Unofficial transcript for users of mofo.com

Judge Moore (00:00):

Augme Technologies v. Yahoo!.

Judge Moore (00:47):

Ms. Albert, you may proceed.

Jennifer Albert (00:48):

Good morning, Your Honors. May it please the court. My name is Jennifer Albert. I'm with the firm of Goodwin Procter here today on behalf of the appellants, Augme Technologies and World Talk Radio. This is an appeal from the Northern District of California. Court's decision granting Yahoo!'s motion for summary judgment of non-infringement with respect to Augme '636 and '691 patent. Augme also appeals to district court's finding that claims 19 and 20 of the '691 patents is invalid as indefinite. Augme further appeals certain of the district court's construction of terms of its claims, as well as Yahoo!'s '320 patent. My argument today will focus upon the issues relating to the court's grant of summary judgment of non-infringement. The inventions described in claimed in the Augme patent relate to systems invest—

Judge Schall (01:44):

Excuse me. If I could, I'm sorry for sort of jumping in on you like this, but time is fleeting in these situations and I can only speak to myself. The one issue I would like you—if you could look at is the question of whether the district court aired in granting summary judgment of no DOE infringement with respect to the embedded limitation. Now, I realize that there's a difference of opinion here as to the construction of that limitation, but assume for the moment, reserving your objection of the construction, but assume for the moment that the district court or the magistrate was the district court did correctly construe that limitation. What in the record supports your position that there's a genuine issue of material fact as to no DOE infringement? I'm not talking about any issue here of [**inaudible**], just a straight infringement issue. What do you point to, I mean, I know there's two items here. We've got the deposition of the Yahoo! expert and then the declaration of your expert in the record. If you could March through that and, and show me where the there's a genuine issue as to the way prong.

Jennifer Albert (03:12):

Well, there's no dispute here that the ad tags of the APT and the RMX first code modules are written into the HTML of the webpage prior to the initiation of the download. And we can—

Judge Schall (03:29):

And then they call on an intermediary, so to speak.

Jennifer Albert (03:31):

Correct.

Judge Schall (03:32):

And then pulls it from the other server.

Jennifer Albert (03:34):

And that smart code, for example, is retrieved, and then copied and pasted into the HTML of the webpage as the webpage is being download.

Judge Moore (03:45):

I think we actually know exactly how it worked, but we're hoping you'll do is walk actually through the evidence and show us with precision where it creates a question of fact.

Jennifer Albert (03:56):

Dr. Gray, Yahoo!'s expert, Dr. Gray admitted during his deposition that the APT and RMX—

Judge Moore (04:02):

What page would you like to look at? And line number.

Jennifer Albert (04:05):

Page A6992 through A6994.

Judge Moore (04:10):

Okay. Which statements, which if you don't have it with you, get it, which statements are you going to want me to understand as creating?

Judge Schall (04:17):

And again, the focus is on the way limitation because on the way prong of the three prong test because there is some testimony in here about the same function, but we're at least I'm interested in the way point.

Jennifer Albert (04:29):

Well, as to the Waypoint, the accused Yahoo! systems function in the same way in that first code module is inserted into the HTML of the webpage as the webpage is being—

Judge Moore (04:48):

So we don't want you to explain to us why you think it's the same way, we want you to show us where an expert gave concrete evidence that it operates in the same way.

Jennifer Albert (04:58):

At page A6992 for example, starting at line 20 on that page, Yahoo!'s expert indicated that in response to the question in the patent, the function perform, and what is the way that function is performed in the patent. In the patent, the function performed by the script.js. No, there's no script.js in the patent. I want to talk about the patent and then compare the function we're on. And then the attorney said we're on the way. Yes. This is at page A6993 Yahoo!'s expert acknowledged that yes, it would be the same. It would be the same way.

Judge Schall (05:56):

Well, it seems that the key part here is if there's enough there for you, the key part would be 6993, starting around line 16 or 17, going through, I don't know, I guess 6994, line five or six.

Jennifer Albert (06:07):

Correct.

Judge Schall (06:17):

How does that—how is he explaining there that they operate in the same way—that the Yahoo! system operates in the same way as the claim, the embedded limitation. Now there is the statement. If you declared the inclusion of the script source tag and declared it arbitrarily the first code module, then it would operate the same. That's lines 21 through 25 on 6992. But how does it talk there about explaining why that's the case. That seems sort of a conclusive statement. How does that—where do we have an explanation either here or in the other—your expert's declaration, which is at I guess 70. The key part would be at 7060 through 7061, maybe. Again, I'm sorry from monopolizing the floor here, but this is the one issue that sort of—I was.

Jennifer Albert (07:35):

The Augme's expert explained that both and a first code module that's entirely written in line into the HTML—

Judge Moore (07:46):

Where are you reading from?

Judge Schall (07:52):

This testimony is the key that—I'm sorry—it's the declaration. I think where you want to—you need to find something is it 760 through 7060 through 7061, I think. And these seem to be the two places. What we looked at in the Yahoo! experts deposition in this section of the declaration.

