

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

LEXOS MEDIA IP, LLC,

Plaintiff,

v.

NIKE, INC.,

Defendant.

§
§
§
§
§
§
§
§

CIVIL ACTION NO. 2:22-cv-00311-JRG
(Lead Case)

CLAIM CONSTRUCTION ORDER

In these consolidated patent cases, Lexos Media IP, LLC, asserts claims from U.S. Patents 5,995,102, 6,118,449, and 7,975,241 against Nike, Inc., CDW LLC, Ulta Beauty, Inc., The Gap, Inc., Walmart, Inc., and Northern Tool & Equipment Company (together, “Defendants”). Generally, the patents relate to modifying a cursor image displayed on a computer for advertising purposes. *See* ’102 Patent at 1:6–8 (“This invention relates . . . to a server system capable of modifying a cursor image displayed on a remote client computer.”); ’449 Patent at 1:9–11 (same); ’241 Patent at 11:8–10 (same). The patents, which share a common disclosure, teach “a simple means to deliver advertising elements . . . without the annoyance of totally interrupting and intrusive content delivery, and without the passiveness of ordinary banner and frame advertisements which can be easily ignored.” ’102 Patent at 2:27–32.

The parties dispute the scope of eleven terms, some of which were recently construed by the Court in *Lexos Media IP, LLC, v. Amazon.com, Inc.*, No. 2:22-CV-00169 (*Amazon*). Having considered the parties’ briefing, along with arguments of counsel during an October 12, 2023 hearing, the Court resolves the disputes as follows.

I. BACKGROUND

In *Amazon*, Chief Judge Gilstrap provided this background of the patents and technology:

The asserted patents relate to on-line advertising during the infancy of the world wide web. As background, the patents describe three prominent types of on-line advertising and the various problems with each. For example, the most common type of advertisements at the time were “banner ads”—“generally square or rectangular boxes provided with some combination of graphics, color and text directed to the product or service being advertised.” ’102 Patent at 1:29–31. However, because banner ads typically occupy a small part of a web page, they are easily ignored. *Id.* at 1:41–49. As an alternative, web page “frames” divide the display into separate sections, some of which may be used for advertising. The content, however, can still be difficult to read and is easily ignored by resizing or eliminating the frames. *Id.* at 1:55–2:3. Finally, the patents describe pop-up ads as an intrusive advertising method that annoys users by generating dialogue boxes that temporarily control the user’s screen. *Id.* at 2:4–26.

Against that background, the asserted patents describe the technical problem as “a need for a simple means to deliver advertising elements, i.e. logos, animations, sound, impressions, text, etc., without the annoyance of totally interrupting and intrusive content delivery, and without the passiveness of ordinary banner and frame advertisements which can be easily ignored.” *Id.* at 2:27–32. To address that need, the patents teach storing (1) “cursor image data” that corresponds to a “specific image,” and (2) “cursor display code” that modifies the cursor image to the specific image. When instructed by a server, the system modifies the cursor image to the shape and appearance of the specific image. *Id.* at [57].

As an example, FIG. 8 (below) of the ’102 Patent shows a web browser displaying a web page called “SportsNews.” When loading the web page, the browser also loads a banner advertisement (62) for Fizzy Cola that contains “cursor display instructions.” Based on those instructions, the user’s computer changes the cursor image from its normal arrow shape into a bottle shape (44a) to promote the product. *See id.* at 13:36–41.

