

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

Duration Media LLC
Petitioner,

v.

Rich Media Club LLC
Patent Owner.

US Patent No. 11,741,482

Inter Partes Review No.: IPR2024-00937

**DECLARATION OF DR. TREVOR SMEDLEY
IN SUPPORT OF PETITION FOR *INTER PARTES* REVIEW**

(Ex-1011)

1) INTRODUCTION

a) Engagement

1. My name is Trevor Smedley. I have been retained by counsel for Petitioner as an expert witness in the above-captioned proceeding. I have been asked to provide analysis and my opinion about the state of the art of the technology described in U.S. patent No. 11,741,482 (the “’482 patent”, Ex-1001) and on the patentability of claims 1-14 (“the challenged claims”) of the ’482 patent.

2. I have been asked to consider whether certain references teach or suggest the features recited in the challenged claims of the ’482 patent, which I understand is allegedly owned by Rich Media Club LLC (“Patent Owner”). My opinions and the bases for my opinions are set forth below. In forming my opinions, I have reviewed and relied upon the exhibits attached to the present *Inter Partes* Review Petition and any additional items identified in this Declaration.

b) Compensation and Prior Testimony

3. I am being compensated for my time to provide analysis and testimony in this *Inter Partes* Review proceeding. My compensation is not contingent on the outcome of any matter or the specifics of my testimony. I have no financial interest in the Petition.

c) Materials and Information Considered

4. My findings are based on my years of education, research, experience and background in the field discussed herein, as well as my investigation and study of relevant materials. In forming my opinions, I have considered the exhibits to the current Petition and materials I identify in this Declaration.

5. I have been advised that for purposes of *inter partes* reviews, the grounds of unpatentability are to be based solely on prior patents and other printed publications. Although I did not cite directly to the following documents in my declaration, I did review and consider them when forming my opinions: Exs-1021-38, Ex-1041, Ex-1043, Exs-1045-56, Ex-1060, Ex-1073, and Ex-1076. I understand that Petitioner reserves all rights to assert other grounds for unpatentability or invalidity, not addressed herein. Thus, the absence of discussion of such matters here should not be taken as indicating there are no such additional grounds for unpatentability and invalidity of the '482 patent.

d) Background and Qualifications

6. This section and my curriculum vitae, attached as Exhibit 1012, summarize my qualifications for forming the opinions in this declaration. That CV also includes a list of my publications and cases in which I have testified at deposition, hearing, or trial within the past five years.

7. I have B.Math (Pure Math and Computer Science), M.Math (Computer Science) and Ph.D. (Computer Science) degrees from the University of Waterloo

Faculty of Mathematics, in Waterloo, Ontario, Canada. I currently work full-time as an expert witness and consultant. I have more than 40 years of experience teaching and practicing computer science.

8. After receiving my Ph.D. from the University of Waterloo in 1990, I spent two years as a Visiting Professor at the University of Delaware, Department of Computer and Information Science, before moving to the Technical University of Nova Scotia, School of Computer Science, which later merged with Dalhousie University, Faculty of Computer Science. I received tenure in 1996 and was promoted to Full Professor in 2004.

9. I taught courses on a wide range of topics, including Software Engineering, Operating Systems, Digital Media and User Interface Design, both at the undergraduate and graduate level. Within Operating Systems I covered subjects such as networking and telecommunications. I was also involved in research in computer science for almost 25 years. I initially investigated issues in computer algebra and symbolic computation before moving into visual programming, end-user programming and human-computer interaction. During this time, I published over 40 articles, participated in numerous conferences and workshops, acted as reviewer for conferences and journals, edited a number of special issues of the Journal of Visual Languages and Computation, served as program chair for the two leading visual languages conferences, and filled numerous other roles serving the

research community. I received research funding from a variety of sources, including NSERC, InnovaCorp, the British Consulate and the Dalhousie University Faculty of Computer Science.

2) LEVEL OF ORDINARY SKILL IN THE ART

10. I understand that my opinion of the '482 patent claims should be from the perspective of a person of ordinary skill in the art ("POSA") as of the earliest claimed priority date. I understand that the earliest priority date that can be claimed is April 4, 2009, the filing date of the U.S. Patent No. 11,004,090 ("'090 patent"). I also understand that, for the purposes of this Petition, the references relied upon all qualify as prior art. Therefore, for the purposes of my analysis, I will assume that the earliest claimed priority date is April 4, 2009.

11. I understand that, to determine the appropriate background of a POSA the following factors may be considered: (a) the types of problems encountered by those working in the field and prior art solutions thereto; (b) the sophistication of the technology in question, and the rapidity with which innovations occur in the field; (c) the educational level of active workers in the field; and (d) the educational level of the inventor.

12. Based on my education, training, and professional experience in the field of the invention, I am familiar with the level of knowledge and abilities of a person of ordinary skill in the art at the time of the invention. The '482 patent is

directed to a system and method for creation, distribution and tracking of advertising via electronic networks. It is my opinions that a POSA would have had a bachelor's degree in computer science, computer engineering or electrical (or similar) engineering with about three years of experience in computer science, computer engineering and electrical engineering. I had achieved at least this level of skill in the art as of the earliest claimed priority date of the '482 patent.

13. I understand that Rich Media Club is arguing that the POSA would also require experience in advertising. It is my opinion that the subject matter of these patents was well known to those of ordinary skill who did not have advertising experience. I have reviewed the declaration of Dr. Michele Madansky, and my opinions in this declaration would not change even if the Board required skill in advertising for the definition of the POSA.

14. Although my experience and qualifications exceed those of a POSA, my analysis and opinions are based on the perspective of a POSA as of April 4, 2009, as explained above.