Jennifer Albert (08:20):

He says that on page A7061 at paragraph 21, that there's no substantial difference between using a first code module embedded in a webpage which is in line code versus using code that's partially embedded, for example, the Yahoo! ad tag. And—

Judge Moore (08:45):

Are you talking about paragraph 21? I just want to make sure I'm with you.

Jennifer Albert (08:48):

Correct. Page A77061, paragraph 21.

Judge Moore (08:53):

I'm there. It says there is no substantial functional difference. And I think it's a three prong: function, way, result, and we're just trying to get you to hone in on way.

Jennifer Albert (09:13):

If you look at the prior page, A7060, for example, at paragraphs 16 through 18, Dr. Batachargy explains that there's no substantial difference between inserting a portion of the first code module in line, in the HTML of the webpage, which then retrieves another portion of the first code module from a server and then copies and pastes that portion in line into the HTML and the webpage. And a first code module that's entirely written in line in the HTML code of the webpage prior to the beginning of the execution of the download. So that's the way part. And then—

Judge Moore (10:05):

Which paragraph gives me the way part?

Jennifer Albert (10:12):

It's paragraphs of 16 through 18.

Judge Moore (10:18):

Well, paragraph 17 is just disputing Yahoo!'s contention that using view source command available in the browser verifies partially that doesn't have anything to do with whether these two things are the same way.

Jennifer Albert (10:29):

Then, for example—

Judge Moore (10:30):

I just want to one by one. So it doesn't does it? Is there something—

Jennifer Albert (10:34):

Correct—

Judge Moore (10:34):

So it's not 17. It's 16 and maybe 18.

Jennifer Albert (10:37):

18. Dr. Battacharjee explains that in accordance with the worldwide web consortium, there's no distinction in behavior. In other words, the way that these things work between code that's written entirely inline—

Judge Schall (10:54):

Meaning embedded.

Jennifer Albert (10:57):

Well.

Judge Schall (10:58):

Inline means embedded, right?

Jennifer Albert (10:58):

Correct.

Judge Schall (11:00):

Yeah.

Jennifer Albert (11:01):

The judge construed embedded as written into the HTML code of the webpage. So there's no distinction between a first code module that's entirely written into the HTML code of the webpage prior to the beginning of the execution and a situation where there is a tag that is written in line into the HTML code of the webpage prior to the beginning of the execution, which then retrieves other code and inserts that code into the HTML of the webpage out the webpage—

Judge Schall (11:36):

No, I agree. And then there's the ref and it—he does refer to the consortium document, which I guess we have at 7190, and most importantly, I guess paragraph 18.1. And you're correctly quoting what he says there. How does he explain why this is the same way? And he says—it says it makes no distinction, but why is there no distinction?

Jennifer Albert (12:04):

Because the results are the same in that both situations, the code can be automatically executed as the webpage is being downloaded. And in both situations, the first code module as it's being executed can issue the command to retrieve the second code module or initiate.

Judge Reyna (12:27):

But that execution is different, isn't it. It's' not executed in the same way.

Jennifer Albert (12:32):

It is executed in the same way because the way a browser parses the HTML of the webpage, it does so on a line by line basis. So as it encounters a command to retrieve code from a server, it goes and gets that code, retrieves it, and inserts it directly in that place inline, so it's the same as if you had that entire—

Judge Reyna (12:55):

There's a middle process in the Yahoo! patent, isn't there.

Jennifer Albert (12:58):

Pardon me?

Judge Reyna (12:59):

There's a middle process in the—there's another process in between the sending for the command for the ad. There's in the Yahoo! patent, there's a middle process there.

Jennifer Albert (13:11):

In the Yahoo! networks, there is an ad tag inserted inline into the HTML code of the webpage prior to the beginning of the download, which then issues a call to go and retrieve a smart code from the server. That smart code is then copied and pasted inline into the HTML code of the webpage as the webpage is being downloaded, which then issues the command to retrieve the second code module.

Judge Reyna (13:44):

So you would say there is a difference in the way that the two pens function.

Jennifer Albert (13:51):

There's no substantial difference because—

Judge Reyna (13:54):

There is a difference, but then the question becomes whether it's substantial or not, correct?

Jennifer Albert (13:58):

Correct.

Judge Reyna (13:59):

But there is a difference.

Jennifer Albert (14:00):

There is a difference, but a jury could reasonably determine that if difference is in substantial, as it relates to the requirements of the claim in that in both circumstances, the first—

Judge Reyna (14:12):

So now show us the evidence that was presented that demonstrates that it's insubstantial, that the difference is insubstantial.

Jennifer Albert (14:20):

Well, for example, Dr. Battacharjee's declaration at page A7061, paragraphs 20 through 22 or 23, he's explaining that there's no substantial difference in the function and the results that are achieved in the Yahoo! Context, and those that would be achieved as if in a situation where the first code module is entirely written in line that—

Judge Moore (14:52):

That's function and result. And I think what Judge Reyna was asking, unless I'm confused, is about wave still and in whether or not it is an insubstantial difference, because we all agree there's a difference.

Jennifer Albert (15:06):

Dr. Battacharjee explains that page A7060, paragraph 18, that for example, the worldwide web consortium makes no distinction in behavior or execution between JavaScript code written inline and code using the script tag containing the SRC attribute such as—

Judge Moore (15:30):

You we've exhausted all your time, almost all your rebuttal time, and I really would like to hear you address service responses. So if you don't mind, can I move you on? I think you'd like that, wouldn't you, at this point?