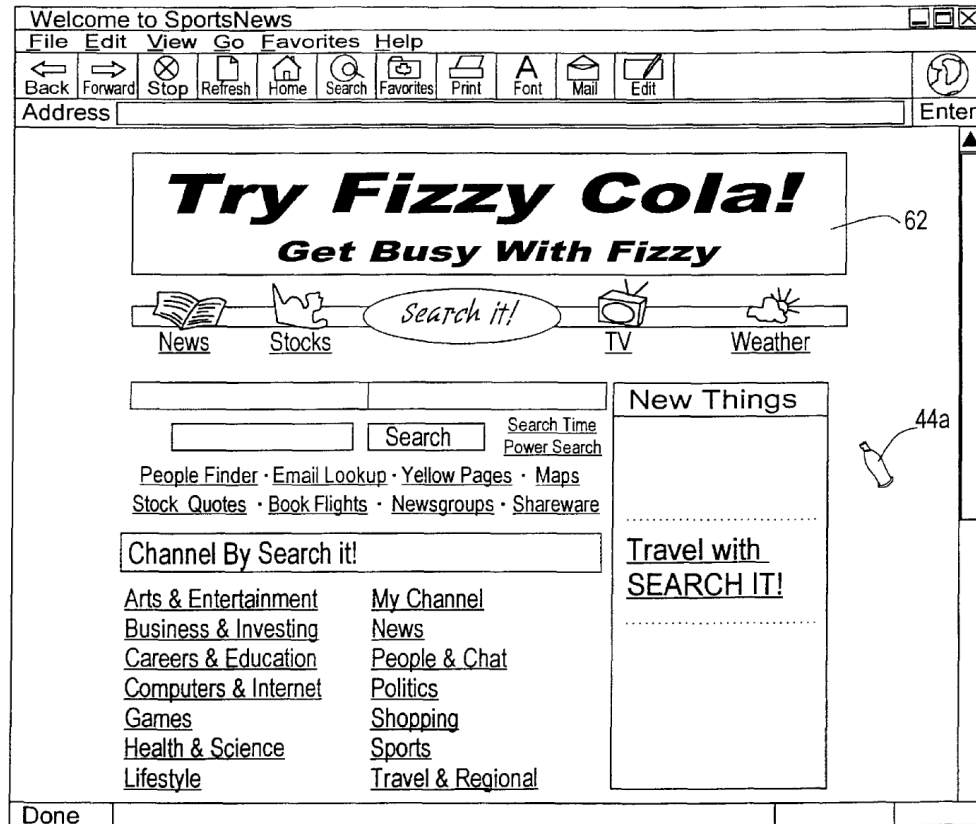


FIG. 8 of the '102 Patent

Claim 72 of the '102 Patent is representative of the claims at issue and includes most of the disputed terms. That claim recites:

72. A method for **modifying** an **initial cursor image** displayed on a display of a user terminal connected to at least one server, comprising:

receiving a request at said at least one server to provide specified content information to said user terminal;

providing said specified content information to said user terminal in response to said request, said specified content information including at least one **cursor display instruction** and at least one indication of cursor image data corresponding to a **specific image**; and

transforming said **initial cursor image** displayed on said display of said user terminal into the shape and appearance of said **specific image** in response to said **cursor display**

instruction, wherein said specified content information includes information that is to be displayed on said display of said user's terminal, wherein said **specific image** includes content corresponding to at least a portion of said information that is to be displayed on said display of said user's terminal, and wherein said **cursor display instruction** indicates a **cursor display code** operable to process said **cursor display instruction** to **modify** said **cursor image** to said **cursor image** in the shape and appearance of said **specific image** responsive to movement of said **cursor image** over a display of said at least a portion of said information to be displayed on said display of said user's terminal.

'102 Patent at 24:10–36 (disputed terms bolded).

Cl. Constr. Order, Dkt. No. 161-5 at 1–4.

II. LEGAL STANDARDS

“‘[T]he claims of a patent define the invention to which the patentee is entitled the right to exclude.’” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (quoting *Innova/Pure-Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). As such, if the parties dispute the scope of the claims, the court must determine their meaning. *See, e.g., Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1317 (Fed. Cir. 2007); *see also Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996), *aff'g*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc).

Claim construction, however, “is not an obligatory exercise in redundancy.” *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997). Rather, “[c]laim construction is a matter of [resolving] disputed meanings and technical scope, to clarify and when necessary to explain what the patentee covered by the claims” *Id.* A court need not “repeat or restate every claim term in order to comply with the ruling that claim construction is for the court.” *Id.*

When construing claims, “[t]here is a heavy presumption that claim terms are to be given their ordinary and customary meaning.” *Aventis Pharm. Inc. v. Amino Chems. Ltd.*, 715 F.3d 1363, 1373 (Fed. Cir. 2013) (citing *Phillips*, 415 F.3d at 1312–13). Courts must therefore “look to the words of the claims themselves . . . to define the scope of the patented invention.” *Id.* (citations omitted; ellipses in original). “[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Phillips*, 415 F.3d at 1313. This “person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Id.*

