendants' alternative, non-means-plus-function constructions for each "instruction" term are set forth below.

None of the "instruction" limitations use the word "means." Accordingly, there is a "strong" presumption that they are not governed by § 112, ¶ 6 that is "not readily overcome." *Lighting World, Inc. v. Birchwood, Lighting, Inc.*, 382 F.3d 1354, 1358 (Fed. Cir. 2004). The Federal Circuit has articulated the test as follows:

> In considering whether a claim term recites sufficient structure to avoid application of section 112 ¶ 6, **we have not required the claim term to denote a specific**

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> **structure**. Instead, we have held that **it is sufficient if the claim term is used in common parlance or by persons of skill in the pertinent art to designate structure, even if the term covers a broad class of structures and even if the term identifies the structures by their function**.

Id. at 1359-60 (emphasis added).

Courts have repeatedly recognized that computer instructions are understood by persons of skill in the art to connote sufficient structure to avoid § 112, ¶ 6. *See, e.g., Clear With Computers, LLC v. Hyundai Motor Am., Inc.*, No. 6:09 CV 479, 2011 WL 43454, at *10 (E.D. Tex. Jan. 5, 2011) ("Computer code and data structures are understood to connote structure . . ."); *Beneficial Innovations, Inc. v. Blockdot, Inc.*, No. 2:07-CV-263, 2010 WL 1441779, at *15 (E.D. Tex. Apr. 12, 2010) (rejecting argument that computer code does not connote sufficient structure); *Rowe Int'l Corp. v. Ecast, Inc.*, 586 F. Supp. 2d 924, 945 (N.D. Ill. 2008) (rejecting argument that the term "instructions" does not convey sufficient structure); *Affymetrix, Inc. v. Hyseq, Inc.*, 132 F. Supp. 2d 1212, 1232 (N.D. Cal. 2001) ("The Court finds that 'computer code' is not a generic term, but rather recites structure that is understood by those of skill in the art to be a type of device for accomplishing the stated functions.").

Indeed, Defendants' proposed constructions of many of the "instruction" limitations identify "instructions" as the corresponding structure. By proposing such constructions, Defendants expressly acknowledge that "instructions" connote sufficient structure. Defendants' attempt to apply § 112, ¶ 6 to the "instructions" limitations should be rejected.

1. "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"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claims 15-18 (112/6 also)	"instructions" for enabling provision of an interface that enables a person to request the set of content data	This is a means plus function term because reciting "instructions for" merely recites the function to be

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1201 Third Avenue, Suite 3800
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"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"	from a specific source of information	performed without reciting structure to perform that function. Function: to enable content providers to install a user interface in the content provider's information environment (e.g., Web page) so that users can request sets of content data from the content provider Structure: The specification merely discloses the instructions are conventional and readily available, but does not provide any further description of the steps or operations such instructions would perform Alternative if not means plus function: "instructions" [as construed herein] that enable content providers to install a user interface in the content provider's information environment (e.g., Web page) so that users can request sets of content data from the content provider

In addition to whether this term is a means-plus-function term, the parties also dispute whether it should be construed as limited to a particular embodiment described in the specification. It should not be. *See Phillips*, 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments."). Interval's proposed construction is a straight-forward construction of the language used in the claims. It is also consistent with the specification which, contrary to Defendants' proposed construction, broadly teaches that "**[a]ny appropriate user interface can be used** for enabling a user to directly request a particular set of content data." '652 patent at 18:60-61 (emphasis added); *see also id.* at 2:63-3:3 ("The content

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data acquisition instructions can include . . . user interface installation instructions for enabling provision of a user interface that allows a person to request a set of content data from a content providing system."). The Court should reject Defendants' unduly narrow construction.