Jennifer Albert (15:41):

Yes. Thank you, Your Honor. Augme contends that the district court impermissibly resolved disputed issues of fact and holding that the Yahoo! accused network flag the service response.

Judge Moore (15:52):

Why didn't you appeal the claim construction?

Jennifer Albert (15:55):

The claim construction would be fine, but the court aired in applying the claims [**inaudible**] to the accused Yahoo! network.

Judge Moore (16:03):

Why is the claim construction fined to the extent that it requires an aspect of permission? I just don't read anything in this patent as requiring permission. So why in the world did you acquiesce and not appeal this claim construction?

Jennifer Albert (16:19):

Well, it's Augme's position that the display or lack of display of an advertisement does indicate whether or not the downloaded webpage is permitted access to the requested function—

Judge Moore (16:33):

I understand that's your argument as to why you think there's a question of fact, even under the district court's construction. I just don't know why you haven't appealed this. It's not that construction you wanted, you didn't advocate for this construction. So, I don't understand why you didn't appeal it because I just have struggled to understand why permission is just required when doing this patent.

Jennifer Albert (16:59):

We felt that we could live with the construction at the time, and we felt that the Yahoo! network satisfied the construction.

Judge Moore (17:07):

Well, how does the blank ad indicate permission as opposed to simply indicating perhaps that your system isn't capable of reading it? I mean, I get all these messages. I click on something, you don't have the right version of Adobe flash to read this or whatever. That's not a lack of permission. That's not saying I don't have the right to do something. It's saying I don't—my system doesn't have the capability of doing it, which is quite different from permission. So why?

Jennifer Albert (17:35):

That is directly analogous to the situation and the patent because the—

Judge Moore (17:41):

Oh, I know, but it has nothing to do with permission. I get that. I get that it's analogous.

Jennifer Albert (17:44):

It is an indication that your system lacks permission to access that particular function.

Judge Moore (17:51):

Why does my system like permission? It's actually telling me if I want to get it, just download this other thing. It's a capability question, not a permission question.

Jennifer Albert (18:01):

It's a permission question in the same analogous situation as is given in the patent in that a display of an advertisement does serve as an indication, whether the downloaded webpage is permitted access to the advertisement and—

Judge Moore (18:19):

Why does the blank ad indicate anything about permission? That's what I don't understand. I understand that the blank ad is completely consistent with the specifications notion of service response. But unfortunately, that's not what I'm looking at today. What I'm looking at is the blank ad consistent with the district court's construction which is not appealed. So why is the blank ad equivalent to permission?

Jennifer Albert (18:42):

It's equivalent to an indication of permission in that if the ad is provided, that is a reasonable jury could find that to be an indication that your system is permitted access. And if the ad server declines to provide an ad, that is an indication that your system is not permitted access to the ad in the way that the patent

describes it, namely the service response is either provided or not provided. That a jury could find that that is an indication of a grant or denial of permission, just to the same extent as somebody walking in Central Park. You know, that is an indication that you're permitted to walk in Central Park, but there's no affirmative indication provided to the user that permission was granted or denied.

Judge Moore (19:44):

Well, but Yahoo!'s witness is 30B6 says that a blank ad code is returned when it's unable to fill an ad, not when somebody doesn't have permission, but when 'they just simply can't find an ad for the person. So why would that necessarily correspond to a denial of permission?

Jennifer Albert (20:04):

Because in that circumstance, the there's no ad suitable to provide to that user. So permission to the added function is denied or a jury could find that to be the case.

Judge Schall (20:19):

No, but in the—do you view the word permission in the computer field as sort of a term of art? In other words, when we think of permission in our daily discourse, we think, you know, you don't have permission to do it. I'm not going to let you do it. You can't do it. You don't have a ticket, whatever, or you're not allowed to do that. Is that what we're talking about here? Is it assist when you say you don't have permission, you're talking about you don't have the right script, or you're not allowed to go to this website, or both, what?

Jennifer Albert (20:52):

It could be both in the context of the patent. The patent talks about access to the requested function with reference to the compatibility of the system to function that way. For example, if your system lacks the capability to display flash advertisement, then your permission to a flash advertisement would be denied. So it's a compatibility issue as well as a user preference issue that's described in the patent.

Judge Reyna (21:31):

But the claims here don't actually require there to be a checking for permission. It's just whether there's an indication.

Jennifer Albert (21:38):

Correct, Your Honor. Thank you.

Judge Moore (21:44):

We'll restore your rebuttal time, Ms. Albert. Ms. Maynard. Go ahead.

Deanne Maynard (21:49):

May it please the court, Deanne Maynard for Appellee Yahoo!. If I may start where the court started with the doctrine of equivalence.

Judge Schall (21:58):

Why is there not enough of a fact issue on way under the three prong test, when you put together the materials that we were discussing with Ms. Albert, namely the, the testimony at deposition of the Yahoo! expert, the declaration of the Augme expert combined with the consortium document.