3) LEGAL STANDARDS FOR PATENTABILITY

a) General

15. In expressing my opinions and considering the subject matter of the challenged claims of the '482 patent, I am relying upon certain basic legal principles.

16. I understand that in this proceeding Petitioner has the burden of proving that the challenged claims of the '482 patent are unpatentable by a preponderance of the evidence. I understand that under “a preponderance of the evidence” standard, Petitioner must show that something is more likely true than not.

17. I understand that for an invention claimed in a patent to be found patentable, it must be, among other things, new and not obvious from what was known before the invention was made.

18. I understand the information used to evaluate whether a claimed invention is patentable is generally referred to as “prior art” and includes patents and printed publications (*e.g.*, books, journal publications, materials on websites, product manuals, etc.).

19. I understand that there are two ways in which prior art may render a patent claim unpatentable. First, the prior art can be shown to “anticipate” the claim. Second, the prior art can be shown to have made the claim “obvious” to a person of ordinary skill in the art. My understanding of the key applicable legal standards is set forth below.

b) Priority Dates for Claimed Subject Matter

20. I understand that in order to be considered “prior art,” patents or printed publications must predate the pertinent priority dates for the subject matter claimed in the '482 patent.

21. I understand that a patent is only entitled to a priority date based on an earlier filed application if the earlier filed application meets the requirements of 35 U.S.C. § 112. Specifically, I understand that 35 U.S.C. § 112 ¶1 requires that the specification of a patent or patent application must “contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the [invention]” I understand that the requirements of this provision are commonly called the written description requirement and the enablement requirement.

22. I understand that compliance with both the written description requirement and enablement requirement must be determined as of the effective filing date of the application for which priority is sought.

23. I understand that to satisfy the written description requirement a patent’s specification should reasonably convey to a person of skill in the art that the inventor had possession of the claimed invention as of the effective filing date of the application.

24. For purposes of my analysis, I have been asked to assume that the claims of the ’482 patent have an earliest effective filing date of April 4, 2009, as explained above.

c) Obviousness

25. I understand that for a single reference or a combination of references to render obvious a claimed invention, a person of ordinary skill in the art must have been able to arrive at the claimed invention by altering or combining the applied references.

26. I understand that a patent claim can be found unpatentable as obvious where the differences between the subject matter taught to be patented and the prior art are such that the subject matter as a whole would have been obvious when the invention was made to a person of ordinary skill in the relevant field. Specifically, I understand that the obviousness question involves a consideration of:

- the scope and content of the prior art;
- the differences between the prior art and the claims at issue;
- the knowledge of a person of ordinary skill in the pertinent art; and
- whatever objective factors indicating obviousness or non-obviousness may be present in any particular case—referred to as “secondary considerations.”

27. Such secondary considerations include: (a) commercial success of a product due to the merits of the claimed invention; (b) a long-felt, but unmet need for the invention; (c) failure of others to find the solution provided by the claimed invention; (d) deliberate copying of the invention by others; (e) unexpected results achieved by the invention; (f) praise of the invention by others skilled in the art; (g)

the taking of licenses under the patent by others and (h) the patentee proceeded contrary to the accepted wisdom of the prior art. Secondary considerations are relevant where there is a connection, or nexus, between the evidence and the claimed invention.

28. In addition, I understand that the obviousness inquiry should not be done in hindsight, but must be done using the perspective of a person of ordinary skill in the relevant art as of the effective filing date of the patent claim.

29. I understand that in order for a claimed invention to be considered obvious, there must be some rationale for combining cited references as proposed.

30. Obviousness may also be shown by demonstrating that it would have been obvious to modify what is taught in a single piece of prior art to create the patented invention. Obviousness may be shown by establishing that it would have been obvious to combine the teachings of more than one item of prior art. In determining whether a piece of prior art could have been combined with other prior art or with other information within the knowledge of one of ordinary skill in the art, the following are examples of approaches and rationales that may be considered:

- a. Combining prior art elements according to known methods to yield predictable results;
- b. Simple substitution of one known element for another to obtain predictable results;

- c. Use of a known technique to improve similar devices (methods, or products) in the same way;
- d. Applying a known technique to a known device (method, or product) ready for improvement to yield predictable results;
- e. Applying a technique or approach that would have been “obvious to try” (i.e., choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success);
- f. Known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations would have been predictable to one of ordinary skill in the art; or
- g. Some teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention.

I also understand this suggestion or motivation may come from such sources as explicit statements in the prior art, or from the knowledge or common sense of one of ordinary skill in the art.

31. I understand that an invention may be obvious in view of a combination of prior art references even if one reference or the features of one reference cannot be physically combined with or substituted into the structure of the other reference.

I understand that the question is not whether the references could be physically combined but whether a person of ordinary skill in the art would find the claimed invention rendered obvious by the teachings of the references or prior art as a whole.

32. I understand that an invention may be considered non-obvious if one or more prior art references discourages or lead away from the line of inquiry disclosed in the reference(s). A reference does not “teach away” from an invention simply because the reference suggests that another embodiment of the invention is better or preferred. My understanding of the doctrine of teaching away requires a clear indication that the combination should not be attempted (*e.g.*, because it would not work or explicit statement saying the combination should not be made).

4) THE '482 PATENT

a) Summary of the Patent

33. I understand that the '482 patent is titled “System And Method For Creation, Distribution And Tracking Of Advertising Via Electronic Networks”. Ex-1001. It was filed on October 7, 2022 and issued on August 29, 2023.