2. "display instructions for enabling display of the image or images"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 15-18 (112/6 also) "display instructions for enabling display of the image or images"	See constructions of "instructions" and "image or images generated from a set of content data." No additional construction necessary.	This is a means plus function term because reciting "instructions for" merely recites the function to be performed without reciting structure to perform that function. Function: to enable particular types of images to be displayed on particular types of display device Structure: "instructions" [as construed herein] that enable the display of particular image(s) on a particular type of display device and are capable of being tailored by the content provider for each set of content data Alternative if not means plus function: "instructions" [as construed herein] that enable the display of particular image(s) on a particular type of display device and are capable of being tailored by the content provider for each set of content data

Defendants' proposed construction of this term is improperly limited to two aspects of preferred embodiments. *First*, Defendants limit the display instructions to instructions that enable the display "of particular image(s) on a particular type of display device." *Second*, Defendants propose that the display instructions must be "capable of being tailored by the content provider for each set of content data." The claim language itself defines the scope of the claims and these

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optional features of preferred embodiments should not be incorporated as requirements. *See Phillips*, 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.").

The language of this term is straightforward and does not require elaborate construction. *See Brown*, 265 F.3d at 1352. This broad language is similarly used in the specification. *See* '652 patent at 4:40-41. The additional limitations sought by Defendants are expressly identified as optional capabilities that can be accomplished by certain embodiments of the display instructions:

> The display instructions can be tailored to enable display of the image or images generated from a set of content data on a display device of a particular type, **or** display of an image or images generated from a set of content data of a particular type.

Id. at 4:55-59 (emphasis added); *id.* at 15:48-52 ("Generally, the display instructions 321 of a particular set of control instructions 320 enable display of content data on a particular type of display device (e.g., a particular type of computer video display or a particular type of audio speaker) **or** display of a particular type of content data." (emphasis added)). The use of the word "or" indicates that a particular embodiment of the display instructions may not include either of these two specific recited capabilities. Accordingly, it follows that neither of these capabilities are requirements for the recited display instructions.

3. "content data scheduling instructions for providing temporal constraints on the display of the image or images generated from the set of content data"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652, claims 15, 17, 18 (also 112/6)	"instructions" that affect the duration, order, timing, and/or frequency of the display of the	This is a means plus function term because reciting "instructions for" merely recites the function to be

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"content data scheduling instructions for providing temporal constraints on the display of the image or images generated from the set of content data"	"image or images generated from the set of content data"	performed without reciting structure to perform that function. Function: to enable the content provider to specify the time or times at which the image or images generated from a set of content data can or cannot be displayed Structure: a file, capable of being tailored by a content provider that specifies the time or times at which the image or images generated from a set of content data can or cannot be displayed. Alternative if not means plus function: a file, capable of being tailored by a content provider, that specifies the time or times at which the image or images generated from a set of content data can or cannot be displayed.

Interval's proposed construction closely tracks the claim language while clarifying the meaning of "temporal constraints" according to the teaching of the specification:

> The instructions of the computer program can include . . . content data scheduling instructions for providing **temporal constraints** on the display of the image or images generated from the set of content data . . . . The content data scheduling instructions can specify, for example, the **duration of time** that the image or images generated from a set of content data can be displayed, **an order** in which the images generated from a plurality of sets of content data are displayed, **a time or times** at which the image or images generated from a set of content data can or cannot be displayed, **and/or constraint on the number of times** that the image or images generated from a set of content data can be displayed.

'652 patent at 4:31-55 (emphasis added); *see also id.* at 16:65-17:28 (further describing various types of content data scheduling instructions).

Defendants' proposed construction is inconsistent with the specification for two reasons. *First*, Defendants propose that the content data scheduling instructions must be contained in a

"file." Presumably, the Defendants have imported this limitation from the package file disclosed for one embodiment of the invention. *See* '652 patent at 22:20-52. Although the content data scheduling instructions limitation could be met by a file,[8] it is not required by the claim language. Again, Defendants seek to improperly import limitations from embodiments disclosed in the specification. *See Phillips*, 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.").

Second, Defendants limit their proposed construction to instructions that "specif[y] the time or times at which the image or images generated from a set of content data can or cannot be displayed." Defendants' construction is limited to what the specification refers to as "timing instructions"—the third example of the specification's explanation of "content data scheduling instructions" at column 4, lines 47-55, quoted above. *See also* '652 patent at 17:12-15 (explaining "timing instructions"). This construction is clearly too narrow because it excludes other types of content data scheduling instructions expressly taught by the specification, including duration instructions, sequencing instructions, and saturation instructions. *See* '652 patent at 4:47-55; 16:65-17:28).