Deanne Maynard (22:27):

Well, it's this court's case law, that conclusory statements of experts are not enough to get you a jury

question. We cite a case to that effect in our briefing, but also in this context, in particular, in the DOE context, this court's Texas Instruments case has been cited at least several times.

Judge Schall (22:43):

Oh yeah. There's no question that that's black letter law. We've been pretty rigorous at the, about applying it, but, but why, when you put all that together when I say all of that, I'm talking about the sources that we were—

Deanne Maynard (22:56):

Right.

Judge Schall (22:57):

—Discussing with Ms. Albert. Why is there not enough there beyond conclusory statements? I mean, other words, tell me what is conclusory about both the statement of your expert at deposition and the statement of the Augme expert in the declaration.

Deanne Maynard (23:17):

The statement it, I mean, starting with the Augme expert statement is hard to find a more conclusory statement than that in paragraph 22, on 7061, which is the only one that directly addresses way, Your Honor. And if I may read it, it says Yahoo!'s ad serving systems perform the same function and substantially the same way to receive substantially the same results.

Judge Schall (23:39):

I agree with you on that, but what about say like paragraph 18 on 7060.

Deanne Maynard (23:44):

Paragraph 18, Your Honor, at best, talks about result or function, it does not talk about way, and it refers to this worldwide web document, which when one looks at it actually supports the notion that it's a different way. So at page 7190 to 7192. The discussion is one way to do it is to embed the code inline and a different way to do it is to retrieve the code from somewhere else. Those are—

Judge Reyna (24:17):

But under both pens, the intermit code for Yahoo!, for example, the second modules are retrieved apparently in the same way. And that's sending a request to the server. I mean, ultimately, that's what happens. A request is sent to the server under both pens.

Deanne Maynard (24:40):

But the way in which it's done, Judge Reyna is in fact diametrically opposite of what's claimed in the patent. So the claim and the patent is the first code module is issues a command to retrieve. The second code module said second code module, having being downloaded, having the function. And that is diametrically opposed to the accused products where the accused first code module is in line, but it retrieves something else. It retrieves an intermediary code that doesn't have the function. It has to be retrieved and download from somewhere else. And then once it's executed, it goes and tries to get the requested ad. That is not in any way, the same way. And there's nothing like what this court case law and requires Texas Instruments in fact, you know upholding, you know, after a jury trial saying that very similar testimony by experts to these in the declarations here, which just sort of stating without any particularity, why you would say this is substantially the same way is enough for DOE and Augme just doesn't have enough to take this to a jury. They just have nothing but clue. And as to our expert statement, Judge Schall it is similarly conclusory. And also just assuming counter to fact that there, that the first code module he was asked to assume in answering the question that the first and intermediary codes were one and that

they were the same. And he said, well, if you assume that hypothetically, you know, then, then it would be the same way that's just saying assuming you're right of me, you would be right. That that's not enough to get you to, to the jury. In fact, he completely disagrees with that being the same way.

Judge Reyna (26:32):

Let's go back to 70, 61 paragraph 21.

Deanne Maynard (26:36):

Yes, sir.

Judge Reyna (26:36):

And maybe the magic words aren't used correctly there, or maybe they're absent, but it says that there's no substantial functional difference between using a first code module embedded in a webpage under what the district court's interpretation includes inline code versus using a code that is partially embedded. And it goes on and says, as done in webpages, utilizing the accused products. It seems to me that there is, that is a declaration of function in the same way that perhaps raises a genuine issue material backward jury.

Deanne Maynard (27:14):

Well, I think that goes to function in that way.

Judge Reyna (27:17):

Well, it uses a word function and—

Deanne Maynard (27:19):

And it doesn't—

Judge Reyna (27:19):

But it's speaking on retrieval on how the request is made to retrieve the [**inaudible**] a or a similar back.

Deanne Maynard (27:32):

But again, Your Honor, even assuming that it's talking about way, which I don't think it is. It's just a conclusory statement of the ultimate conclusion. It doesn't explain with the, any particularity why someone of skill in the art would see it to be substantially the same and not different. And in fact, the, the worldwide web documents that he points to suggests that they are actually two different ways to do it. One way, write it inline in which it is embedded. And another way is to retrieve it from somewhere else and download it. And the patent sets up a, a dichotomy, a binary dichotomy between those two things. And although, I know, Judge Schall you ask my counsel the other side, not to talk about the initiation, but here it would go counter in the district court with absolutely correct. That it would be reading out structural limitations to this patent to allow a jury to conclude—

Judge Schall (28:25):

Let me ask you not to be a Johnny One Note on this DOE issue if I might. But what would you, in other words, posit, for the testimony in a declaration or in a deposition that in your view, would've gotten Augme over the fact issue on the way point. In other words, I'm going to ask you if their expert or your expert had said what would've been enough in your view?

Deanne Maynard (29:01):

It's hard to say what would be enough to get to a jury judge shall, but it's very—

Judge Schall (29:05):

Fact issue here. On the way prong.