34. I understand the '482 patent generally relates to a system and method for creation, distribution and tracking of advertising via electronic networks, enabling creation of advertisements using licensed third-party content and placement of said ads at desired network locations, utilizing an auction of ad spaces based on bids placed by advertisers to have their ads displayed at such locations. *Id.*, abstract.

b) Summary of Prosecution History

35. I have reviewed the prosecution histories of the following patent applications: The '482 patent issued from U.S. Application No. 17/961,952, which is a continuation of U.S. Application No. 17/316,499 (now U.S. Patent No. 11,468,453), which itself is a continuation of U.S. Application No. 12/384,403 (now U.S. Patent No. 11,004,090), which is a continuation in part of U.S. Application No. 11/803,779 (now U.S. Patent No. 10,380,602), which also is a continuation in part of U.S. Application No. 11,643,245 (now U.S. Patent No. 10,380,597). The '482 patent has priority no earlier than to its direct grandparent, filed on April 4, 2009, as discussed in detail in a subsequent section.

5) MATERIALS CONSIDERED

36. The following is a list of materials I considered in rendering my opinions:

Ex. No.	Description
1001	U.S. Patent No. 11,741,482 (“’482 Patent”)
1002	U.S. Patent No. 8,135,616 (“Callaghan”)
1003	U.S. Publication No. 2007/0265923 (appl. no. 11/803,779) (“Krassner”)
1005	International Publication No. WO2006138400A1 (“Badros”)
1006	U.S. Publication No. 20050177401 (“Koepfel”) (’953 IPR Ex-1025)
1007	File History of U.S. Patent Application No. 17/961,952 (File History for ’482 Patent)
1008	U.S. Publication No. 2009/0265243 (appl. no. 12/384,403) (“’403 appl.”)
1012	C.V. of Trevor Smedley, Ph.D.

1013	Document compare of specification of the '090 Patent with the specification of Krassner
1017	Duration Media Response to ROG 2 (from '953 IPR Ex-2056)
1018	International Publication No. WO2007089082A1 ("Seo")
1019	Screenshot of publicly available Assassin's Creed Webpage source code
1020	U.S. Patent No. 6,477,575 ("Koeppel '575")
1021	MRC's Viewable Impression Advisory (Nov. 14, 2012) ('953 IPR Ex-2018)
1022	Press - Duration Media ('953 IPR Ex-2022)
1023	Patent Information - Duration Media ('953 IPR Ex-2023)
1024	David Cohen - Curious Thoughts from Curious Minds: This Could Change Everything - David Cohen – MediaBizBloggers ('953 IPR Ex-2024)
1026	Smedley Deposition Exhibit - Media Ratings Council Accreditation Letter (April 13, 2010) ('953 IPR Ex-2017)
1027	Declaration of Igor Tchibirev #2 (Under Seal) ('953 IPR Ex-2026)
1028	Declaration of Alan Edwards ('953 IPR Ex-2027)
1029	Smedley Deposition Exhibit - IAB Annual Report 2013 ('953 IPR Ex-2028)
1030	Smedley Deposition Exhibit - Measurementnow.net homepage from Internet Archive 7-21-12 ('953 IPR Ex-2029)
1031	Smedley Deposition Exhibit - Measurementnow.net FAQs from Internet Archive 7-22-12 ('953 IPR Ex-2023)
1032	Smedley Deposition Exhibit - Measurementnow.net Who's Involved from Internet Archive 7-22-12 ('953 IPR Ex-2031)
1033	Smedley Deposition Exhibit - Measurementnow.net Benefits from Internet Archive 7-22-12 ('953 IPR Ex-2032)
1034	IAB - Our Story ('953 IPR Ex-2033)
1035	Media Rating Council homepage ('953 IPR Ex-2034)
1036	Smedley Deposition Exhibit - Volunteer Landing ('953 IPR Ex-2035)
1037	Smedley Deposition Exhibit - Think with Google – See How Viewability is Measured ('953 IPR Ex-2036)
1038	Smedley Deposition Exhibit - Google Active View reporting metrics ('953 IPR Ex-2037)
1039	MRC's Update to Viewable Impression Advisory (June 12, 2013) ('953 IPR Ex-2038)

1040	MRC Accredited Viewability Verification Disclosure ('953 IPR Ex-2039)
1041	MRC Viewable Impression Advisory Update, November 2013 ('953 IPR Ex-2040)
1042	MRC Lifts Viewable Impression Advisory for Display Advertising (March 31, 2014) ('953 IPR Ex-2041)
1043	RealVu Revolutionizes Internet Advertising Measurement With the Viewable Impression ('953 IPR Ex-2042)
1044	Expert Declaration of Robert J. Sherwood (Under Seal) ('953 IPR Ex-2045)
1045	Deposition Transcript of Trevor Smedley 10-25-23 ('953 IPR Ex-2050)
1046	IAB 2004 Ad Guidelines ('953 IPR Ex-2053)
1047	Screenshots - Viewability Panel - IAB Ad Ops Summit ('953 IPR Ex-2054)
1048	MRC Accreditation Renewal Press Release ('953 IPR Ex-2057)
1049	Lume – Display Ad Tech Landscape ('953 IPR Ex-2058)
1050	DoubleVerify Aims to Police the Online Advertising World ('953 IPR Ex-2059)
1051	David Evans - The Online Advertising Industry: Economics, Evolution, and Privacy ('953 IPR Ex-2060)
1052	Harvard Business Review - The Dark Underbelly of Online Advertising ('953 IPR Ex-2061)
1053	Patent Owner Response "POR" ('953 IPR, Paper 35)
1054	Igor Deposition transcript ('953 IPR Ex-1020)
1055	Alan Edwards Deposition Transcript ('953 IPR Ex-1021)
1056	Robert Sherwood Deposition Transcript ('953 IPR Ex-1022)
1057	US Patent No. 6,317,782 ("Himmel") (titled "Method and apparatus for detecting actual viewing of electronic advertisements," priority 1998) ('953 IPR Ex-1028)
1058	US pub. no. 20080222503 ("Sandige") (titled "Rendering of two-dimensional markup messages," priority 2007) ('953 IPR Ex-1029)
1059	US pub. no. 20060155615 ("Loo") (titled "Object placement within computer generated multidimensional environments," priority 2005) ('953 IPR Ex-1030)
1060	Overview of Viewability and Active View - Google Ad Manager Help ('953 IPR Ex-1033)
1061	US Patent No. 5,778,372 ("Cordell") ('953 IPR Ex-1034)