To the extent Defendants attempt to argue that the language of claims 14, 15, 16, and 17 supports their position (perhaps with reference to claim differentiation), they are mistaken. These claims recite "content data scheduling instructions" (i.e., a genus term) and then further limit the respective claims to a specific type of such instructions (i.e., a particular species), namely, duration instructions (claims 14 and 16), sequencing instructions (claim 15), and saturation

[8] Defendants' recognition that a "file" can constitute "content data scheduling instructions" is an implicit admission that Interval's proposed construction of "instructions" is correct and Defendants' proposed construction is too narrow in light of the teaching of the patents. *See*

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instructions (claim 17). Indeed, these claims confirm that sequencing, duration, and saturation instructions are types of "content data scheduling instructions." *See* claim 14 ("the content data scheduling instructions further comprising duration instructions") (emphasis added); claim 15 ("the content data scheduling instructions further comprise sequencing instructions") (emphasis added); claim 17 ("the content data scheduling instructions further comprise saturation instructions") (emphasis added).

4. "sequencing instructions that specify an order in which the images generated from a set of content data are displayed"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 15 (also 112/6) "sequencing instructions that specify an order in which the images generated from a set of content data are displayed"	See constructions for "instructions" and "images generated from a set of content data." No additional construction necessary.	This is a means plus function term because reciting "instructions for" merely recites the function to be performed without reciting structure to perform that function. Function: specifying an order in which images generated from a set of content are displayed Structure: "instructions" [as construed herein] that are capable of being tailored by the content provider and control the order in which the image(s) within a set of content data are displayed Alternative if not means plus function: "instructions" [as construed herein] that are capable of being tailored by the content provider and control the order in which the image(s) within a set of content data are displayed

(… cont'd)
§ III.H, *supra*.

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In light of the constructions of "instructions" and "images generated from a set of content data" discussed herein, no additional construction of this term is necessary. *See Brown*, 265 F.3d at 1352 ("These are not technical terms of art, and do not require elaborate interpretation."). To the extent the Court chooses to construe this term, it should reject Defendants' proposed limitation that the instructions "are capable of being tailored by the content provider." The possibility of such tailoring is a characteristic of certain embodiments and should not be imported into claims that make no reference to tailoring. *See Phillips*, 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.").

5. "saturation instructions that constrain the number of times that the image or images generated from a set of content data can be displayed"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 17 (also 112/6) "saturation instructions that constrain the number of times that the image or images generated from a set of content data can be displayed"	See constructions of "instructions" and "image or images generated from a set of content data." No additional construction necessary.	This is a means plus function term because reciting "instructions for" merely recites the function to be performed without reciting structure to perform that function. Function: specifying a maximum number of times that the image or images generated from the acquired set of content data can be displayed Structure: "instructions" [as construed herein] that are capable of being tailored by the content provider and specify a maximum number of times that the set of content data can be displayed Alternative if not means plus function: "instructions" [as construed herein] that are capable

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		of being tailored by the content provider and specify a maximum number of times that the set of content data can be displayed.

For the same reasons discussed with respect to the construction of the "sequencing instructions" limitation, further construction of this term is not necessary. *See* § III.I.4, *supra*. The claim language—which specifies that the saturation instructions "constrain the number of times that the image or images generated from a set of content data can be displayed"—will be readily understood by the jury. Also for the same reasons discussed above, the Court should reject Defendants' proposed requirement that the instructions are "capable of being tailored by the content provider." *See id.*

6. "instructions for providing one or more sets of content data to a content display system associated with the display device"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'314 claim 3 (also 112/6) "instructions for providing one or more sets of content data to a content display system associated with the display device"	See constructions for "instructions" and "content data." No additional construction necessary.	This is a means plus function term because reciting "instructions for" merely recites the function to be performed without reciting structure to perform that function. Function: to provide one or more sets of content data to a "content display system" associated with the "display device" Structure: "instructions" [as construed herein] that cause a digital computer connected to a content display system via a network to perform at least the steps of: (1) transferring to the content display system a user interface tool that enables the user a to request a particular set of content data; (2) receiving from the content display system a user request for a

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		particular set of content data; (3) transferring to the content display system a set of instructions that identify the site from which the data is to be acquired and (4) downloading to the content display system the particular set(s) of content data requested by the user at the content display system.