Deanne Maynard (29:06):

To create a fact issue, what this court's case law requires is sufficient particularity—that those are words from Texas Instruments to explain how it is that someone of skill in the art would think that they are substantially the same function, substantially the same way, substantially the same result. And these four sentences in this declaration can't possibly be enough particularity. In fact, this is very similar to the testimony that the experts gave in Texas Instruments. In other words, he's just set out his literal infringement case and he says, and, and if you think it's not literal infringement, it's essentially the same. And so therefore it would at least be DOE and that can't be enough to get to a jury.

Judge Schall (29:45):

Let me ask you just one other thing. The district court on this point, really focused on [**inaudible**] point on the DOE issue. He, the, the magistrate didn't get into the kind of analysis that is presented in the briefs that we've been discussing with you and Ms. Albert. Does that make any difference?

Deanne Maynard (30:07):

No, I don't think it does. I mean, I think the district court held for exactly the right reason and there—

Judge Schall (30:13):

Oh, no, I understand you would agree—

Deanne Maynard (30:14):

Right.

Judge Schall (30:14):

—with the district court [**inaudible**] point, but I'm just saying, does it make any difference? I mean, we've been focusing to a large extent today on whether there was enough evidence to get to a jury on the way prong of DOE with respect to the embedded limitation and the district court didn't go to that place at all. Does that make any difference?

Deanne Maynard (30:35):

It doesn't Your Honor, because the district court rationale is one independently proficient. And two, if to extent that this court is focusing on that issue, this court is, obviously more than capable of locating the only three possible places in this record where they might have enough fact to get to a jury. And they just don't, so there, there's certainly no point telling that.

Judge Moore (30:57):

And can you disservice response?

Deanne Maynard (30:59):

Yes, please Judge Moore. So even if you disagree with us on the doctrine of *Clements*, there's a completely independent way to affirm non-infringement here. And that is that there is absolutely no evidence of any indication of permission in the accused products.

Judge Moore (31:15):

Why isn't sending the ad an indication of permission?

Deanne Maynard (31:18):

Because the fact that the district court, absolutely correct that, that an ad is sent, tells you nothing about whether or not the, they check to see if there was permission.

Judge Moore (31:31):

As Judge Reyna pointed out—don't require check to see if there's permission only an indication of permission.

Judge Moore (31:35):

If I said, Ms. Maynard, can I have your pen? And you hand it to me, am I really to assume you're not giving me permission to take the pen from your hand?

Deanne Maynard (31:43):

Well, I think that's different than here, where we have a computer, which is required to see two things. There's two parts of the claim construction. Is the website that's requesting it—does it, is it permitted to have the function? And if so, how is the function permitted? So the return of the ad, if anything, is the second piece—

Judge Moore (32:02):

I don't wait, hold on. Where is that part? Remind me where that is.

Deanne Maynard (32:05):

Where's the district court's construction.

Judge Moore (32:07):

Yes.

Deanne Maynard (32:07):

It is—

Judge Moore (32:07):

I was focused on the permitted.

Deanne Maynard (32:09):

It is on page—the, the analysis the district court is on page 20, sorry.

Judge Moore (32:17):

Maybe 47 to 50 of the record.

Deanne Maynard (32:20):

Oh, I'm in the wrong patent. Apologies. Service response is on 49.

Deanne Maynard (32:25):

And then the actual construction is on 50—A50. The court construes the term service response as a response that indicates whether the downloaded webpage is permitted to have access to requested function. And if yes, how the function should be presented on the webpage.

Judge Schall (32:41):

But what are you reading?

Deanne Maynard (32:43):

I'm sorry, I'm reading the district court's construction. It's the first line on page A50 of the district court's claim construction order.

Judge Schall (32:49):

Okay.

Deanne Maynard (32:50):

So there's two—

Judge Moore (32:51):

Yeah. What is it you think there are two, what is the two things?

Deanne Maynard (32:56):

Well, the two things are a response that indicates whether the downloaded webpage is permitted to have access to request requested function. And if yes, how the function should be presented on the web page. And I was simply saying that to collapse the provision of the ad into the first part would, would the—would collapse the analysis. The first part of the construction requires some permission element and for there to be permission element. So the fact that people are in Central Park, Judge Moore—

Judge Moore (33:24):

But the patent makes it clear that giving somebody an ad or media is an indication of permission. It is a service response. The patent makes that expressly clear.

Deanne Maynard (33:34):

No, I disagree Your Honor. And you know, well, for one, just to step back, of course—

Judge Moore (33:40):

Page—the column seven of the 691 patent. At line 55 through 65?

Deanne Maynard (33:50):

Right. So in the context though, in column seven, that is talking about after there's been a permission check, one of the results—

Judge Moore (34:00):

Yes, but the check isn't required here by these claims, all that's required is an indication of permission.

Deanne Maynard (34:02):

An indication of permission, which assumes that there has to be some sort of check. How, how else can you indicate permission? If there hasn't been a check to whether or not you're permitted?

Judge Moore (34:14):

By handing you my pen when you ask for it.

Deanne Maynard (34:16):

But here we're talking about a computer who in the passive is checking to see if there is permission, and then then providing the service response, the, and the claims here that you're reading here, the service response indicating denial of service. Denial of service is something more than just the absence of service.

Judge Moore (34:42):

Okay, but how about granting service, right? Why isn't granting service and maybe your argument is okay, Judge Moore, maybe handing the ad could be possibly construed as a service response, possibly under a factual scenario, possibly what denial of service doesn't exist here? Is that what maybe your argument is?