Intrinsic evidence is the primary resource for claim construction. *See Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343, 1348 (Fed. Cir. 2010) (citing *Phillips*, 415 F.3d at 1312). For certain claim terms, “the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.” *Phillips*, 415 F.3d at 1314; *see also DeMarini Sports, Inc., v. Worth*, 239 F.3d 1314, 1324 (Fed. Cir. 2001) (“We cannot look at the ordinary meaning of the term . . . in a vacuum. Rather, we must look at the ordinary meaning in the context of the written description and the prosecution history . . .”). But for claim terms with less-apparent meanings, courts consider ““those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean[,] [including] the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.”” *Phillips*, 415 F.3d at 1314 (quoting

Innova, 381 F.3d at 1116).

III. THE LEVEL OF ORDINARY SKILL IN THE ART

The level of ordinary skill in the art is the skill level of a hypothetical person who is presumed to have known the relevant art at the time of the invention. *In re GPAC*, 57 F.3d 1573, 1579 (Fed. Cir. 1995). In resolving the appropriate level of ordinary skill, courts consider the types of and solutions to problems encountered in the art, the speed of innovation, the sophistication of the technology, and the education of workers active in the field. *Id.* Importantly, “[a] person of ordinary skill in the art is also a person of ordinary creativity, not an automaton.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007).

During post-grant review of the ’102 Patent, the PTAB found a person of ordinary skill in the art would have had “at least a master’s degree in Computer Science, Computer Engineering, or a related field, or hold a bachelor’s degree in Computer Science, Computer Engineering, or equivalent and have at least two years of relevant work experience in the fields of [user interface] design and [operating systems].” Final Written Decision, Dkt. No. 155-1 at 10. Lexos asserts that level of ordinary skill here. Dkt. No. 155 at 9. Because Defendants do not offer a competing level of skill, the Court adopts the PTAB’s characterization for its analysis. *See also* Cl. Constr. Order, Dkt. No. 161-5 at 7 (adopting the same level of ordinary skill in the art).

IV. THE DISPUTED TERMS

- A. “corresponding to” as used in the phrase “cursor image data corresponding to [a/said] specific image” (’102 Patent, Claim 72; ’449 Patent, Claims 1, 5, 38, 53)

Lexos’s Construction	Defendants’ Construction
“associated with”	Plain and ordinary meaning, or in the alternative, “conforming to, in degree and kind”

These claims require some relationship between “cursor image data” and a “specific image.” For example, Claim 1 of the ’449 Patent requires a system comprising “cursor image data corresponding to said specific image.” ’449 Patent at 18:43. Similarly, Claim 72 of the ’102 Patent requires providing, to a user terminal, “specified content information” that includes an “indication of cursor image data *corresponding to a specific image.*” ’102 Patent at 24:16–19 (emphasis added); *see also* ’449 Patent at 22:36–39.

The parties dispute the extent of the required relationship between the “cursor image data” and the “specific image.” Citing to two excerpts from the specification, Lexos asserts “corresponding to” means “associated with.” Dkt. No. 155 at 10 (citing ’102 Patent at 3:4–9, 3:10–14). Suggesting Defendants intend to use “plain and ordinary meaning” as a “stalking horse” to improperly limit the scope of the term, Lexos asks the Court to expressly reject Defendants’ “alternative” construction. Dkt. No. 163 at 5. But according to Defendants, “[c]orresponding to” is a common phrase that jurors can understand without further construction,” and Lexos’s construction unnecessarily changes the term’s meaning. Dkt. No. 161 at 11.

The Court agrees with Defendants. “Corresponding to” is a well-understood phrase, and neither party points to evidence that changes its meaning. Notably, neither excerpt cited by Lexos strongly supports its construction, as both concern the relationship between the cursor’s appearance and the content displayed on the screen—*not* between cursor image data and a specific image. *See* ’102 Patent at 3:4–9 (noting the invention’s objective of “provid[ing] a means for changing a cursor’s appearance by sending data and control signals from a remote computer so that *the cursor or pointer’s appearance is associated with a portion of, or the entire content being displayed on the user’s screen*” (emphasis added)); *id.* at 3:10–14 (noting the invention’s objective of “provid[ing] a means for changing the appearance of a computer’s cursor or pointer by sending

data and control signals from a remote computer *so that the cursor or pointer's appearance is associated with advertising messages*" (emphasis added)). The Court therefore adopts a "plain and ordinary meaning" construction for this term.