1062	US Patent No. 6,418,470 (“Blumenau”) (titled “Metering of internet content using a control,” priority 1998) (’953 IPR Ex-1035)
1063	ComScore v. MOAT complaint (’953 IPR Ex-1036)
1064	Audience 2.0_ Time - Alenty - Web 2.0 Marketing (’953 IPR Ex-1038)
1065	Alenty analyzes the visibility of advertisements on the Internet (’953 IPR Ex-1039)
1066	AppNexus Buys Paris-Based Viewability Firm Alenty (’953 IPR Ex-1040)
1067	Ad Viewability Debate Disrupts the Marketplace (’953 IPR Ex-1041)
1068	Need the list of Auditors for MRC accreditation. Adops (’953 IPR Ex-1042)
1069	Moat Accreditation (’953 IPR Ex-1043)
1070	DoubleVerify Accreditation (’953 IPR Ex-1044)
1071	Integral Ad Science Accreditation (’953 IPR Ex-1045)
1072	Viewability Has Arrived_ What You Need To Know To See Through This Sea Change (’953 IPR Ex-1046)
1073	C.V. of Dr. Michele Madansky (’953 IPR Ex-1047)
1074	MRC Announces Changes to Accreditation Statuses of Comscore Digital Measurement Products (’953 IPR Ex-1048)
1075	Ad Formats: from concept to award winning (’953 IPR Ex-1049)
1076	DoubleVerify Raises \$10 Million in Series B Funding DoubleVerify (’953 IPR Ex-1050)
1077	IAB_ Internet_ Advertising_ Revenue_ Report_ Full_ Year_ 2021 (’953 IPR Ex-1051)
1078	Programmatic Ad Revenues Totaled \$10.1 Billion in 2014, According to First-Ever IAB Programmatic Revenue Report (’953 IPR Ex-1052)
1079	3MS Initiative Releases Five-Part Digital Marketing Measurement Solution (’953 IPR Ex-1054)
1080	A History Of Programmatic And The Era Of Control _ AdExchanger (’953 IPR Ex-1055)
1081	MRC-Viewable-Ad-Impression-Measurement-Guideline (’953 IPR Ex-1056)
1082	Declaration of Michele Madansky, Ph.D.
1083	The Decade of Display That Wasn’t 2007 – 2017 (’953 IPR Ex-1023)
1084	File History for Appl. No. 12/589,321 (Cousin of the ’482 Patent)
1085	File History for Appl. No. 12/316,781 (Cousin of the ’482 Patent)

6) OVERVIEW OF THE PRIOR ART

a. U.S. Publication No. 2007/0265923 (appl. no. 11/803,779) ("Krassner")

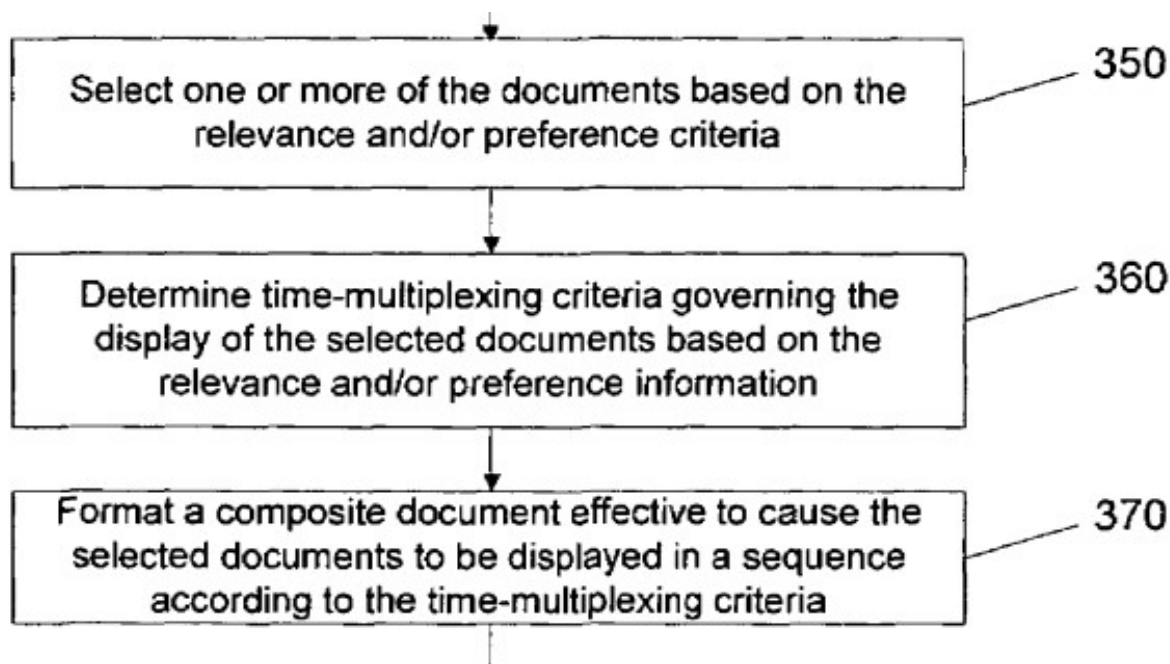
37. I understand that Krassner published in 2007 and is prior art under pre-AIA § 102(b). Krassner eventually issued as the '602 patent, of which the '482 patent is a continuation-in-part. Rich Media Club also filed a terminal disclaimer admitting that the '482 patent was patentably indistinct from Krassner. Ex-1007, 279-80.