As discussed above, this term is not governed by 35 U.S.C. § 112, ¶ 6. *See* § III.I, *supra*. By declining to offer a proposed alternative construction, Defendants concede that no additional construction is required. Interval respectfully requests that the Court decline to further construe this limitation.

7. "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"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 18 (112/6 also) "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"	"instructions" that specify when to obtain an updated version of a previously acquired set of content data and the location from which to obtain such updated version of the set of content data	This is a means plus function term because reciting "instructions for" merely recites the function to be performed without reciting structure to perform that function. Function: to enable the content display system to acquire an updated version of a previously acquired set of content data. Structure: "instructions" [as construed herein] that cause a computer to perform the operations described as step 403-410, namely: (1) detect the version of the content display program; (2) check whether the version of the content display program is compatible with the display content and, if it is incompatible, acquire a compatible version; (3) load the display content

		into the content display program; (4) execute control instructions and data acquisition instructions of the content display program; (5) check whether a predetermined time to update the content data has elapsed using schedule information programmed in the display content, and using a communications daemon inserted into the startup file of the operating system; (6) if the time to update the content has elapsed, detect the location of the content provider from the scheduling information of the content data, and acquire, if available, from the content provider a updated version of a previously acquired set of content data. Alternative if not means plus function: "instructions" [as construed herein] that specify when to obtain an updated version of a previously acquired set of content data and the location from which to obtain such updated version of the set of content data

The parties' only dispute with respect to this term is whether it is governed by 35 U.S.C. § 112, ¶ 6. As discussed above, it is not. *See* § III.I, *supra*. Accordingly, the Court should adopt Interval's proposed construction, which—subject to the dispute over the meaning of "instructions," discussed at § III.H, *supra*— is the same as Defendants' alternative construction.

8. "content display system scheduling instructions for scheduling the display of the image or images on the display device"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 18 (also 112/6) "content display	"instructions" that implement a display schedule by determining which image or images generated from the sets of content data will be	This is a means plus function term because reciting "instructions for" merely recites the function to be performed without reciting structure

system scheduling instructions for scheduling the display of the image or images on the display device"	displayed and mediating conflicts between the display requirements of multiple sets of content data	to perform that function. Function: "determining the display order and display duration for each available set of content data used to generate an image or images on the display device" Structure: "instructions" [as construed herein] that cause a computer to check for available sets of content data and use a set of rules to prioritize the display of all available sets of content data and set the display duration of each available set of content data by evaluating at least one of the following: (1) the amount of time that has passed since a set of content data has been updated, (2) a user's preference for a set of content data, (3) compatibility of a set of content data with other application "instructions" [as construed herein], or (4) display restrictions for a set of content data. Alternative if not means plus function: "instructions" [as construed herein] for determining the display order and display duration for each available set of content data used to generate an image or images on the display device

The parties' constructions are similar in that they both recognize that the content display system scheduling instructions are used to schedule the display of sets of content data. Interval's proposed construction is correct because it encompasses all types of content display system scheduling instruction discussed in the specification without requiring any particular type of content display system scheduling instructions. Defendants' construction, however, is overly

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narrow because it requires one type of content display system scheduling instructions (*i.e.*, instructions that "determine display order and display duration for each available set of content data") while excluding other types of content display system scheduling instructions (*i.e.*, instructions that determine whether certain sets of content data will be displayed at all).

For example, the specification teaches that certain "content display system scheduling instructions" can be used to remove incompatible sets of content data from the display schedule. *See* '652 patent at 20:33-42. Another type of "content display scheduling instructions" can "include instructions that evaluate a probability function each time that a set of content data in the schedule is presented for display, and either display or not display the set of content data dependent upon the evaluation of the probability function." *Id.* at 26:52-57. Defendants' proposed construction is incorrect because it excludes these types of content display system scheduling instructions. *See Adams Respiratory Therapeutics, Inc. v. Perrigo Co.*, 616 F.3d 1283, 1290 (Fed. Cir. 2010) ("A claim construction that excludes the preferred embodiment is rarely, if ever, correct and would require highly persuasive evidentiary support." (quotation marks omitted)).