Deanne Maynard (35:00):

Well, I think there, I think there's two things here. The facts here show that, that the, the Yahoo! accused systems don't, they're agnostic about permission. If there, the facts show that if there is an ad that meets the parameters, the systems will serve it. And if there isn't, they won't.

Judge Reyna (35:23):

Is a serving of the ad, an indication of permission?

Deanne Maynard (35:26):

No, it isn't Your Honor, because there's no evidence that, that the ad that the accused systems care anything about permission. So I do think that the requirement of permission does entail some sort of permission check. It does, because otherwise, how can you read from the fact that a response is returned, that, that there is permission. So to go to their hypothetical, the fact that people are walking around in Central Park says nothing about whether or not they're permitted to be there. It simply says they are there. Same with the provision of an ad provision of an ad, just shows that I provide you an ad. It doesn't say I've checked to see if you are, if the webpage that's requested the ad is actually permitted to have the function, which is what the patent calls for.

Judge Moore (36:04):

But, but the permission to the extent that it exists in the function, doesn't seem to me to have anything to do with what I guess I would think of as traditional notions of permission. I mean, and when I read this patent, I don't see a requirement along the lines of the way you want me to interpret the word permission.

Deanne Maynard (36:25):

Well, but permission, the meaning of permission is that you, you know, that you either are granted or denied authority or access. I mean, there trying to—

Judge Moore (36:35):

Here, Yahoo! Is granting access. So you're that you have therefore decided you have permission because they're granting it to you. They have decided not to withhold it from you by giving it to you.

Deanne Maynard (36:46):

That would read out the requirement of permission, which does entail some kind of check. if you look at pay, if you look at, if I can show you column 12, where they talk about—

Judge Reyna (36:55):

It's not a requirement, there's a requirement of indication.

Deanne Maynard (36:58):

An indication in the service response. Right. And I agree the, the, the, cause an indication in the service response that the webpage requesting the function is permitted to have the function and the accused systems don't care about whether or not the requesting webpage is, is permitted to have the function. So if, if, if one looks like page 12, which I think they haven't challenged the claim construction.

Judge Schall (37:24):

When you say page 12, or column 12?

Deanne Maynard (37:25):

I'm sorry.

Judge Schall (37:25):

Column 227.

Deanne Maynard (37:25):

Thank you. That's what I'm looking at. Yes. Thank you, Judge Schall. Column 12 line 52-ish, that paragraph—this is talking about the service response, and they haven't claimed challenged the claim construction, but I think that the, the claim is, is, you know, correctly construed to have this kind of requirement. Every time there is a service response—one of, one of the things is of course, a discussed [**inaudible**] if the service response is denial of service response media application metaphor may be presented with a slash steward, or maybe absent from webpage. Denial, denial of service response, not just like, I don't have an ad for you, but denial, which is permission in the—

Judge Moore (38:09):

Why isn't I don't have an ad for you, a denial of an ad because that's what it is. It's, you're talking about whether you can get the ad or not get the ad, the criteria under which that decision could be made, or what you suggesting are the indicators or permission. Perhaps my indication is only if you're over the age of 18. Perhaps yours is only if your system can accommodate the ad, i.e., you have the right software compatibility wise. Why isn't Yahoo!'s system indicating permission when it determines whether it has an ad for you or not.

Deanne Maynard (38:40):

Because that's not the permission in the sense of the patent. Permission in the sense of the patent—

Judge Moore (38:44):

But the claims don't require permission. They require an indication of permission.

Deanne Maynard (38:48):

But there is no indication of permission by Yahoo!'s return or non-return of an ad. If I can point to the evidence—

Judge Moore (38:53):

That's exactly what this allows for and a service response, it can be constitute a denial. If you simply don't send something.

Deanne Maynard (39:04):

Not in the context of the patent, because that's—

Judge Moore (39:06):

I'm reading from the patent. Were you pointing me to?

Deanne Maynard (39:08):

Column 12, which says, of course, as previously discussed, which goes back to column seven, which is what we were discussing before.

Judge Moore (39:13):

Where it also says not sending something is a denial.

Deanne Maynard (39:17):

But not sending something after having done a check as to whether or not you're permitted, the webpage that's requesting the function is permitted.

Judge Moore (39:24):

But that check isn't required by these claims. So that's your problem. These claims aren't limited to that check being performed.

Deanne Maynard (39:31):

What—

Judge Moore (39:31):

Limited, only permission and why can't permission be, I've got an ad for you where I don't have an ad for you, f. Why not let the jury figure that out? It seems awfully close to me.

Deanne Maynard (39:40):

I think that would read, is permitted an indication that the website is permitted out of, out of the claim construction and the claim construction is not challenged.

Judge Moore (39:50):

[**Inaudible**].

Deanne Maynard (39:50):

Well, it isn't challenged.

Judge Moore (39:52):

I get it. It's not challenged.

Deanne Maynard (39:53):

Isn't challenged.

Judge Moore (39:54):

Well, I have one other question for you, which is, do you think this claim requires an indication of service response in every instance, or what if the Yahoo! system sometimes indicated service response and sometimes did not? A method claim.