B. "cursor display code" ('102 Patent, Claim 72; '449 Patent, Claims 1, 5, 38, 53)

Lexos's Construction	Defendants' Construction
"computer code for modifying the display of the cursor image"	Plain and ordinary meaning. No construction required.

The Court previously considered construction of this term in *Amazon*. Here, Lexos urges the same construction previously adopted by the Court, and Defendants incorporate the *Amazon* defendants' arguments from the claim-construction briefing. *See* Dkt. No. 155 at 11–12; Dkt. No. 161 at 12. For the same reasons set forth in *Amazon*, the Court again adopts Lexos's construction of "computer code for modifying the display of the cursor image." *See* Cl. Constr. Mem. Op. & Order, Dkt. No. 161-5 at 7–8.

C. "cursor display instruction" ('102 Patent, Claim 72; '449 Patent, Claims 1, 38, 53; '241 Patent, Claim 35)

Lexos's Construction	Defendants' Construction
"an instruction operable to modify the display, in conjunction with other information, of a cursor image"	Plain and ordinary meaning. No construction required.

The parties' arguments track those for "cursor display code." As it did in *Amazon*, Lexos cites the patents' disclosure of a web browser retrieving a web page to be loaded on a terminal:

The retrieved web page in accordance with one embodiment of the invention contains a set of predetermined instructions referred to herein as cursor display instructions. The browser or browser extension interprets the information contained in cursor display instructions and instructs the operating system of the user's terminal via an application programming interface (API) to check its memory to determine

if the user terminal is capable of loading the coded image, animation, and/or sound-bite.

Dkt. No. 155 at 12–13 (quoting ’102 Patent at 4:31–45). Defendants incorporate the *Amazon* defendants’ arguments from the prior claim-construction proceeding. Dkt. No. 161 at 13.

In *Amazon*, the parties’ dispute concerned Lexos’s use of “in conjunction with other information” in its proposed construction. The *Amazon* defendants asserted there was no reason to import that phrase into the claims. And Lexos ultimately agreed that language from its construction is not “material.” *See generally* Cl. Constr. Order, Dkt. No. 161-5 at 9.

Here, too, the Court agrees “in conjunction with other information” is not part of the correct construction. Otherwise, as it did in *Amazon*, the Court adopts the remainder of Lexos’s construction for this term: “an instruction operable to modify the display of a cursor image.” *See id.* at 8–9.

D. “cursor image” and “initial cursor image” (’102 Patent, Claim 72; ’449 Patent, Claims 1, 27, 53; ’241 Patent, Claim 35)

Lexos’s Construction	Defendants’ Construction
“the appearance of the cursor on a user’s screen before the cursor image is modified into the ‘specific image’” (Lexos Media contends that the terms “cursor image” and “initial cursor image” should be construed together and to mean the same thing)	“cursor image”: “the movable image on a display screen whose position is controlled by a user interface and that indicates the point where input can be received from the user interface” “cursor image” should be construed as a standalone term. “initial”: Defendants believe the adjective “initial” should be given its plain and ordinary meaning or, in the alternative: “first in time”

As they did in *Amazon*, the parties present different disputes to the Court. Lexos focuses on this Court’s earlier holding that “the ‘cursor image’ recited in the claims is the image that

appears before the cursor image is modified into the specific image.” Dkt. No. 155 at 14 (quoting *Lexos Media IP, LLC v. APMEX, Inc.*, 2017 WL 1021366, at *2 (E.D. Tex. Mar. 16, 2017)). Defendants agree with the Court’s construction in *Amazon*, but suggest it should go further because it “does not explicitly distinguish between the claimed cursor image and other, unclaimed non-cursor images” with user-controllable positions. Dkt. No. 161 at 14. “A cursor,” Defendants argue, “moves with a pointing device to indicate the point where input can be received from the user interface.” *Id.*

The Court agrees with Defendants. Regarding Lexos’s construction, as Judge Gilstrap noted, “There appears to be no confusion about whether the terms, based on the surrounding claim language, refer to an image before or after modification or transformation. Lexos does not point to any particular instances of confusion. Thus, even though Lexos’s construction might be correct, it is unnecessary.” Cl. Constr. Order, Dkt. No. 161-5 at 11.