9. "instructions for acquiring a set of content data from a content providing system"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'314 claim 13 (also 112/6) "instructions for acquiring a set of content data from a content providing system"	See constructions of "instructions," "set of content data," and "content provider." No additional construction required.	This is a means plus function term because reciting "instructions for" merely recites the function to be performed without reciting structure to perform that function. Function: acquiring a set of content data from a content providing system Structure: "instructions" [as construed herein] to perform the

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		steps described in connection with 401-406 of FIG. 4, namely: (1) providing a user with an interface to directly request a particular set of content data, (2) indicating to the content provider the particular set of content data requested by the user, (3) receiving a set of instructions at the content display system that identify the site from which the set of content data is to be acquired, (4) downloading the particular set(s) of content data requested by the user at the content display system.

As discussed above, this term is not governed by 35 U.S.C. § 112, ¶ 6. *See* § III.I, *supra*. By declining to offer a proposed alternative construction, Defendants concede that no additional construction is required. Interval respectfully requests that the Court decline to further construe this limitation.

10. "audit instructions for monitoring usage of the content display system to selectively display an image or images generated from a set of content data"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'652 claim 18 "audit instructions for monitoring usage of the content display system to selectively display an image or images generated from a set of content data"	See constructions of "instructions" and "selectively display an image or images generated from a set of content data." No additional construction needed.	'652 claim 18 and '314 claim 3 are means-plus-function because "audit instructions" has insufficient structure. Function: recording or computing information about the "sets of content data" that the display system chooses and displays to the user. Structure: software that stores in an appropriately structured database at least one of the (i) identity of each set of content data displayed by the attention manager, (ii) the frequency (e.g., number of times per week)

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		that a set of content data was displayed by the attention manager, (iii) the times at which a set of content data was displayed by the attention manager, (iv) a user-expressed satisfaction level for a particular set of content data, and (v) last set of content data displayed to a user before the user either "passively" (i.e., by making an input to the computer with an input device) or "actively" (i.e., by selecting a control option) terminated operation of the attention manager (of interest, since the user presumably was viewing the display screen when such interaction occurred).

As discussed above, this term is not governed by 35 U.S.C. § 112, ¶ 6. *See* § III.I, *supra*. By declining to offer a proposed alternative construction, Defendants concede that no additional construction is required. Interval respectfully requests that the Court decline to further construe this limitation.

11. "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"

Claim Language	Interval's Proposed Construction	Defendants' Proposed Construction
'314 claim 3 a set of instructions for enabling the content display system to selectively	See constructions for "instructions," "selectively display," "unobtrusive manner," and "image or images generated from a set of content data." No additional construction needed.	This is a means plus function term because reciting "instructions for" merely recites the function to be performed without reciting structure to perform that function. These terms should be interpreted

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; '314 claim 13 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		consistently with the "means for selectively displaying" in claim 4 of the '652 patent. As set forth above, this term includes a phrase that is indefinite within the recited function; thus this term is indefinite. Function: "selectively displaying [on the display device], in an unobtrusive manner that does not distract a user of the display device or 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" [as construed herein] To the extent there is any structure disclosed that could fulfill the recited function, it is: Structure: a program(s) that includes a screen saver application program, activated by the detection of an idle period, or a wallpaper application program, that "selectively displays … image or images generated from the set of content data" [as construed herein]

For the reasons discussed above, the "unobtrusive manner" language is not indefinite. *See* § III.A, *infra*. Additionally, this term is not governed by 35 U.S.C. § 112, ¶ 6. *See* § III.I, *infra*. By declining to offer a proposed alternative construction, Defendants concede that no additional construction is required. Interval respectfully requests that the Court decline to further construe this limitation.

IV. CONCLUSION

For all of the foregoing reasons, Interval respectfully requests that its proposed constructions for the terms in dispute be adopted and Defendants' proposed constructions be rejected.