Deanne Maynard (40:13):

The—

Judge Moore (40:13):

At claim after being furnished by a system, every time it's operated?

Deanne Maynard (40:18):

The facts are—

Judge Moore (40:19):

Are no, I'm not. This is a simple question.

Deanne Maynard (40:22):

Okay. I think the answer to that is no.

Judge Moore (40:24):

So a method claim doesn't have to be infringed by a, in order for system to infringed, it doesn't have to perform every step every time it just has to form every step, at least once. Right? And the rest goes to damages in terms of how much. That sound about, right?

Deanne Maynard (40:37):

Yes, but here there's no evidence.

Judge Moore (40:39):

So if Yahoo! Ever in any instance is issuing a service response and we think there's a problem unembedded, then there's a question, right? Because they don't have to do it every time.

Deanne Maynard (40:50):

But there are no facts in the record that the Yahoo! accused systems care, anything about permission ever, anytime. And the, so that the most that, that they can point to on that is their conclusory testimony of their expert, again, which isn't enough, but that the actual facts in the record, or to the contrary. The actual facts in the record talk about—

Judge Moore (41:18):

But what—

Deanne Maynard (41:19):

Whether or not there's a content ad of the tight request. It's not about permission. Do I have an ad? I serve it. It's about sending people ads. We want to send people ads.

Judge Moore (41:26):

My question to you is I, you feel like that the problem part of the problem with this permission language is that there aren't specific criteria articulated anywhere by which permission ought to be granted or denied. And that this patent seems to be directed entirely to tailoring ads or tailoring media for individuals. And so I'm trying to figure out, well, what do they mean by permission? Because again, I, we talked about, could it be compatibility? Could it be some criteria? Like you're not over the age of 18, therefore I'm not going to send you a cigarette ad or whatever. I mean, is it, I'm trying to figure out what is the criteria by which permission is to be measured. And in the context of this patent, I guess the sense I have is do we have an ad that is appropriately tailored to you is an indication in this patent of what they mean by permission. And so that's what I'm trying to understand.

Deanne Maynard (42:20):

Well, I don't think that would be the right understanding of this patent, which is really about streaming media. And in column seven, you can see what they care about—

Judge Reyna (42:28):

Isn't that an issue for the jury?

Deanne Maynard (42:29):

No, Your Honor, this is a question. Well, the claim protection we think is correct. And we think it requires that the service response indicate that the requesting website is permitted to have access to the function. And that makes sense in the context of this patent, because what they were talking about was streaming media that was going to appear, you know, often in the media metaphor, on a website, and they might care about what kind of website it is, that's where the objectionable content check that they're talking about in. So I don't think that the patent is talking about, like, you're talking about Judge Moore, what our ads do, which is just the, they just, we just look to see whether or not we have the kind of an ad that fits the criteria you wanted.

Deanne Maynard (43:12):

Do we have one, if we do, we send it, if we don't, we don't—

Judge Reyna (43:15):

Isn't fitting the criteria a permission in the context of the [**inaudible**]?

Deanne Maynard (43:22):

No, Your Honor. I don't think it is whether the service, the service response is not a plain term. And it's been interpreted, it's been interpreted to say it one must first show an indication of whether or not the requesting website is permitted to have the function and then to how that function should appear. And in the context of claims 12 and column 12 and column seven makes clear that there's a denial of permission. The absence of a providing the function is a denial of permission. That's not what's happening in the queue systems. The there's no denial. Permission and denial have certain meanings.

Judge Moore (44:02):

You didn't answer Judge Reyna's question. Which is—

Deanne Maynard (44:03):

I apologize.

Judge Moore (44:03):

Why isn't the Yahoo! System, which evaluates criteria and makes a decision on whether to send you an ad or not based on certain criteria—why isn't that evaluation based effectively permission? Why can't it possibly under a factual scenario, be construed as deciding whether you're permitted?

Deanne Maynard (44:23):

Because the district court correctly concluded that whether—that just merely serving up an ad or not serving up an ad does not indicate anything about permission or denial of permission, and to allow a jury to conclude that would be inconsistent with the way the claim was construed. And the claim construction has not been challenged. That's not deciding a fact question. That's the application of well settled [**inaudible**] summary judgment law. There isn't enough here to go to a jury.

Judge Moore (44:50):

Do you have a closing comment?

Deanne Maynard (44:53):

Either basis would be enough to affirm this judgment. We would request the court affirming in its entirety.

Judge Moore (45:00):

Thank you, Ms. Maynard.

Judge Moore (45:03):

Ms. Albert, we're going restore your three minutes of rebuttal time. I think that keeps the time pretty equal.

Jennifer Albert (45:06):

Thank you, Your Honor. Turning to the service response I think the, Your Honors are correct that the district court took the factual issue away from the jury as to whether or not the provision or non-provision of an ad is an indication of whether the downloaded webpage is permitted access to the requested function. So and a jury could readily conclude based upon the examples of the preferred embodiments provided in the specification that the accused Yahoo! networks function in exactly the same way that's described in the patent. Namely—

Judge Moore (45:45):

If I understand Ms. Maynard's argument, it is that while normally if I say, can I have your pen? I hand you the pen. It might be an indication of permission that that's actually not at all what goes on in the Yahoo! Website because they never deny anybody. As long as you know, they've got an ad for you, they want you to have it. So it's, there is no aspect of denial. There is only tailoring an ad to someone, but that has nothing to do with permission. That's her, her argument is so, so providing it or not providing it, isn't an indication of permission.