As the patents explain:

Nearly all online computer interfaces utilize a wired or remote control positioning device such as a mouse or roller or track ball which controls the cursor’s movement on the screen. It is the cursor controlled by the mouse or positioning device which a user uses to “navigate” or move the cursor over objects, buttons, menus, scroll bars, etc., which appear on-screen *and then clicking or in some cases double-clicking in order to activate a screen or task, or to commence an application or some function.*

’102 Patent at 3:25–35 (emphasis added); *see also id.* at 8:24–34 (“Fundamental to the graphical user interface is the pointing device, generally mouse 22 which allows the user to manipulate or input information into the user terminal 14.”). In other words, cursors facilitate user input to a computer. The Court therefore adopts a variation of Defendants’ construction and construes “cursor image” as “a movable image on a display screen whose position can be controlled through a

user interface and that indicates where user input can be received.”¹

E. “following receipt of the content information” (’241 Patent, Claim 35)

Lexos’s Construction	Defendants’ Construction
Plain and ordinary meaning and requires no construction beyond the term “content information,” proposed above.	“upon receipt of the content information from a server and not based on the position or movement of the cursor on a video monitor”

The first two limitations of Claim 35 recites:

35. A system for modifying a cursor image, comprising:

at least one client computer receiving content information from at least one server computer, said content information including at least one cursor display instruction specifying an appearance of a visual image,

following receipt of the content information, the at least one client computer processing the at least one cursor display instruction and modifying the cursor image to include the visual image and displaying the modified cursor image . . .

’241 Patent at 20:61–21:3.

Defendants assert their construction is the plain and ordinary meaning of the phrase in the context of the specification and the prosecution history. Dkt. No. 161 at 17. Regarding the specification, they point to a disclosed embodiment that explains “[w]hen web page 60a loads, the Cursor Display Instructions cause arrow 44 to change into a Fizzy cola shaped cursor 44a in conjunction with the Fizzy Cola banner advertisement.” *Id.* (citing ’241 Patent at 13:22–25). This, they say, means the cursor image changes *upon receipt* of the content information. *Id.* As for the prosecution history, Defendants assert disclaimer based on arguments made to overcome U.S. Patent 5,956,484 (Rosenberg) and U.S. Patent 6,018,345 (Berstis). *Id.* at 17–20.

¹ No further construction is required for “initial.”

Lexos has the better position. To start, Defendants present no evidence that one possible “ordinary meaning” of “following” is “upon.” Instead, they simply point to an embodiment from the specification and map the claim language to their understanding of that embodiment.² Even if that understanding is correct, Defendants acknowledge the claims need not cover every disclosed embodiment, *see* Dkt. No. 161 at 17 (citing *Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1383 (Fed. Cir. 2008)), yet mapping claim language to embodiments to construe claims undercuts this principle.

Moreover, Defendants do not explain why the embodiment to which they point would not fall under the scope of Claim 35 using the ordinary meaning of “following receipt.” The claim requires the common-sense notion that the cursor display instructions are not processed until they are loaded, and nothing about the embodiment to which Defendants point is inconsistent with that interpretation.

Defendants’ prosecution-history argument is stronger, but not strong enough to find disclaimer. In a response to a final office action, the applicants characterized Berstis as

determin[ing] whether [a] cursor pointer is over a link by querying a local browser. If the system determines that the cursor is over a link, an alternate predetermined cursor design, preferably a design that resembles buttons on a remote control and/or a keyboard, is displayed. Thus, in Berstis, “[t]he cursor has the so called normal appearance when it is in a position in the interface where no link is present. Once the cursor is moved over a link the presentation of the cursor switches” In other words, the cursor only changes appearance in response to a link presented on a local region of the interface.