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/s/ Matthew R. Berry

Justin A. Nelson
WA Bar No. 31864
E-Mail: jnelson@susmangodfrey.com
Edgar G. Sargent
WA Bar No. 28283
E-Mail: esargent@susmangodfrey.com
Matthew R. Berry
WA Bar No. 37364
E-Mail: mberry@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1201 Third Ave, Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Facsimile: (206) 516-3883

Max L. Tribble, Jr.
E-Mail: mtribble@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

Oleg Elkhunovich
E-Mail: oelkhunovich@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, California 90067
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

Michael F. Heim
E-mail: mheim@hpcllp.com
Eric J. Enger
E-mail: eenger@hpcllp.com
Nathan Davis
E-mail: ndavis@hpcllp.com

Niraj P. Patel
E-mail: npatel@hpcllp.com
HEIM, PAYNE & CHORUSH, L.L.P.
600 Travis, Suite 6710
Houston, Texas 77002
Telephone: (713) 221-2000
Facsimile: (713) 221-2021

Attorneys for INTERVAL LICENSING LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 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:

Attorneys for AOL, Inc.

Cortney Alexander	cortney.alexander@finnegan.com
Robert Burns	robert.burns@finnegan.com
Elliot Cook	elliot.cook@finnegan.com
Gerald Ivey	gerald.ivey@finnegan.com
Scott Johnson	scott.johnson@stokeslaw.com
Molly Terwilliger	mollyt@summitlaw.com

Attorneys for Apple, Inc.

David Almeling	dalmeling@omm.com
Brian Berliner	bberliner@omm.com
George Riley	griley@omm.com
Jeremy Roller	jroller@yarmuth.com
Scott Wilsdon	wilsdon@yarmuth.com
Neil Yang	nyang@omm.com
Xin-Yi Zhou	vzhou@omm.com

Attorneys for eBay, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhlt.com
Jeffrey Love	Jeffrey.love@klarquist.com
Derrick Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com
Christopher Wion	chrisw@dhlt.com

Attorneys for Facebook, Inc.

Chris Durbin	cdurbin@cooley.com
Heidi Keefe	hkeefe@cooley.com
Sudhir Pala	spala@cooley.com
Michael Rhodes	mrhodes@cooley.com
Elizabeth Stameshkin	lstameshkin@cooley.com
Mark Weinstein	mweinstein@cooley.com

Attorneys for Google, Inc.

Aaron Chase	achase@whitecase.com
Dimitrios Drivas	ddrivas@whitecase.com
John Handy	jhandy@whitecase.com
Warren Heit	wheit@whitecase.com

Scott Johnson	scott.johnson@stokeslaw.com
Shannon Jost	shannon.jost@stokeslaw.com
Kevin McGann	kmcgann@whitecase.com
Wendi Schepler	wschepler@whitecase.com
Theresa Wang	theresa.wang@stokeslaw.com

Attorneys for Netflix, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhlt.com
Jeffrey Love	jeffrey.love@klarquist.com
Derreck Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com

Attorneys for Office Depot, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhlt.com
Jeffrey Love	jeffrey.love@klarquist.com
Derreck Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com

Attorneys for OfficeMax, Inc.

Kevin Baumgardner	kbaumgardner@corrcronin.com
Steven Fogg	sfogg@corrcronin.com
John Letchinger	letchinger@wildman.com
Jeffrey Neumeyer	JeffNeumeyer@officemax.com
Douglas Rupert	rupert@wildman.com

Attorneys for Staples, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhlt.com
Jeffrey Love	jeffrey.love@klarquist.com
Derrick Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com

Attorneys for Yahoo! Inc.

Francis Ho	fho@mofo.com
Richard S.J. Hung	rhung@mofo.com
Michael Jacobs	mjacobs@mofo.com
Matthew Kreeger	mkreeger@mofo.com
Dario Machleidt	dmachleidt@flhlaw.com
Eric Ow	eow@mofo.com

Mark Walters	mwalters@flhlaw.com
Gregory Wesner	gwesner@flhlaw.com

Attorneys for YouTube, LLC

Aaron Chase	achase@whitecase.com
Dimitrios Drivas	ddrivas@whitecase.com
John Handy	jhandy@whitecase.com
Warren Heit	wheit@whitecase.com
Scott Johnson	scott.johnson@stokeslaw.com
Shannon Jost	shannon.jost@stokeslaw.com
Kevin McGann	kmcgann@whitecase.com
Wendi Schepler	wschepler@whitecase.com
Theresa Wang	theresa.wang@stokeslaw.com

By: /s/ Matthew R. Berry
Matthew R. Berry