Jennifer Albert (46:18):

But the, the problem is that the jury could have found as a matter of fact, that the provision or non- provision of the ad was an indication of permission or denial.

Judge Moore (46:29):

But only if Yahoo! Is evaluating something for permission, right? Something can't be an indication of permission if it's not actually ever happening, it can't be. You can only indicate something if it's actually happening.

Jennifer Albert (46:39):

Well, the Yahoo! System is evaluating permission in the same way that the patent talks about evaluating permission, namely, is there an ad that's compatible with the system? Is the website permitted to have access to this particular ad. Is the user, are the user's preferences such that this particular ad is permitted for that user. For example, if the user has some sort of an adult content restriction preference, then the ad server will not serve an adult content ad to that particular end user. So—

Judge Moore (47:20):

You're basically saying if I understand it right, that suitability is equivalent to permission?

Jennifer Albert (47:24):

Correct. Compatibility user preferences, that's, what's discussed in the patent—that's—those are the same criteria that are evaluated by the Yahoo! Network and determining whether or not to serve an ad. And, and similarly the district court took from the jury, the factual issue as to whether or not the evidence was such that the jury could have found that the way that the Yahoo! networks operate is, is not substantially different from the claimed embedded first code module and that the, the Yahoo! networks function in substantially the same way to achieve—

Judge Renya (48:12):

Here's your last shot, show us in the record the evidence are substantially the same way.

Jennifer Albert (48:17):

It's the same evidence that we've been talking about Your Honor, that the Yahoo!—

Judge Reyna (48:24):

Something other than the expert saying it functions in the same way. I mean what's the evidence? What's the step by step detail that, that indicates that?

Jennifer Albert (48:37):

It's just the expert testimony and the fact that when you have the embedded ad tags such as are used by the Yahoo! Networks there's no dispute here that the Yahoo! Systems embed the ad tags in the HTML code of the webpage prior to the download. Those ad tags call a second portion of code and retrieve that. And then that code is written inline in the HTML code of the webpage and the, and so there's no distinction between that situation. It's going to have the same lines of code as in a situation where that code was entirely written inline into the HTML of the webpage prior to the download. So as it relates to the functions required by the claim, which is namely that the first code module be able to automatically execute as the webpage is downloaded, both situations function exactly the same way. And in both situations, the code that's written into the HTML of the webpage includes the command to retrieve the second code module from the server.

Judge Schall (50:00):

No, but I guess what you'd be in to pick up on Judge Reyna's question for specific testimony, I guess what you would look to is paragraph seven on 7058, with respect to the APT and then paragraph 14 on 7060, the RMX is that. Because I think on this point, the service response, we don't have the situation that we do with invent, correct me if I'm wrong, please, where we had statements by the by the Yahoo! expert in the deposition, but here everything, whether it's enough or not enough on this point would seem to be in the declaration of Mr.—

Jennifer Albert (50:48):

Battacharjee.

Judge Schall (50:49):

Is that correct?

Jennifer Albert (50:49):

That's correct. Your Honor.

Judge Schall (50:50):

And do we have, is that, is that section at 7—7058, paragraph seven through 7060 paragraph 14. That's

where we have to find it. If it's there?

Jennifer Albert (51:00):

That the paragraph seven is talking about the service response. It's not really I mean, talking about the parsing procedure at the beginning of that paragraph.

Judge Schall (51:11):

In other words, where in this do we get over the fact issue requirements?

Judge Reyna (51:20):

And look at paragraph 11 0 70 59 in that regard?

Jennifer Albert (51:27):

Pardon me? I'm sorry.

Judge Reyna (51:29):

And, and also, as you answered Judge Schall's question, I want you to take a look at paragraph 11 of 70 58.

Jennifer Albert (51:36):

Right, yes. On page A 70-59, paragraphs 10 through 11 is talking about this. The fact that in the accused Yahoo! Systems, there's the embed added ad tag that calls the other portion of the first code module from the Yahoo! Server. And then that causes additional code to be returned to the browser that's described in paragraph 11. And that is then written in line into the HTML code of the webpage and then that second portion of the first code module contains the IMP call. And the IMP call is what calls the ad server to initiate retrieval of the second code module. So that functionality described at paragraph 10 and 11, a jury could reasonably conclude that that is not substantially different from writing that entire portion as if you wrote the ad tag and the smart code entirely in line in the HTML code of the webpage prior to the initiation of the download. Both in both circumstances, the browser parses that code on a line-by-line basis and executes it as it encounters it. And in both situations, that code module is automatically executed as the webpage is downloaded. And in both situations the end result is that the command is issued to the ad server to retrieve the second code module.

Judge Moore (53:13):

Give a final thought.

Jennifer Albert (53:14):

Thank you.

Judge Moore (53:16):

I'd like to—