Amendment, Dkt. No. 159-12 at 18–19 (citations omitted). The applicants characterized Rosenberg as:

² The language cited by Defendants does not include “upon receipt.”

a method and apparatus for providing force feedback over a network. In the described system, display information and force feedback information is transmitted to a client machine. Once the data is received by the client machine, the force feedback requires a trigger such as a force object, and is executed “[i]f the pointer icon on the display device 64 is at a position (or time) that correlates to a desired force feedback to the user 52 . . .” Rosenberg describes various triggers and conditions that can be programmed for the force feedback, such as using a force button, “texture”, “viscosity”, “keep out” regions, “snap-in” regions, “spring” regions, “Force To Left” regions, etc.

Id. at 19 (citations omitted). The applicants then argued:

[N]either reference teaches, suggests, or contemplates displaying the at least one image in accordance with the at least one cursor display instruction following receipt of the content information, as recited in amended independent claim 7. As discussed above, Berstis is limited to changing a design of the cursor only based on the position of the cursor, i.e., when it is over a link, and not upon receipt of content information. Further, even if it is conceded that force feedback information is comparable to cursor display instructions (which it is not), Rosenberg also fails to teach or suggest that any action is taken following receipt of content information as recited in independent claim 7. Rosenberg is limited to providing force feedback only in response to the position and movement of the cursor, and not when the content information is received.

Id. at 20–21.

This is not clear and unmistakable disclaimer. A skilled artisan could interpret these arguments as distinguishing Berstis and Rosenberg as not *receiving* the content information—that is, as not meeting the *first* limitation of Claim 35. And if neither Bertis nor Rosenberg ever *receive* the claimed content information, it stands to reason they will never *process* the information “following receipt” as required by the *second* limitation. In other words, the applicants appear to be arguing neither Berstis nor Rosenberg meet either the first or second limitation of Claim 35. Given that, the applicants’ arguments are not sufficient to justify the negative limitation proposed by Defendants nor narrow the ordinary meaning of “following” to “upon.” Accordingly, the Court

will give this phrase a “plain and ordinary meaning” construction.

F. “modified cursor image” (‘449 Patent, Claims 1, 5, 38; ‘241 Patent, Claim 35)

Lexos’s Construction	Defendants’ Construction
The term “modified cursor image” as used in Claims 1 and 38 of the ‘449 Patent means “the cursor image in the shape and appearance of a specific image.” The term “modified cursor image” as used in Claim 35 of the ‘241 Patent means “the cursor image modified to include at least the visual image.”	“cursor image” should be construed as set forth separately. Plain and ordinary meaning for “modified,” or in the alternative, the adjective “changed.”

Construction of this term is addressed with the Court’s construction of “cursor image” and “initial cursor image” in Part IV.D. *supra*.

G. “modifying”/“transforming” [said cursor image/initial cursor image] (‘102 Patent, Claim 72; ‘449 Patent, Claim 38, 53; ‘241 Patent, Claim 35 (including “modify [said cursor image]” and “modifying [a cursor image]”))

Lexos’s Construction	Defendants’ Construction
“Changing (change) or replacing (replace) the form, shape or appearance of a cursor image.”	Plain and ordinary meaning. No construction required.

The Court previously construed this term in *Amazon*. *See generally* Cl. Constr. Order, Dkt. No. 161-5 at 14–15. Lexos again seeks clarification that both “modifying” and “transforming” the cursor image mean either changing or replacing the cursor image. Dkt. No. 155 at 19. Defendants rely on the *Amazon* defendants’ arguments. Dkt. No. 161 at 21–22. There, the defendants called use of these terms “consistent with everyday parlance, which is confirmed by Lexos’s attempt to convert [the terms] into other workaday terms—‘changing’ and ‘replacing.’” *See* Cl. Constr. Order, Dkt. No. 161-5 at 14–15.

For the same reasons set forth in *Amazon*, the Court concludes these are well-understood terms that each include within their scope the notion of changing or replacing the cursor image. Subject to that guidance, the Court will give these terms a “plain and ordinary meaning” construction.

H. “promotional material” (’241 Patent, Claim 35)

Lexos’s Construction	Defendants’ Construction
Plain and ordinary meaning. No construction required.	Plain and ordinary meaning, though this term refers to printed matter and is entitled to no patentable weight.