38. I have reviewed Krassner and determined that it teaches a system and method for creation, distribution and tracking of advertising via electronic networks, enabling creation of advertisements using licensed third-party content and placement of said ads at desired network locations, utilizing an auction of ad spaces based on bids placed by advertisers to have their ads displayed at such locations. Ex-1003, abstract. When a network user/ad viewer requests an ad by clicking or other action, an auction algorithm executes to select the ad to be displayed from those that bid for display at such ad space location and then the ad is composed and delivered to the ad space location by accessing a relational database storing commands that retrieve, assemble, and dispatch the licensed ad content. *Id.* Usage and display of licensed content on designated ad space is tracked to enable cost-per-use charging for both use of licensed content and ad display at the designated ad space. *Id.*

b. International Publication No. WO2006138400A1 ("Badros")

39. I understand that Badros published in 2006 and is prior art under pre-AIA § 102(b). Badros was cited, but the teachings relevant to this IPR were not discussed by the examiner during prosecution of the '428 patent.

40. I have reviewed Badros and determined that it teaches a system and method for time-multiplexing the display of a plurality of electronic documents. Ex-1005, abstract. Time-multiplexing criteria for displaying a plurality of selected documents associated with a concept on a time-multiplexed basis is determined. *Id.*



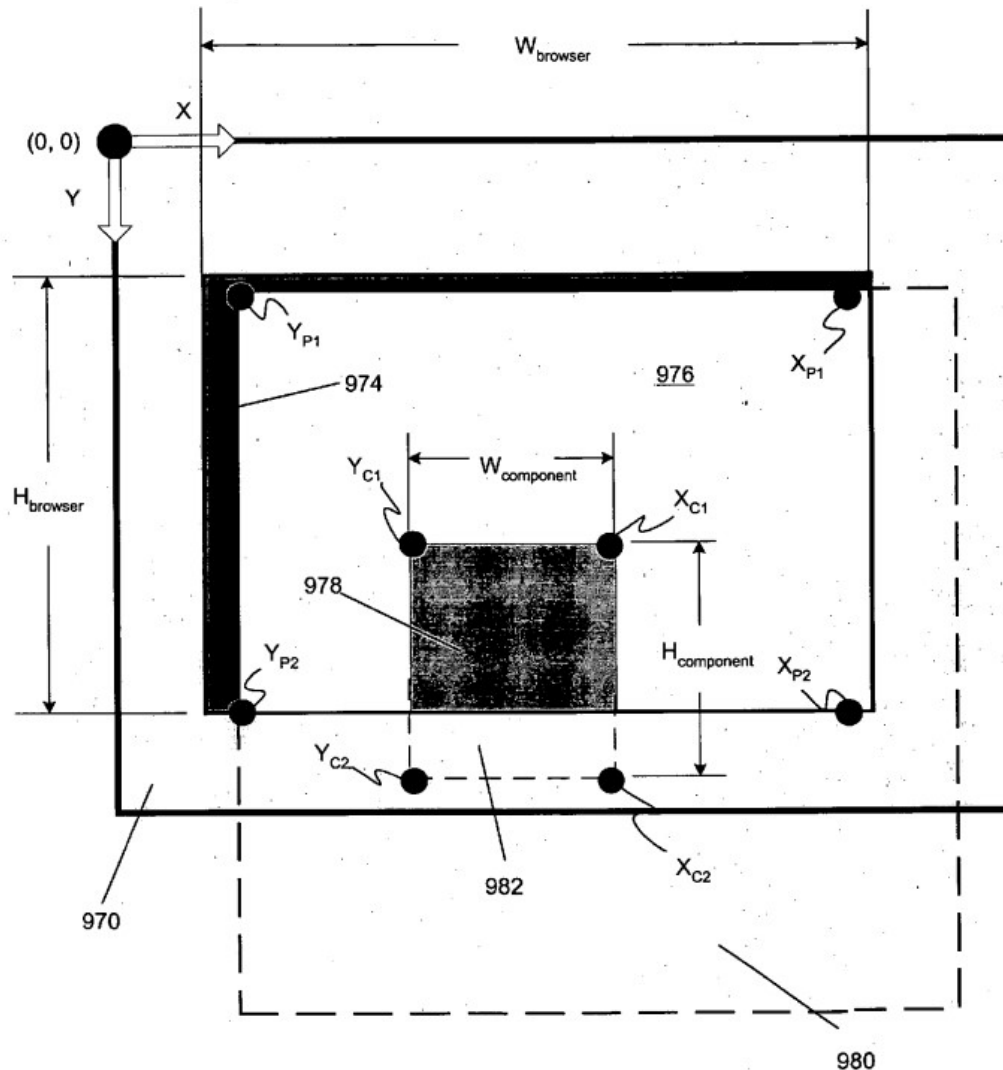
Id., FIG. 3.