Claim 35 recites “wherein the visual image includes *promotional material*.” ’241 Patent at 21:4–6 (emphasis added). Again pointing to the *Amazon* defendants’ position, Defendants argue the term is not entitled to patentable weight under the printed-matter doctrine. Dkt. No. 161 at 22. Lexos, however, contends “the patentable weight to be accorded [the] term must be resolved another day in an appropriate procedural and substantive context.” Dkt. No. 155 at 20.

For the reasons explained by Judge Gilstrap in *Amazon*, the Court concludes this term is subject to the printed-matter doctrine and not entitled to patentable weight. *See* Cl. Constr. Order, Dkt. No. 161-5 at 20–22 (explaining consideration of the printed-matter doctrine is proper at claim construction and “promotional material” is directed to printed matter not functionally related to its substrate).

I. “specific image” (’102 Patent, Claim 72; ’449 Patent, Claims 1, 27, 53)

Lexos’s Construction	Defendants’ Construction
a “modified cursor image,” and not the “cursor image” or the “initial cursor image”	An “explicitly defined image, which is static and representative of at least a portion of the subject or topic being displayed on the screen”

The parties’ competing constructions present two disputes. First, Lexos resists limiting a

“specific image” to a “static” image as Defendants propose. Second, Defendants require the “specific image” to be “representative of at least a portion of the subject or topic being displayed on the screen.” These are the same disputes set forth by the parties in *Amazon*. See Cl. Constr. Order, Dkt. No. 161-5 at 15–17.

The Court again rejects that the “specific image” must be “static.” As Judge Gilstrap explained:

The specification uses “image” broadly enough to include both a “dynamic” and “static” image, as evidenced by its characterization of the moving straw as a “dynamic cursor image.” Regarding the baseball bat example, the specification shows the otherwise static image can be “enhanced” with related animation. In other words, the static image is *improved* with animation; it is not a different image. Accordingly, a skilled artisan would not understand “image” as used in the specification and claims as only a “static” image. Defendants’ position might be correct in a very technical way, but that is not how a skilled artisan would understand the term in light of this record.

Cl. Constr. Order, Dkt. No. 161-5 at 16–17.

The Court also rejects including “representative of at least a portion of the subject or topic being displayed on the screen” as part of the proper construction. As in *Amazon*, the parties have agreed “said specific image includes [or including] content corresponding to at least a portion of said information that is to be displayed on said display of said user’s terminal” should be construed as “an image representative of at least a portion of the subject or topic being displayed on the screen.” Dkt. No. 155 at 9. The “said specific image . . .” phrase appears in each of the relevant claims, thus distinguishing “specific image” from “modified cursor image.” See ’102 Patent at 24:25–27 (Claim 72); ’449 Patent at 19:61–64 (Claim 1), 20:56–59 (Claim 27), 22:45–48 (Claim 53). Thus, the parties have already agreed to that part of Defendants’ construction, so there is no dispute for the Court to resolve.

The Court will give this term a “plain and ordinary meaning” construction but, as noted *supra*, expressly rejects the requirement of a “static” image.

J. [the visual image] “tracks a movement” [of the modified cursor image] (’241 Patent, Claim 35)

Lexos’s Construction	Defendants’ Construction
“the visual image moves according to a movement of the modified cursor.”	“The visual image moves the same distance in both X- and Y-directions as the modified cursor image”

The last limitation of Claim 35 recites “the visual image tracks a movement of the modified cursor image.” ’241 Patent at 21:4–6 (emphasis added). As in *Amazon*, the parties dispute the meaning of this phrase. Lexos calls Defendants’ construction improperly limiting and argues one object can track another “without mirroring its movement exactly.” Dkt. No. 155 at 24. Defendants point to the *Amazon* defendants’ construction and reasoning. Dkt. No. 161 at 23. In *Amazon*, the defendants noted the specification’s description of a mouse-shaped cursor being tracked by a “cat” image. *See* Cl. Constr. Order, Dkt. No. 161-5 at 19 (summarizing the argument).