The plurality of selected documents are displayed at an output device in a predetermined sequence according to the time-multiplexing criteria. *Id.* The time-multiplexing criteria may be a variety of criteria related to the selected documents,

the source of the selected documents, or other factors such as a relevance to a concept and one or more preferences associated with the selected documents. *Id.*

c. U.S. Publication No. 20050177401 (“Koeppel”)

41. Koeppel published in 2005 and is prior art under § 102(b). Koeppel is titled, “system and method for performing Web based in-view monitoring.” It teaches a client-side script to determine the coordinates of various components of a webpage on a display and whether they are in view. Ex-1006, ¶¶85-185.



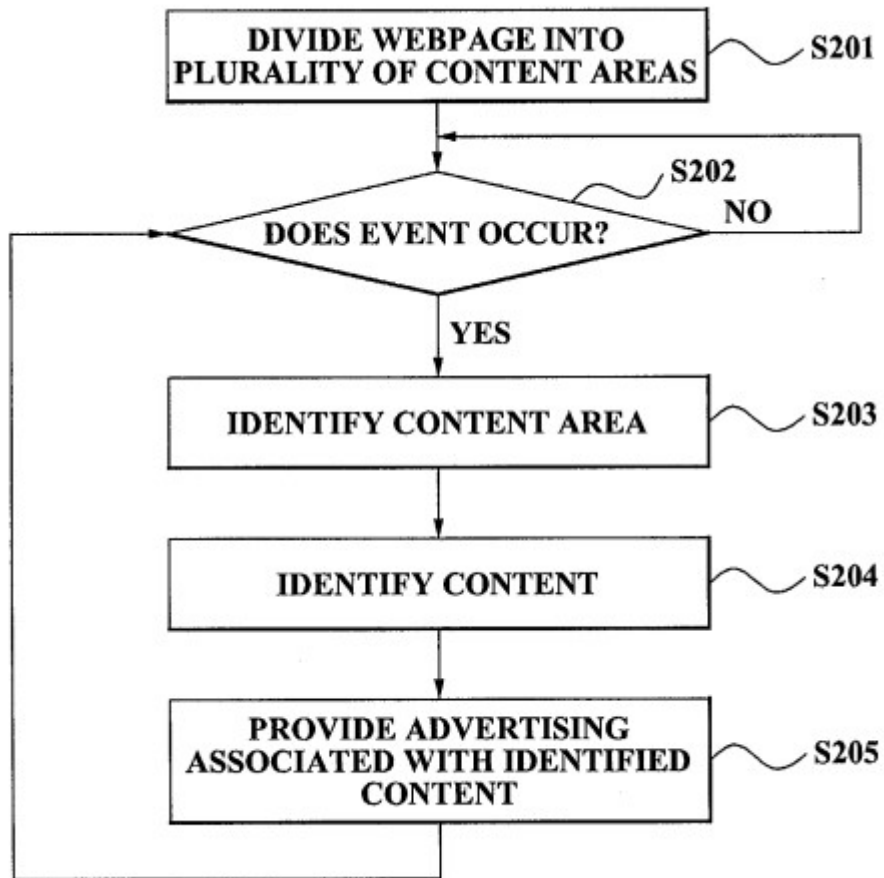
Id., FIG. 9B

FIG. 9B includes a representation of an unseen portion 980 of Web page 976, and an unseen portion 982 of target component 978. FIG. 9B also includes values W_{browser} , H_{browser} , Y_{P1} , Y_{P2} , Y_{C1} , Y_{C2} , X_{P1} , X_{P2} , X_{C1} , X_{C2} , $W_{\text{component}}$, and $H_{\text{component}}$, which will be described in further detail later. In order for the client side script to determine whether a component is in view to a user, detailed positional information is collected and stored in client side data store 160.

Id., ¶186. The target component can be an image, such as an advertisement. *Id.*, ¶18. Koeppel uses information about whether an advertisement is “in-view or partially in-view” to generate billing records. *Id.*, ¶177.

d. International Publication No. WO2007089082A1 (“Seo”)

42. Seo published in 2007 and is prior art under Pre-AIA § 102(b). Seo is titled, “Method for offering advertisement in association with contents in view and system for executing the method.” It discloses identifying a user event, such as scrolling, corresponding to a content area becoming visible, and downloading an advertisement in response to the event. Ex-1018, 5:1-14.



Id., FIG. 2.

43. Seo determines whether a user is “currently viewing” by detecting whether an event, such as scrolling, occurs (S202), and displays an advertisement only when the content area is visible. *Id.*, 10:16-18.

7) THE PRIORITY DATE OF THE '482 PATENT

44. I understand that the '482 patent is a continuation of the '453 patent (appl. 17/316,499), which is a continuation of the '090 patent (appl. 12/384,403). The '090 patent is a continuation in part of Krassner.

45. I understand that if an application is a continuation in part, the priority date of the claims depend on whether the claims relate to new matter. In order to obtain an earlier priority date, the Patent Owner would need to prove that the patent claims do not relate to new matter and were fully disclosed in the earlier application.

46. I understand that for the '482 patent, the earliest priority date that can be claimed is April 4, 2009, the filing date of the '090 patent, because the '090 patent application contains new matter, specifically the phrases “predefined period of time” and “replacement advertisement” that do not appear in Krassner.

47. I have reviewed Ex-1013 to determine whether there was support for the following two claim limitations: “predefined portion of the predefined area of the ad content display page is in the visible area” and “causing a communication to be sent.” I determined that there is no support in Krassner for these claim limitations. Ex-1013, Certain portions of the text in the '090 patent specification were not present in the Krassner specification.

48. I understand that a similar issue was before the Board in IPR2023-00953 and that the Patent Owner did not contest this fact.

49. It is my opinion that the claim limitations of the '090 patent are based on new matter. A document compare of the '090 patent specification and the Krassner specification is attached as Ex-1013.

8) Prior Art Viewability Tests

50. I understand that the Patent Owner argued in IPR2023-00953 that it was the first to invent what it calls a “viewability test.”¹ It is my opinion, having been well aware of the state of the art in 2009, that viewability tests were easy to implement and were well known at the time. *See, e.g.*, Ex-1057, 8:44-46 (“The term viewable, as used hereinafter, defines when a particular advertisement is completely or identifiably (i.e., partially but not completely) seen by the end user.”); Ex-1005, ¶82 (“user module 40 may determine whether a particular document is currently viewable on a user’s screen. For instance, a user may scroll down a website so that a banner ad at the top of the page is no longer viewable on the user’s display”); Ex-1002, 7:61-64 (“as part of an impression ad campaign, an advertiser is not charged for an advertisement if all or a designated portion of the advertisement is not within a current viewable space of a browser display”), and Ex-1006, 22:5-7 (“This fee may be altered based on whether the third party content was fully in-view or partially in-view.”). It is my opinion that each of these patents discusses viewable impressions, not served impressions, which requires determining viewability. The difference between a content that was served or viewed was well known inside and outside of the advertising industry as of 2009. Ex-1082, ¶12.

¹ The Patent Owner described a “viewability test” as, “in response to a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time.” ’953 POR, 3.

9) GROUND A: Koeppel in View of Seo and Optionally Krassner Renders Obvious Claims 1-14

51. It is my opinion that Koeppel and Seo are related to determining whether an online advertisement is in view. Ex-1006, abstract; Ex-1018, abstract. Seo discloses only downloading ads “associated with a content that the user is currently viewing.” Ex-1018, 2:9-11. The combination of known elements of Koeppel and Seo would achieve the predictable result of downloading an advertisement in response to a predefined area, or portion thereof, appearing in the visible area of a display. This would be an obvious solution to try given the fact that both Koeppel and Seo teach downloading advertisements. Ex-1006, abstract; Ex-1018, 5:1-14, 10:16-18.

a. Claim 1: (b) in response to a determination that the predefined portion of the predefined area of the ad content display page is in the visible area of the browser window, causing a communication to be sent from the remote computing device to one or more dispatcher servers, wherein the one or more dispatcher servers are configured to:

(i) receive the communication, and

(ii) cause advertisement content to be served to the remote computing device,

52. It is my opinion that Koeppel discloses performing an action “in response to a determination that the predefined portion of the predefined area of the ad content display page is in the visible area of the browser window”:

[I]n accordance with an aspect of the invention, Web server 110 recognizes when third party content was included in the rendered Web page and in response to this determination performs additional in-view analysis specifically for the third party content. This analysis includes determining the in-view characteristics of each third party content (Step S.820). That is, analytical program 115 may determine the number of times each third party content was in-view or partially in-view on each rendering of the Web page. Utilizing the results of the in-view analysis performed by analytical program 115, billing program 113 generates a billing record associated with each third party entity 180 (Step S.830).

Ex-1006, ¶177. Koeppel discloses the browser notifying the server of “user events” such as “whether content is actually in-view.” *Id.*, ¶82. Koeppel also teaches “determining the proportion of a component in view.” *Id.*, ¶125.

53. I also note that Koeppel teaches a detailed algorithm for determining whether an ad is in view and by what percentage. *Id.*, ¶¶86–153. This is an obvious and easy to implement way of determining whether an object is in view using basic X-Y coordinates.

54. The Koeppel algorithm is much more detailed than the correlator code in columns 56-58 of the '482 patent. Ex-1001, 65:40-67:25. I reviewed this “correlator code”; without additional information it is gobbledygook. For example,

it discloses an object² called `var_viz_check {...}` that relies on several nondescript, undefined global-variables, functions and objects, including “thislocation”, “_adi[i]”, “_popul”, “_sv”, and “_ea_list.” This correlator code makes very little sense without additional explanation or at least meaningful object and function names.³ It is also wholly unnecessary because viewability tests were not difficult to code.

55. Seo discloses being “*in response to a determination that the predefined portion of the predefined area of the ad content display page is in the visible area of the browser window ... cause advertisement content to be served to the remote computing device.*”:

FIG. 2 is a flowchart illustrating a method of providing advertising associated with a content in a visible area using an event according to an exemplary embodiment of the present invention.

In operation S201, a system for providing advertising associated with a content in a visible area divides a webpage into a plurality of content areas using a predetermined area division scheme.

² Objects are basic components of object-oriented programming languages, such as JavaScript and C++. Objects are abstractions that can be associated with functions/methods and variables. Object-oriented programming has been a foundational skill for any computer science/engineering curriculum since at least the 1980’s.

³ However, based on the explanations of Mr. Tchibirev and Mr. Edwards that they used a “geometrical” visibility test (Ex-1054, 49:12-50:12; Ex-1055, 13:13-14:10), I was able to identify only two ‘if’ statements that appear to be “geometric” at 64:11-12 and 64:20-21. Both of these simply test if one rectangle is contained within another.

In this instance, the area division scheme may include a scheme of dividing the webpage into the plurality of content areas using a program code which is divided into content units to constitute the webpage. Also, the area division scheme may include a scheme of dividing the webpage into the plurality of content areas using a blog bulletin board.

In operation S202, the system identifies whether the event occurs. When the event occurs, the system performs operation S203, otherwise, the system waits for the event to occur. In this instance, the event may include a user enter event or a scrolling event. Also, the user enter event may include at least one of 1) a mouse-over a word on the webpage or the content area, 2) a drag of a word or a sentence via a mouse, and 3) a mouse click on the webpage.

In operation S203, the system identifies a content area where the event occurs, when the event occurs on the webpage. In this instance, when the event corresponds to the user enter event, the system identifies an area where the user enter event occurs, as the content area. Also, when the event corresponds to the scrolling event, the system identifies a valid area as the content area.

In operation S204, the system identifies a content included in the identified content area.

In operation S205, the system provides advertising associated with the identified content. In this instance, the system selects any one of a skyscraper type advertising and a fixed type advertising depending upon a scrolling event, and provides the advertising in the selected type.

Ex-1018, 5:1-27, 10:16-18 (“[I]t is possible to provide advertising associated with a content that a user is currently viewing, and thereby fit an advertiser’s intention to provide advertising associated with the content that the user is interested in.”), and FIG. 2. Koeppel also explains the well-known fact that advertisements are delivered to browsers because a server “*receive[d] a communication*” from the browser.

A billing account may describe how a third party entity 180 may be charged for particular renderings of third party content within a Web page served by Web server 110. Utilizing the detailed features of the in-view analysis described previously, Web server 110 may diversify its third party content fees based on whether particular content was actually viewable by a user browsing the Web page served by Web server 110. For instance, Web server 110 may charge a third party entity 180 a certain fee only when an in-view analysis of the user response data indicates that the third party entity’s content was actually viewable to a user. This fee may be altered based on whether the third party content was fully in-view or partially in-view.

Ex-1006, ¶172. Browsers sending requests to servers is the basic client-server architecture upon which the Internet functions.

1) Claims 7 and 14: The method of claim 1 wherein the determination that the predefined portion of the predefined area of the ad content display page is in the visible area of the browser window occurs periodically.

56. It is my opinion that this claim requires what is known as “polling.”

See, e.g., [https://en.wikipedia.org/wiki/Polling_\(computer_science\)](https://en.wikipedia.org/wiki/Polling_(computer_science)). Polling is a process where a program periodically checks to see whether an event occurred. This

is in contrast to what is known as “interrupt-driven I/O.” *Id.* There are two extremely basic computing principles necessary for implementing input/output (I/O) functions in computers that have costs and benefits. It is a matter of implementation choice to choose between polling and interrupts. Each is a simple substitution that most or all general purpose personal computers have supported for decades. Therefore, to the extent that a prior art reference discloses detecting an event, the POSA would have understood that either polling or interrupts could be used to detect an event, such as when “the predefined area of the ad content display page is in the visible area of the browser window.”

2) GROUND B: Koeppel and Seo, and Optionally Krassner, further in View of Badros Renders Obvious Claims 6 and 13

57. I have reviewed Koeppel, Seo, Krassner, and Badros and determined that they are all related to online advertising. Ex-1006, abstract; Ex-1018, abstract; Ex-1003, abstract; Ex-1005, abstract. Krassner is a grandparent application to the '482 patent, and it relates to the system and method for creation, distribution and tracking of advertising via electronic networks. Ex-1003, abstract. Koeppel also teaches charging fees for advertisements that “may be altered based on whether the third party content was fully in-view or partially in-view.” Ex-1006, ¶172. Similarly, Badros teaches a system and method for time-multiplexing the display of a plurality of electronic documents. Ex-1005, abstract. The plurality of selected documents is displayed at an output device in a predetermined sequence according to the time-

multiplexing criteria. *Id.* An advertisement is an electronic document available for viewing in a portion of a display. It would have been obvious to a POSA to consider Badros' method for time multiplexing the display of a plurality of electronic documents in a predetermined sequence in the methods of Krassner. As Badros explains, "one advantage of time-multiplexing the display of documents is that more than one document can be output to users." Ex-1005, ¶¶17 and 69. In embodiments related to webpage advertisements, more than one advertisement may be displayed in a single ad space of a single webpage. Ex-1005, ¶17. Accordingly, the POSA would have been motivated to take advantage of Badros' teaching by modifying Krassner to display multiple advertisements instead of just one.

3) SECONDARY INDICIA OF NONOBVIOUSNESS

58. I have considered the alleged evidence of secondary indicia of nonobviousness submitted by the patent owner in IPR2023-00953 but find it unpersuasive. I understand that secondary indicia cannot overcome a strong showing of obviousness based on two cases I reviewed: [*WesternGeco LLC v. ION Geophysical Corp.*](#), 889 F.3d 1308, 1331 (Fed. Cir. 2018); and [*Geo. M. Martin Co. v. All. Mach. Sys. Int'l LLC*](#), 618 F.3d 1294, 1305 (Fed. Cir. 2010). I also understand that the Board must properly consider all evidence of secondary indicia when determining whether a summation of the evidence overcomes the findings of obviousness. [*Volvo Penta of the Americas v. Brunswick Corp.*](#), 81 F. 4th 1202, 1215

(Fed. Cir. 2023). The grounds of unpatentability as explained in the petition, and discussed in additional technical detail above, are strong. Therefore, it is my opinion that the POSA would have found the claims obvious even after considering the alleged evidence of secondary indicia.

4) CONCLUSION

59. In my opinion, all the elements of the challenged claims are unpatentable in view of the references discussed above. It is my opinion that the references support Grounds A through E as set forth in the Petition for *Inter Partes* Review.

60. I reserve the right to supplement my opinions to address any information obtained based on any new information that comes to light throughout this proceeding.

61. In signing this Declaration, I recognize that the Declaration will be filed as evidence in case before the Patent Trial and Appeal Board of the United States Patent and Trademark Office. I recognize that I may be subject to cross-examination. If cross-examination is required, I will appear for cross-examination within the United States during the time allotted for cross-examination.

62. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful

false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Respectfully Submitted

/ Trevor Smedley /

Trevor Smedley

Executed on: May 17, 2024