Here, Defendants present no evidence the ordinary meaning of “tracks a movement” requires the tracking image to “move[] the same distance in both X- and Y-directions as the modified cursor image.” Nor did the *Amazon* defendants, which instead argued the specification’s only example of tracking refers to a specific offset. *See* Cl. Constr. Op., Dkt. No. 161-5 at 19. But even so, that is not enough to limit the claims to that example of “tracking.” *See Phillips*, 415 F.3d at 1323 (“[W]e have expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment.”). Accordingly, the Court gives this phrase a “plain and ordinary meaning” construction, but expressly rejects Defendants’ construction and any requirement of a “one-for-one linear relationship.”

K. “visual image” (’241 Patent, Claim 35)

Lexos’s Construction	Defendants’ Construction
Plain and ordinary meaning.	“A moveable image specified by the cursor display instruction”

Defendants point to Claim 35’s requirement that the “cursor image” be modified “to include the visual image.” Dkt. No. 161 at 24. Specifically, the claim requires that, “following receipt of the content information,” the client computer processes the cursor display instruction and modifies the cursor image to include the visual image and display the modified image. ’241 Patent at 20:66–21:3. Defendants argue that because the Court has already determined a “cursor image” is movable, their construction “simply attempts to capture that ability once the ‘visual image’ is included in the cursor language.” Dkt. No. 161 at 24.

The Court, however, is not inclined to construe “visual image” by itself as movable. Not only do Defendants fail to provide a legal basis for excluding *immovable* images from the scope of the term, but there appears to be no dispute from Lexos that, once the cursor image is modified to include the visual image, it can move. Dkt. No. 155 at 26 (calling Defendants’ proposed limitation “unnecessarily redundant” because “[t]he claim language already specifies that the ‘visual image tracks a movement of the modified cursor”). The Court will give this term a “plain and ordinary meaning” construction.

V. CONCLUSION

The Disputed Term	The Court’s Construction
“corresponding to” as used in the phrase “cursor image data corresponding to a/said specific image” (’102 Patent, Claim 72; ’449 Patent, Claims 1, 5, 38, 53)	Plain and ordinary meaning

The Disputed Term	The Court's Construction
“cursor display code” (’102 Patent, Claim 72; ’449 Patent, Claims 1, 5, 38, 53)	“computer code for modifying the display of the cursor image”
“cursor display instruction” (’102 Patent, Claim 72; ’449 Patent, Claims 1, 38, 53; ’241 Patent, Claim 35)	“an instruction operable to modify the display of a cursor image”
“cursor image,” “initial cursor image,” “modified cursor image” (’102 Patent, Claim 72; ’449 Patent, Claims 1, 27, 53; ’241 Patent, Claim 35)	“cursor image”: “a movable image on a display screen whose position can be controlled through a user interface and that indicates where user input can be received”
“following receipt of the content information” (’241 Patent, Claim 35)	Plain and ordinary meaning
“modified cursor image” (’449 Patent, Claims 1, 5, 38; ’241 Patent, Claim 35)	“cursor image”: “a movable image on a display screen whose position can be controlled through a user interface and that indicates where user input can be received”
“modifying”/“transforming” [said cursor image/initial cursor image] (’102 Patent, Claim 72; ’449 Patent, Claim 38, 53; ’241 Patent, Claim 35)	Plain and ordinary meaning
“promotional material” (’241 Patent, Claim 35)	Plain and ordinary meaning. Subject to the printed-matter doctrine and not entitled to patentable weight.
“specific image” (’102 Patent, Claim 72; ’449 Patent, Claims 1, 5, 38, 53)	Plain and ordinary meaning
“tracks a movement” (’241 Patent, Claim 35)	Plain and ordinary meaning
“visual image” (’241 Patent, Claim 35)	Plain and ordinary meaning

The Court **ORDERS** each party not to refer, directly or indirectly, to its own or any other party's claim-construction positions in the presence of the jury. Likewise, the Court **ORDERS** the parties to refrain from mentioning any part of this opinion, other than the actual positions adopted by the Court, in the presence of the jury. Neither party may take a position before the jury that contradicts the Court's reasoning in this opinion. Any reference to claim construction proceedings is limited to informing the jury of the positions adopted by the Court.

SIGNED this 2nd day of November, 2023.


ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE