VOLUME: I

EXHIBITS: 1017 to 1018

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DURATION MEDIA, LLC

Petitioner

vs.

RICH MEDIA CLUB, LLC

Patent Owner.

Case IPR2023-00953

U.S. Patent 11,443,329

DEPOSITION OF TREVOR SMEDLEY, Ph.D, called as a witness on behalf of the Patent Owner, before Jeanette N. Maracas, Registered Professional Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the Offices of Dentons US, LLP, One Beacon Street, Boston, Massachusetts, on Wednesday, October 25, 2023, commencing at 10:24 a.m.

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I N D E X

Testimony of:	Direct	Cross
Trevor Smedley, Ph.D		
(by Mr. Berten)	4,191	
(by Mr. Greenleaf)		179

E X H I B I T S

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P R O C E E D I N G S

TREVOR SMEDLEY, Ph.D

A witness called for examination by counsel for the Patent Owner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERTEN:

Q. Good morning, Dr. Smedley. My name is Dave Berten. I represent the patent owner in this IPR. I understand you've submitted a report on behalf of the petitioner in the IPR, is that correct?

A. I think it was, it's called a declaration, but a document, a sworn document, yeah.

Q. A document, it is called a declaration and I believe there are copies in front of you as Exhibit 109 that we'll be referring to. You also submitted a copy of your curriculum vitae that's Exhibit 100 -- I'm sorry, 1010, Exhibit 1010. Do you have that in front of you?

MR. GREENLEAF: No.

MR. BERTEN: I have a copy.

Q. Do you see the exhibit number on that

document down in the lower right that was added by Duration Media?

A. Yes.

Q. And that is a copy of your curriculum vitae, is it?

A. Yes.

Q. I've noted in your CV that you worked a lot providing testimony in support of patent owners, is that correct?

A. I think that's a fair statement, yes.

Q. Would you describe it as relatively rare that you provide testimony on behalf petitioners or defendants in patent cases?

A. I wouldn't describe it that way myself.

Q. Do you know about how many times you've testified on behalf of a defendant in a patent infringement case where you were the petitioner in an IPR?

A. I don't know that number, no.

Q. Can you ballpark it as five, less than five?

A. No, I'm afraid not.

Q. Did any of the cases where you have testified involve instances where the petitioner or the defendant in a patent infringement case committed acts of plagiarism?

A. I really don't recall.
Q. You don't recall any of that happening?
A. One way or the other, no.
Q. So if Duration Media plagiarized the work of Rich Media Club in this case, that would be the first case where you've encountered a situation of plagiarism?
A. That's certainly not what I said, no.
Q. I know you didn't testify to that. You're not aware of any act of plagiarism, as you sit here today, by Duration Media of the work of Rich Media Club, correct?
A. That's right, I'm not aware of any acts of plagiarism.
Q. How do you define "plagiarism"?
A. Very informally, copying without authorization.
Q. Copying without authorization or attribution, would it be fair to say?
A. I'm not prepared to give expert testimony on the meaning of plagiarism today, so...
Q. It's not an unusual word, is it? You've heard the word before?
A. Yes, I've heard the word before.
Q. I'd like you to take a look at Exhibit 1001,

which is the '329 patent in this case. That might also be in front of you. If not, I have a copy.
A. That's here. I have that.
Q. This is the patent that is owned by Rich Media Club, correct?
A. Sorry. I have three copies of this. As I understand it, this is a patent that is owned by Rich Media Club, yes.
Q. It's the patent that is the subject matter of this IPR, correct?
A. That's my understanding, yeah.
Q. And you reviewed this patent in the course of preparing your declaration, right?
A. Yes, I did.
Q. About how much time did you spend in total preparing your declaration in this case?
A. I don't recall.
Q. You can't approximate it?
A. No, I can't.
Q. Do you know when you were first contacted by Duration Media to prepare a declaration?
A. Not with any specificity, no.
Q. Do you know whether it was a month before the petition was filed or longer than that

or shorter than that?
A. It was, I believe it was earlier this year and more than a couple of months ago. That's as specific as I can get.
Q. So I believe the petition was filed in May of this year. Do you know when you were hired by Duration Media?
A. No, I don't remember that, no.
Q. Do you keep any billing records of how much you charged for your work in this case?
A. Yes, I do.
Q. And do you have an idea of how much you have billed Duration Media up to the filing of the petition?
A. I don't, no.
Q. You can't ballpark it at all?
A. No, I can't.
Q. Your sworn testimony is you do not know how much money you billed Duration Media in this case?
A. That's correct.
Q. You can't give me any idea?
A. I can't, no.
Q. How much did you make last year?
MR. GREENLEAF: Objection, beyond

the scope.
A. I don't know specifically how much I made last year.
Q. Do you have any idea how much you made last year, again, order of magnitude?
MR. GREENLEAF: Same objection.
A. It would be somewhere around [redacted] That's gross.
Q. And are you anticipating a similar level of revenue or income this year?
MR. GREENLEAF: Same objection.
A. It looks like I'll probably make [redacted] this year.
Q. And all of your income -- I'll rephrase that.
The majority of your income comes from providing testimony in IPRs and patent infringement cases, correct?
A. Not in providing testimony, no.
Q. In preparing declarations and otherwise supporting cases involving patent infringement or in IPRs?
A. When you include "otherwise supporting," yes, yeah.
Q. And in 2023, approximately how many matters are you working on?

A. So I believe there's been some added since I produced this CV. Let me just think. Six, around there, roughly.
Q. Is the Duration -- is your commitment of time on the Duration Media matter about the same as it is on the other five or so matters you've worked on in 2023?
A. Well, there's a whole range, so...
Q. Well, could you rank them in terms of which has taken the most time and just tell me where Duration Media falls?
A. In the lower half, I would say.
Q. All right. So do you know how much time you spent reviewing the '329 patent before you signed your declaration?
A. I don't know that number, no.
Q. Take a look, if you will, at Figure 51 of the '329 patent, please.
A. I have it here.
Q. Do you have that in front of you? This is one of the figures that you reviewed before you signed your declaration?
A. Yes, it is.
Q. What do you understand that figure to show?
A. It shows a browser, a browser window, a

computer screen display area and a content page.
Q. So you're reading the titles of that document, of the various parts of that figure?
A. I just read the labels of the parts that are on that figure, yes.
Q. Did you have an understanding of how that figure is described in the specification?
A. Yes.
Q. And do you understand how it relates to the invention that's claimed in this case?
MR. GREENLEAF: Objection, relevance.
A. That was part of my analysis, yes.
Q. Can you explain what that figure is trying to show in terms of area of a webpage that is outside of the viewport?
A. Not from my memory, no.
Q. And just looking at the drawing, you can't do that either?
A. No.
Q. All right. I'm going to show you what's been marked as Rich Media Club Exhibit 2005. You've never seen this document before, I

assume, correct?
A. I can't say for sure that I haven't seen this before, no.
MR. GREENLEAF: Objection, relevance.
Q. You haven't seen it before?
A. I can't say for sure that I haven't seen it before, no.
Q. Well, in what context do you think you may have seen it?
A. It's not that I think I may have seen it. It's that I can't say for certain that I haven't seen it.
Q. Well, Exhibit 2005 is a copy of U.S. Patent No. 11,195,210 B2. Have I read that number correctly?
A. I believe so, yes.
Q. Do you see that the application, the applicant there is Duration Media, LLC?
A. Yes.
Q. And do you see the filing date of the provisional application of this patent?
A. Yes.
Q. What date is that?
A. August 6, 2019.

MR. GREENLEAF: David, I just want to place a standing objection on the relevance of any questions relating to Exhibit 2005, and with that understanding, I won't object to further questions concerning it.
MR. BERTEN: Why don't we get to the relevance first.
Q. You agree, don't you, that evidence of copying is a relevant secondary consideration in a determination of obviousness, right?
A. That sounds correct, yes.
MR. GREENLEAF: Again, I just want to be clear. The line of questioning I'm objecting to is for relevance, but I don't want to interrupt your flow.
Q. I'll just repeat the question. You agree that evidence of copying by others is a relevant objective indicia of non-obviousness when you're considering whether a patent is obvious or not, correct?
A. That sounds correct, yes.
Q. Well, it doesn't just sound correct. You've actually put that in your declaration that that is a factor that should be considered,

right?
A. If that's there, then yes, I do agree, but I haven't checked myself to be sure.
Q. It would surprise you to hear that that's in your declaration?
A. No, not at all.
Q. Why don't you look at Paragraph 26 of your declaration which is Exhibit 1009.
A. Paragraph which?
Q. 26. Does that refresh your recollection as to whether copying is a factor, deliberate copying of the invention by others is a secondary consideration?
A. It doesn't change my memory at all. I believe that is true, but I would -- to give sworn testimony that it's true, I would want to check the factors themselves and be sure that that's precisely what's there.
Q. Is it your testimony that you need to review your declaration in order to remind yourself of what some of the secondary considerations are?
A. No.
Q. Without reviewing your declaration, can you name me the other objective indicia?

A. So I'm giving sworn testimony here and so I'm not going to rely on my memory to recite a list of the factors.
Q. That's exactly what I'm trying to do, is to test to see whether, as you sit here today under oath, your testimony is either "I don't know any of the objective indicia" or "I can name a few of them," and if you can name a few of them, what are they?
A. So I'm not going to participate in a memory test during a deposition because this is sworn testimony. And if I were to rely on my memory, it's possible that I would make some errors.
Q. So let me just make sure I understand your testimony. Can you name today a single objective indicia of non-obviousness besides copying off the top of your head?
MR. GREENLEAF: I want to just clarify my relevance objection to this entire line of questioning.
A. What was your question again?
MR. BERTEN: Can you read back the question?
(Question read)

A. If I answer a question off the top of my head, I can't be sure that it's precisely correct, and I feel it's important to give precisely correct answers in sworn testimony.
Q. When you put your declaration together in the Bumble V Match.com case, you also listed the objective indicia of non-obviousness, did you not?
A. If you say so. I have no reason to think that you're wrong about that.
Q. Again, as you sit here, is it your testimony that you don't recall whether that is a list of the objective indicia of non-obviousness in your declaration in the Bumble case?
A. I don't recall one way or the other, no.
Q. Let me give it to you and refresh your recollection. I'll hand you what I've marked as Exhibit Rich Media Club Exhibit 2012. This is a copy of your testimony in the Bumble V Match.com IPR. Does that look familiar?
MR. GREENLEAF: Relevance objection continues.
A. Yes, it looks familiar.
Q. Why don't you take a look at Exhibit 26 (sic)

in that exhibit, 2012.
A. I presume you mean Paragraph 26?
Q. I do mean Paragraph 26.
A. I have that.
Q. It's on Page 13. You agree that your report in the Bumble v. Match IPR included a listing of the objective evidence of non-obviousness?
A. My declaration here includes a list of the secondary conditions of non-obviousness.
Q. So my first question is, I'd like you to compare the two paragraphs 26, the paragraph from Exhibit 1009, your expert report in this case -- I'm sorry, expert declaration, and Paragraph 26 in Exhibit 2012, and there are some differences between those two paragraphs, correct?
A. Which paragraphs in which exhibits again?
Q. They're the same paragraph in both exhibits. It's Paragraph 26 in Exhibit 1009 and it's Paragraph 26 in Exhibit 2012.
A. I don't have Exhibit 2012.
Q. You do. It's marked as Exhibit 2012 on the first page. In the Match.com it had a separate exhibit number which is Exhibit 2001. So you do agree that you have a copy

of Exhibit Rich Media Club 2012?
A. Yes, that's correct. Thank you for clarifying that.
Q. And I was correct, was I not, when I said that both your declaration in this case, Paragraph 26 from Exhibit 1009, and your declaration in the Bumble v. Match IPR, which is Exhibit 2012, both paragraphs 26 have lists of the objective evidence of non-obviousness?
A. Both of them have lists of secondary considerations, yes.
Q. Why are these two paragraphs worded differently?
A. I don't know.
Q. Does it have anything to do with the fact that in the Bumble Trading V Match Group IPR you were preparing a declaration in support of the patent owner?
A. I was doing that. I don't think I understand the question.
Q. Well, for example, in the Match Group IPR, Paragraph 26 says that you understand that objective indicia of non-obviousness, also referred to as secondary considerations of

non-obviousness, should be considered when evaluating whether a claimed invention would be obvious to one of ordinary skill at the time of the invention, right?
A. Yes.
Q. That's a correct statement that would apply in the current IPR as well, right?
A. As far as I know, the law has not changed on that in the meantime, so yes.
MR. GREENLEAF: My relevance objection continues throughout this line.
Q. So it's your understanding that objective indicia of non-obviousness should be considered when evaluating whether a claimed invention would be obvious to one of ordinary skill at the time of the invention?
A. That's, yes, that's what I've written here.
Q. You did not do that in this case, correct?
A. What I've written about secondary conditions isn't the same, no.
Q. When you say what you've written about secondary considerations isn't the same, you're saying what you wrote in this case is not identical to what you wrote in the Match.com case?

A. That's correct.
Q. All right. My question is referring only to this case. You did not consider any of the secondary considerations of non-obviousness in forming your opinions?
A. I wouldn't agree with that, no.
Q. Which of the -- why don't you show me your report in this case, Exhibit 1009, where you describe consideration of any of the secondary considerations of non-obviousness
A. I don't recall specifically if I have, if I did, where that would be. I'd have to search through to see whether it was there or not.
Q. Well, take your time. Let me know where it is in your report.
A. (Witness examines document) I don't see anywhere where I have given an opinion on secondary considerations.
Q. Is it your testimony that while you didn't give any opinion on objective evidence of non-obviousness, you did, however, consider it?
A. Yes.
Q. Tell me what investigation you did to determine whether there was a long-felt

but unmet need in the prior art that was satisfied by the claimed invention?
A. I'm not sure I understand the question.
Q. Well, that's one of the objective indicia of non-obviousness, right?
A. Right.
Q. You just said you considered objective indicia of non-obviousness in forming your opinions even though your report or your declaration doesn't mention them?
A. Right.
Q. And I'm asking you what you did to determine whether there was a long-felt but unmet need in the prior art that was satisfied by the claimed invention?
A. I'm not sure how I could answer that type of question.
Q. Let me make it easy for you. I don't think you did anything to investigate whether there was a long-felt but unmet need that was satisfied by the claimed invention. Is that right or am I wrong?
A. You might be wrong.
Q. Can you tell me what you did to investigate whether there was a long-felt but unmet need

in the prior art?
A. So I wouldn't be able to answer that sort of question really about anything, like what specific things I did for some very specific fine-grained aspect of my analysis. It was, part of my analysis was considering the secondary considerations.
Q. And my question is how could you consider them if you didn't investigate them?
A. Well, I didn't say I didn't investigate them.
Q. Let's talk about what investigation you did do. Did you investigate whether there was a long-felt but unmet need in the prior art that was satisfied by the claimed invention?
A. As I said, I'm not going to be able to answer that type of question because I don't commit to memory every aspect of my analysis connected with each sort of fine-grained investigation that I do.
Q. As you sit here today, can you identify a single thing you did to investigate whether there was a long-felt but unmet need in the prior art that was satisfied by the claimed invention?
A. As I sit here today, I cannot identify that,

no.
Q. As you sit here today, can you identify a single thing you did to determine whether there was commercial success of the processes covered by the patent?
A. As I sit here today, I can't recall them.
Q. As you sit here today, can you identify anything you did to determine whether there were unexpected results achieved by the invention?
A. As I sit here today, I cannot identify that, no.
Q. As you sit here today, can you identify any effort you did to determine if there was praise of the invention by others skilled in the art?
A. As I sit here today, I can't specifically identify anything like that, no.
Q. You would have the same answer, as you sit here today, that you can't identify anything you did regarding determining whether there was taking of licenses under the patents by others?
A. That's correct.
Q. As you sit here today, you don't know whether

others have tried and failed to make the invention?
A. I'm sorry. What was the --
Q. As you sit here today, you don't know whether you investigated whether others have tried to make the invention?
A. I can't identify any specific investigation that I did.
Q. And you can't identify any specific investigation of whether persons of ordinary skill in the art expressed surprise or disbelief regarding the invention?
A. That's correct.
Q. And you can't describe whether the inventor proceeded contrary to accepted wisdom or any investigation you did of that?
A. I can't identify any specific investigations of that either, no.
Q. And you didn't -- as you sit here today, you can't recall any investigation you did of deliberate copying of the invention?
A. As I sit here today, I can't identify any specific investigations as to whether there was deliberate copying of the invention, no.
Q. All right. So returning to Exhibit 2005

which is the Batkin '210 patent, the Duration Media patent, would you take a look at Exhibit 3.
A. Are we done with this or are we going to return to it later?
Q. Is that the Bumble 2012 that you're asking about?
A. Yes.
Q. We may come back to it in a bit, but you can just put it aside for now.
A. I'll put it on the bottom of the pile.
Q. Let's take a look at Exhibit 2005 which is the Batkin '210 patent.
A. I have that here.
Q. Would you look at Exhibit 3 -- I'm sorry. Figure 3.
A. I have it here.
Q. And you still have Figure 51 of the '329 patent in front of you?
A. Yes, I do.
Q. Figure 3 is a plagiarized version of Figure 51, isn't it?
MR. GREENLEAF: Relevance objection continues.
A. I certainly can't give an opinion as to

whether or not that's been plagiarized.
Q. You can't look at those two figures and determine that they are substantially identical?
A. I can determine that they're substantially identical by looking at them, yes.
Q. And it's true that Figure 51 was part of the '329 patent at least as of 2009?
A. Figure 51 is part of the -- sorry. What?
Q. Figure 51 is part of the '329 patent, correct?
A. Yes, that's correct.
Q. And that figure was part of the '329 patent application at least as of 2009, correct?
A. Yes. There it is. Yes, yup.
Q. And Figure 3 from the Batkin '210 patent which is substantially identical to Figure 51 from the '329 patent was first applied for in either 2019 or 2020?
A. I don't know if that's the case or not.
Q. Well, you know the date of the earliest provisional that's cited in the '210 patent is 2019, correct?
A. I see that, yes.
Q. And I'll represent to you that I've looked at

the provisional and that Figure 3 was not part of it. So the earliest date of the Figure 3 being added to the application that matured into the '210 patent would be early 2020, correct?
MR. GREENLEAF: Objection, calls for a legal conclusion.
A. What was the question specifically?
Q. What was the filing date of the patent that matured into the '210 patent?
A. The filing date on the face of the '210 is August 6, 2020.
Q. And do you have any explanation for how Figure 3 came to be included in the '210 patent other than it was copied out of the '329 patent or another patent belonging to Rich Media Club?
A. I have no knowledge of how this figure ended up in either of these patents.
Q. But you'll agree with me that the two figures are nearly identical?
A. It depends what you mean by "nearly identical," but there are not many differences, no.
Q. If you'll turn to --

MR. GREENLEAF: I just want to reiterate that I have a standing objection to all questions relating Exhibit 2005.
Q. If you'll turn to Column 3 of Exhibit 2005, do you see the description of what Figure 3 is?
A. Yes, I see that.
Q. And if you'll turn to the description of Figure 51 in the '329 patent which is, you'll see it in Column 14 of Exhibit 1001.
A. Yes, I see that.
Q. Am I correct, am I not, that the way Duration Media described Figure 3 is identical to the way Rich Media Club described Figure 51 ten years earlier?
A. Those two descriptions are identical, yeah.
Q. Okay. So I'm prepared to make a side-by-side comparison of these two parts of these two exhibits. I've marked it as Exhibit 2007. I just want to make sure that you agree that I've done that fairly, that I've copied in the left-hand side Figure 51 and the description of Figure 51 from the Rich Media Club patent and Figure 3 and the description of Figure 3 from the '210 patent on the

right-hand side.
A. (Witness examines document) Yes, that looks to me like it's been done accurately.
Q. So with Exhibit 2007 in front of you, does it look to you like Duration Media copied an aspect of Rich Media Club's invention in its patent that it submitted for in 2020?
MR. GREENLEAF: Objection, calls for a legal conclusion.
A. I have no way of knowing that one way or another.
Q. You would press back on the fact that Duration Media copied aspects of the Rich Media Club invention that we just went over?
A. What do you mean by "press back"?
Q. Is there some other explanation that you're going to offer as to how Duration Media's Figure 3 is substantially identical to Figure 51 other than it was copied?
MR. GREENLEAF: Objection, relevance.
A. I have no way of knowing one way or another and so I can't provide any sort of explanation. I have no knowledge of that.
Q. Did you discuss with any of the lawyers

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representing Duration Media the relationship between Duration Media and Rich Media Club prior to 2020?
A. What does the "prior to 2020" modify in your question?
Q. What is your understanding of the previous history or relationship between Duration Media and Rich Media Club? Do you have an understanding of what the relationship was?
MR. GREENLEAF: Objection, relevance.
A. I'm not sure what you mean by "relationship." I know this IPR exists.
Q. It would be news to you that Duration Media and Rich Media Club had entered a cooperation agreement whereby Duration Media was using the technology covered by the '329 patent?
A. I have no knowledge of that at all.
Q. No knowledge. If that was, in fact, the case, if Duration Media had been cooperating with Rich Media Club to do second print ads -- do you know what those are, by the way?
A. Second print ads?
Q. Yes.

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A. No, I do not.
Q. That's a new phrase to you?
A. It's not something I recall at the moment.
Q. And I guess I'll just ask these questions now because they're going to come up throughout the day. In the context of online advertising, there's a few acronyms I'm going to be using in today's deposition. I just want to know if you've heard of them before. Do you know what the IAB is?
A. I'm sorry?
Q. The IAB.
A. I can't recall off the top of my head, no.
Q. What about the MRC?
A. So I'm unlikely to be able to identify just about any acronyms you throw out at me, so you might as well explain them if you've got them.
Q. Well, what I want to know about is whether you have any knowledge about the online advertising ecosystem.
A. I have some knowledge of the online advertising ecosystem.
Q. But you don't know how the IAB would relate to that?

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MR. GREENLEAF: Objection, relevance.
A. That's not something I can answer off the top of my head, no.
Q. And you don't know what the MRC is?
A. I can't say off the top of my head what the acronym MRC stands for in this context.
MR. GREENLEAF: Objection, relevance.
Q. What about M3S?
A. I'll be giving you the same answer for every acronym you provide.
Q. You don't know what the 4A's are?
A. Again, the same answer for every acronym you want to ask me about today.
MR. GREENLEAF: I have the same objection.
Q. What about a DSP?
A. In at least some context, DSP is a digital signal processor.
Q. What about in the online advertising aspect?
A. I'm not going to be able to answer, as I said, any questions like that unless you happen to hit one that comes from something I have a lot of familiarity with outside of

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this case.
Q. An SSP?
MR. GREENLEAF: Relevance.
A. Again, it's an acronym. I'm not going to be able to answer that question.
Q. Do you know what the phrase "Run of Site" means?
A. I can't tell you off the top of my head what the phrase "Run of Site" means.
Q. Do you know in 2005 what advertisers would describe as good ad placements were as compared to okay ad placements?
A. Can you repeat the question? I'm not sure I understood what you're asking me.
Q. Do you know in 2005 whether in the online advertising industry there was a distinction between good ad placements and okay ad placements?
MR. GREENLEAF: Objection, relevance.
A. I don't recall one way or another whether that existed in 2005 or not.
Q. Have any of your previous engagements involved work with the online advertising ecosystem?

A. Yes.
Q. Which ones?
A. I'll have to go through my CV.
Q. Please do.
A. (Witness examines document) So there was Grew Digital in 2019. This list goes back five years, and I remember there was at least one prior to that date, prior to, more than five years ago.
Q. What was that one?
A. I don't recall off the top of my head what it was.
Q. On your CV, which is Exhibit 1010, on Page 3 there's a reference to representing Direct Media, LLC at the top of the page. Do you see that?
A. Not representing, but being engaged by, yes.
Q. Is Direct Media different than Duration Media? Is this a typo?
A. That's meant to refer to this case, and I do recall there was, I had some confusion about that, or just put the wrong word in.
Q. It's a typo?
A. Yes, effectively, it's a typo, yes.
Q. So it's not a separate case involving

creation, distribution, tracking of online advertising?
A. That's correct. That line in my CV refers to this matter.
Q. And you talked about Grew Digital and then there's one more matter you recall in the online advertising space, but you don't recall the name of the parties involved in that?
A. There's at least one that was more than five years, and no, I don't recall.
Q. Okay. We were going over a few acronyms and I think you indicated that you were not familiar with some, with any of the acronyms I've been using, and we'll talk some more about that this afternoon.
I'd like to get back to Exhibit 2005, which is the Batkin '210 patent. You also indicated that you're not aware that there was a commercial relationship between Duration Media and a company affiliated with Rich Media Club called RealVu. You haven't heard of the name RealVu, have you?
A. I may have heard the name RealVu, but I certainly don't recall it at the moment, no.

Q. Do you know what relationship RealVu has to Rich Media Club?
MR. GREENLEAF: Objection, relevance.
A. I have no current knowledge of that, no.
Q. I think what I'd like to -- maybe the easiest way for me to start going over the '210 patent is just to tell you where I'm coming from and we can then have some discussion about it. Do you see who's listed as the inventors on the '210 patent?
MR. GREENLEAF: Objection, relevance.
A. I do see the inventors listed on the front of the '210 patent.
Q. Andy Batkin, Gary Herman and Michael Hannon?
A. Is there a question there?
Q. Did I read the names of the inventors correctly?
A. Yes.
Q. You don't know who any of those people are?
A. I do not, no.
Q. So if I told you that they were executives of Duration Media, LLC, that would be the first time you heard that?

MR. GREENLEAF: Relevance, objection.
A. To the best of my recollection, yes.
Q. Rich Media Club's contention is that those inventors did not invent what's listed in the '210 patent. Rich Media Club did. That's our contention. If we're able to demonstrate that this patent is a copy of the technology that Rich Media Club patented ten years earlier, would you agree that that's a relevant consideration of objective indicia of non-obviousness?
MR. GREENLEAF: Objection, calls for a legal conclusion.
A. I'm sorry. What?
Q. If Duration Media copied the invention that Rich Media Club invented ten years earlier, would you agree that that's an objective indicia of non-obviousness of the '329 patent?
MR. GREENLEAF: Same objection and also relevance.
A. So deliberate copying of the invention by others is one of the secondary considerations.

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Q. And if Duration Media didn't just copy the technology that Rich Media Club invented but they actually copied the patent, would that to you be an objective indicia that the '329 patent is not obvious?

MR. GREENLEAF: Objection, relevance.

MR. BERTEN: Let me answer that question. What's the relevancy objection, Kevin?

MR. GREENLEAF: You're asking whether he copied a particular -- whether copying a figure is the same as copying an invention.

MR. BERTEN: That's not my question.

MR. GREENLEAF: It is your question Let's read your question. I got it right here on the realtime. If Duration Media didn't just copy that technology that Rich Media invented, but they actually copied the patent, would that to you mean an objective indicia that is, that the '329 patent is not obvious. So you're relating the technology and the patent to a figure and its description. That is irrelevant.

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Q. I'll just do it this way. I'm going to hand you what I've marked as Rich Media Club Exhibit 2021. This is a proposed claimed amendment that we're considering in this case.

MR. GREENLEAF: Objection, relevance.

Q. I'd like to know whether, in your opinion, based on the work that you've done, this claim would also be invalid under the prior art that you've identified in this case. So I want to go through the claim and have you identify that, and I will represent to you that this claim bears a similarity to Claim 1 of the '210 patent, and we're going to talk precisely about what's in the '210 patent in a minute, but I want to do it this way with this claim first, okay?

A. You're the boss.

Q. So if you look at the first element of Claim 1 of this proposed claim amendment --

MR. GREENLEAF: I just want to object to the relevance and the hypothetical here before us, but you can continue to ask questions concerning Exhibit 2021, but my objection is standing on all questions related to it.

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Q. Do you agree that Claim 1, the first element, and I'll just call it Element A, would be in the prior art based on your review of the art that you've looked at in this case?

A. I just want to make sure I understand what you're asking me here. If I understand correctly, you're asking me to do, like analyze this claim that I've never seen before as I sit here today?

Q. That's what I'm asking you to do.

A. Against the prior art?

Q. I'm asking you whether this claim is going to survive the art that's been submitted in this case so far, and if your opinion is that it is, then that's a claim that we can submit as an amendment in this IPR. If your position is that this claim would still be invalid, then you can explain why it would still be invalid and we won't submit it.

MR. GREENLEAF: In addition to relevance, I'll add in -- well, relevance, calls for a legal conclusion and outside the scope to these questions concerning 2021,

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but you can answer to the extent you're able.

A. So I'm still not clear simply because, obviously, I can't do a full prior art analysis of a claim as I sit here today. So perhaps I've misunderstood what you're asking me to do.

Q. Well, why don't you look at Element B, performing by the process or a first realtime determination whether the first ad content has been loaded in the webpage for a predefined time period.

A. I see that element, yes.

Q. You would argue, would you not, that the Badros reference teaches that element?

A. So just, again, so I understand, this claim element is perhaps being proposed as an amendment to the '210 patent.

Q. No. It's being proposed as an amendment to the '329 patent.

A. That helps, but I can't answer that question off the top of my head. It would be inappropriate for me to do so.

Q. You can't, as you sit here today, tell me whether you think Badros teaches making a

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determination whether the first ad content has been loaded in the webpage for a predefined time period?
A. So I take my job quite seriously and I work carefully, and for me to say anything at all about one claim element, I have to understand the whole claim and then relate that to the prior art, and that would take significantly more time than we have to sit here today.
Q. What's Badros about?
A. Where is Badros?
Q. Badros is Exhibit 1003.
MR. GREENLEAF: I got it here.
A. So Badros is about a system and method for tying multiplexing to display electronic documents.
Q. Anything else?
A. That's a single statement about a patent. It's about everything that's contained in it.
Q. Did you not contend that Badros discloses determining whether content has been loaded for a predefined time period?
A. Sorry. What was the question again?
Q. I'll ask it a different way. As you sit here today, do you know whether Badros discloses

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determining whether first ad content has been loaded on a webpage for a predefined time period?
A. Can you just read the question to me again?
Q. The question was whether Badros discloses making a first realtime determination whether the first ad content has been loaded in the webpage for a predefined time period.
A. (Witness examines documents) I don't recall doing an analysis that involved a determination about first ad content being loaded in realtime, and perhaps I did. I don't recall it, but I'd have to go through my declaration and the petition with a search to see if that is, in fact, in there.
Q. So the hesitation you're having is based on the realtime determination language in Element B of Exhibit 2021?
A. I wouldn't characterize it that way, no.
Q. Well, do you know if, as you sit here today, whether Badros discloses anything about a realtime determination?
A. I don't recall off the top -- that's not a question I can answer off the top of my head, no.

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Q. You do agree with me, though, that your opinion is that Badros teaches making a determination that the predefined area that is used to display an advertisement has been in view for a predefined period of time?
A. Can you read that again so I get the wording precisely?
Q. Why don't you take a look at Pages 34 and 35 of the petition.
A. Okay.
Q. The petition is Paper 1 in this IPR. You may have it in front of you. If you don't, I have another copy.
MR. GREENLEAF: It should be here somewhere.
A. I just need to reassemble some of this stuff.
(Pause)
A. So which?
Q. Pages 34 and 35 of the petition which is Paper 1.
A. Okay. I have that in front of me.
Q. Do you see where in your opinion, on Page 35 you say, "Badros teaches how in response to a determination of the predefined area that is

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used to display the advertisement has been in view"?
A. I'm sorry. I'm not with you because you've now asked my opinion, but this is the petition.
Q. That's correct, and everything in the petition is your opinion, correct?
A. My opinion is in my declaration.
Q. Well, everything in the petition is in your -- in your opinion, everything in the petition is correct, correct?
A. I'm sure there are legal arguments in the petition that are outside the scope of my opinion.
Q. Why don't you take a look at your opinion, Paragraph 62 on Page 21, this is Exhibit 1009.
A. Paragraph what?
Q. Paragraph 62.
A. Yes.
Q. In your opinion -- if I'm reading this correctly, in your opinion, "all of the elements of the challenged claim are unpatentable in view of the references discussed above." It is your opinion --

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let me rephrase that. I'll just quote.
Quote, "it is my opinion that the references support Grounds 1 and 2 as set forth in the petition for inter partes review."
A. Yes, that's correct.
Q. So it is correct, is it not, that when the petition says Badros teaches something, based on your opinion that the references support Grounds 1 and 2 as set forth in the petition, that you also agree that that's what Badros teaches?
A. Yes, that's correct.
Q. So if we go back to the petition now, was I correct in saying on Page 35 that it's your opinion that Badros teaches a determination that the predefined area that is used to display the advertisement has been in view within a visible area of the browser window for a predefined period of time? And all I've done is quote the part that's in italics.
A. Okay. Can you just repeat that because I wasn't following what was in italics so I didn't see where you were.
Q. I'll repeat it. In your opinion, Badros

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teaches a determination that the predefined area that is used to display the advertisement has been in view within the visible area of a browser window for a predefined period of time.
A. I'm sorry. You lost me because you didn't, you read, you may have read some of what was in italics, but I was looking at the beginning so I didn't align with what you were reading as you were reading it.
Q. All right. Why don't you hand me your exhibit and I'll highlight what I'm reading. I'll ask the question again just so the record is clear.
In your opinion, Badros teaches a determination that the predefined area that is used to display the advertisement has been in view within the visible area of a browser window for a predefined period of time"?
A. That's not the opinion that's given here.
Q. I understand that there are other aspects of what I've read. Is it not the case that Badros teaches what I read?
A. So I haven't given an opinion on that, so I would have to do an analysis to determine

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whether that's true or not.
Q. Seriously? You would have to do a separate analysis? What I just said you do not agree with that Badros teaches the part of the petition on Page 35 that I just quoted?
A. Sorry, there were a couple of questions in there. I'm not sure which one you would like me to answer.
Q. I will rephrase the question. Let's just take it element by element. Is it not true that your opinion is Badros teaches how in response to a determination that the predefined area that is used to display the advertisement has been in view. We'll just stop there. Badros teaches that.
A. You left off half of -- no, you left off two-thirds, the thing that I'm giving an opinion on.
Q. We're going to do it part by part because you seem unable to agree to what I just said Badros teaches because you're saying I'm leaving things out, and I want to make sure that I agree with you that I'm leaving things out. But is it not the case that if Badros teaches everything, it also teaches the

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subparts of everything?
A. If you're asking me that as a hypothetical question, I can't be sure. I'm not sure that that would always be the case.
MR. GREENLEAF: Trevor, if you need a break, we've been going for over an hour. I don't need a break. I just wanted to interject that.
THE WITNESS: No, I'm actually okay.
Q. I'll just ask the question again and we can do it in small parts. Your opinion is that Badros teaches how -- and I'm just reading directly from the first part of the first full paragraph on Page 35 of the petition -- how in response to a determination that the predefined area that is used to display the advertisement has been in view, and that chunk is separately broken down with citations to Badros, right?
A. There are citations given that are after that chunk.
Q. Is it correct that it is your opinion that Badros teaches how in response to a determination that the predefined area that is used to display the advertisement has

been in view?
A. So the opinion that I've given is that Badros teaches how in response to a determination that the predefined area is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time causing a communication to be sent to one or more dispatcher servers, and I'm not at all sure that I read that correctly, but I believe so.
Q. Is it your opinion that you are unable to agree with me that if Badros teaches those three things, it teaches each one independently as well?
A. So I just want to make sure I understand. Your question generally is that you're asking me if, where I've given an opinion and you just cut the sentence into pieces, if each part of that sentence is, I have an opinion on that as well.
Q. That's exactly my question. Is it your testimony that you do not know whether Badros teaches to make 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?
A. That's not something that I have given an opinion on.
Q. My question is, as you sit here today, is it your opinion that Badros teaches that or not?
A. That's not something I've given an opinion on here, and I can't formulate that sort of opinion as we sit here. I'd have to -- it's something I haven't done, so I'd have to sit down and analyze what he's proposed carefully and it would take longer than we have to sit here today.
Q. I want to know whether Badros teaches, in your opinion, to make 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?
A. It's not something I'm able to do as I sit here right now.
Q. How long is it going to take you?
A. I don't know.

Q. Well, I actually need an answer to that question because I need to know whether Badros teaches that or not because if it doesn't teach it, I don't see how Badros can invalidate, how your opinion can support the petition.
MR. GREENLEAF: Objection, asked and answered.
A. Is there a question there?
Q. The question is, you do not have an opinion about whether Badros teaches to make 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?
A. That's not something I've given an opinion on and it's not something I'm able to give an opinion on as we sit here today.
Q. So as you sit here today, you are not able to opine that Badros teaches to make a determination that the predefined area that is used to display the advertisement has been in view within a visible area of the browser window for a predefined period of

time?
A. I'm not able to form an opinion about Badros teaching, as I sit here today, about Badros teaching, I'd say, pretty much anything that I haven't already analyzed and given an opinion on.
MR. BERTEN: I'm going to need a break now. I don't know if you guys -- if the lunch is here, we can do that.
MR. GREENLEAF: 15 minutes.
MR. BERTEN: We can go off the record.
(Break taken)
BY MR. BERTEN:
Q. Dr. Smedley, do you recall when I asked you previously about the phrase "second print" and you said you didn't know what that meant?
A. Yes.
Q. Do you have an understanding that one aspect of the invention of the '329 patent is to determine whether an ad space is within the visible area of a user's browser?
A. Right. So that's kind of a paraphrase of the beginning of Claim 1A.
Q. So the first thing that the '329 patent

describes is trying to figure out if that ad space is within the viewable area of a user's browser?
A. The visible area of browser window, which would be the user's browser, yes.
Q. And if that ad space is within that visible area, then you can replace the ad that's there with a second ad, right?
A. There's more to the claim than that.
Q. There is more to the claim than that, but as a general concept, you agree that the claim describes replacing ad space, an ad in an ad space in the visible portion of a viewer's browser with a second ad?
A. Part of Claim 1 involves rendering a replacement advertisement in that predefined area.
Q. That's what I mean when I refer to the phrase "second print." Is that clear?
A. If that's how you want to talk about second print, that's fine with me.
Q. You don't know whether the phrase "second print" is an industry term of art that's used to describe this process of replacing an ad that originally ran with a second ad at some

point?
A. That's not something I recall coming across, no.
Q. Am I correct that Exhibit 2005, the Batkin patent, is also directed to this concept of replacing an ad that's in the visible space of a browser with a second ad?
A. I'm sorry. I was looking for the document. Can I get you to repeat the question?
Q. The question is, is the Batkin patent, Exhibit 2005, the one that Duration Media got ten years after the '329 patent was applied for, it's also directed to this concept of replacing an ad in a user's browser where a previous ad was within the visible part of that browser?
MR. GREENLEAF: Objection, relevance.
A. So if you want to point me to the things you're referring to in the '210 patent, I can confirm whether it says those or not, but I haven't analyzed this patent in order to be able to give an opinion as to the concepts.
Q. Why don't you just read the abstract.

A. I will do that. (Witness examines document) Okay.
Q. Am I correct that the '210 patent assigned to Duration Media also relates to this concept of replacing an ad with a second ad if there's a determination that the ad space is on the visible portion of the user's screen?
A. That's not something I'm able to give an opinion on despite reading the abstract. I haven't analyzed this patent. I haven't looked at it in relation to the '329.
Q. Maybe there's an easier way to understand what the patent is driving at. Why don't you look at the bottom of Column 1 of Exhibit 2005 where it says, "clearly, a viewable ad is worth much more to an advertiser than an ad that is not yet in view and may never actually come into view." You agree that that's something that the '329 patent was also considering?
A. The '329 patent is concerned with whether ads are viewable or not. They have that in common.
Q. And so is the '210 patent at least in part

based on what I read?
A. Well, this sentence talks about whether advertisements are viewable or not, yes.
Q. And the next line says, "moreover, once an ad has been viewed, placement of a different ad may increase the monetization of that ad space for the publisher and expand the pool of desirable high-impact ad space available for the advertiser," right?
A. That's what that says, yes.
Q. And that's that concept of replacing one ad with a second ad?
MR. GREENLEAF: Objection, vague.
A. It does talk about replacing a different ad, so a second ad.
Q. And if you read the summary of the invention, the first paragraph, Column 2, Line 15, "the present invention relates to the systems and methods for performing a second realtime bidding auction that may source a second ad content to be displayed in an ad slot, i.e. an ad slot that has remained below the fold on the webpage and loaded into a browser, but has been scrolled above the fold and meets specific viewability criteria." Do you see

that?
A. Yes, I see that here.
Q. Does that help you understand that the '210 patent is directed to determining whether an ad space is viewable, and if it is, replacing an ad that was in that ad space?
MR. GREENLEAF: Objection, vague.
A. So that paragraph, any paragraph in here would be helpful in me understanding what it means.
Q. I'll just ask my question again. The paragraph I just read is describing this process of determining whether an ad slot is viewable, and if it is, replacing that ad with a second ad?
A. I haven't analyzed this patent. I can't give an opinion on that based on just reading a paragraph as I sit here.
Q. That's what this paragraph that we just read describes, isn't it?
A. I can't say that without analyzing the patent.
Q. And I take it you also can't tell me whether Badros discloses what I just read in the summary paragraph from the '210 patent,

Column 2, Lines 15 through 21?
MR. GREENLEAF: Objection, vague.
A. I haven't done an analysis of what Badros or anything else might disclose out of the '210 patent. I can't give an opinion on that as I sit here today.
Q. As you sit here today, putting your report and the petition, everything else aside, what do you recall that Badros does disclose?
MR. GREENLEAF: Objection, asked and answered.
A. Just so I understand your question, this is like a memory test of some sort.
Q. That's exactly what it is.
A. I'm not going to participate in a memory test during a deposition because I take my job seriously and I want to give precise, correct answers.
Q. It's your testimony, as you sit here today, that you cannot identify from memory a single teaching of Badros?
A. It's my testimony, as I sit here today, that I think it would be irresponsible of me to give answers from memory in sworn testimony when I have the precise answer in my opinion.

Q. Well, the way the depositions work are we ask the questions and you give the answer. I'm taking your answer as a refusal to answer the question, as you sit here today, whether you remember a single teaching from Badros.
MR. GREENLEAF: Objection, mischaracterizes testimony.
A. So I understand your question to be like whether I can recite one of the specific teachings from Badros, and that's not something I can do accurately, confidently from memory.
Q. Not a single one?
A. That's correct.
MR. BERTEN: Lunch is here. Why don't we take a lunch break.
(Lunch break)

AFTERNOON SESSION
BY MR. BERTEN:
Q. Dr. Smedley, we talked earlier about the objective indicia of non-obviousness and things like whether it was a long-felt need and industry praise or things like that. Do you remember that?
A. I do, yes.
Q. I asked you previously whether you know what the acronym IAB stands for, and you said no?
A. I guess so. I don't remember which acronyms you said.
Q. I'm going to give you what has been marked as Rich Media Club Exhibit 2028. This is a 2013 annual report from the IAB, and if you flip the page, you'll see a statement from Randall Rothenberg who was the president and CEO of the Interactive Advertising Bureau. Do you see that?
A. I do see that.
Q. So the IAB, I will refer to it as the IAB, but by that I mean this Interactive Advertising Bureau, okay?
A. That's fine with me, yes.
Q. And have you ever heard of the Interactive

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Advertising Bureau before?
A. I may have, but not that I recall now, no.
Q. Do you know what it does?
A. I couldn't recall what it does.
Q. Why don't you take a look at Page 22 of the 2013 IAB annual report, and do you see the list there of general members of the IAB?
A. Yes, I do see that.
Q. And if you look down the list, you'll see names like ABC National TV, AccuWeather, AOL, BBC Worldwide, Cablevision Media Sales, CBS Interactive, CBS Sportsline. This is just the As and Bs and Cs. There's a list of prominent companies in advertising who are members of the Interactive Advertising Bureau, correct?
A. There's a membership, but I recognize, I think, all of the ones you read out.
Q. But there's a longer list, companies like the Wall Street Journal or NBC, NASCAR is a member on it, eBay, Facebook, Google. It's basically a who's-who of companies doing online advertising, isn't it?
A. I wouldn't know if it's a who's-who or not, but there's certainly a lot of companies here

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and I recognize the names of many of them.
Q. And if you flip the page, you'll see the associate membership on Page 23, and one of the associate members of the IAB in 2013 was RealVu. Do you see that down the bottom of the page?
A. Vu is spelled V U?
Q. That's correct.
A. I see that.
Q. And we've already established you might have heard the name RealVu, but you don't really know its relationship to Rich Media Club?
A. Right. I don't recall anything in that respect, no.
Q. If you turn the page to Page 32, you'll see under the phrase Thought Leadership, people who have spoken at various IAB meetings. Do you see that?
A. If you say that's who these are, I have no reason to disagree.
Q. Well, for example, Susan Wojcicki spoke at the IAB annual leadership meeting. Do you see that?
A. It gives her name and the IAB annual leadership meeting, and I have no reason to

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doubt that's what...
Q. Do you know who she is?
A. I don't know Susan Wojcicki or -- no.
Q. If you flip the page, you'll see Marissa Mayer from Yahoo. Do you know who she is?
A. No, I don't think so.
Q. You're not aware that she was the CEO of Yahoo?
A. I don't really keep track of CEOs of companies in general, so no.
Q. You're in no position to dispute that the IAB is a prominent organization of companies with an interest in online advertising?
A. I'm not in a position to give an opinion on that one way or the other.
Q. And by not being able to give a position one way or the other, you're not in a position to dispute the prominence of the IAB?
A. That's included in one way or the other, yes.
Q. Now, I want to direct your attention to what the IAB was doing in 2013. So if you go back to Page 1, the third paragraph reads, "in 2013, the Making Measurement Make Sense (3MS) initiative, founded by IAB, the Association of National Advertisers (ANA),

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the American Association of Advertising Agencies (4A's), and led by the Media Rating Council ended the year just months away from debuting revolutionary viewable impression standards for transacting and display and video advertising. This new currency standard enables the first-ever common-ground membership with television and other traditional media without compromising the benefits of interactivity and will be the foundation of the cross-platform Gross Rating Point." Do you see that?
A. I do, yes.
Q. And I take it that it's the first time that you've heard about the initiative of the Making Measurement Make Sense?
A. I don't recall having heard about it before, no.
Q. And I asked you earlier if you knew what the acronym 4A's meant, and that's the American Association of Advertising Agencies?
A. That's what it says here, yes.
Q. I asked you also if you knew what the acronym MRC meant, and that's the Media Rating Council. Do you know what the Media Rating

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Council did?
A. I assume they're a council that rates media.
Q. Do you know how they were formed?
A. I do not.
Q. Or when they were formed?
A. I don't know that either.
Q. Okay. But is it -- do you have an understanding that the IAB was part of this Making Measurement Make Sense initiative and that in the view of the IAB, a viewable impression standard would be revolutionary?
MR. GREENLEAF: Objection, vague.
A. That's what it says here, yes.
Q. You didn't do any investigation on the history of moving to a viewable impression standard in the online advertising world, correct?
MR. GREENLEAF: Objection, vague.
A. Not that I recall, no.
Q. Why don't you take a look at Page 16 of the IAB annual report, Exhibit 2028.
A. I'm there.
Q. This is entitled Making Measurement Make Sense. You can take a minute, if you will, and just read everything on Page 16.

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A. Sure.
Q. And let me know when you're finished.
A. (Witness examines document)
MR. GREENLEAF: I just want to clarify that I'm objecting since this is the first time I've had these references, objecting to the relevance. To the extent I haven't already, Exhibit 2021, which is the proposed claim amendment, and Exhibit 2005, which is the Batkin reference, I'm objecting to the exhibits themselves.
A. Okay. I've finished reading that.
Q. Okay. Is this discussion on Page 16 of the IAB annual report for 2013 something that you were aware of prior to reading this?
A. Not as far as I know, no.
Q. You were not aware of an effort within the online advertising ecosystem of shifting from a served impression to a viewable impression standard?
A. Not that I recall, no.
Q. Does the fact that this group of advertisers and sites like Google and Yahoo and AOL undertook an effort to move from a served impression to the viewable impression to

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you relate at all to any of the objective indicia of non-obviousness?
MR. GREENLEAF: Objection, vague.
A. They could. I haven't done that analysis so I can't reach a conclusion, but it's a possibility, I suppose.
Q. So it could be a legitimate objective indicia of non-obviousness if a major portion of the American advertising industry wanted to move from the standard of a served impression to a viewable impression and they undertook that effort in 2013?
MR. GREENLEAF: Objection, vague, hypothetical.
A. It's not something I can give an opinion on one way or another.
Q. Well, let's break it down by what they describe is an effort for making measurement -- let me back up.
Do you understand the difference between a served impression and a viewable impression?
A. I understand what that means. It's possible that it may be used specifically somewhere else.

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Q. What is your understanding of the difference between a served impression and a viewable impression?
A. It's whether it's sent somewhere or whether it's actually made viewable.
Q. And by "sent somewhere," that would be a served impression, correct?
A. That would certainly be one way to describe it, yes.
Q. Would it be fair to describe the state of online advertising prior to the '329 patent as being focused on the served impression as the measure of how Internet ads were paid for?
A. Can you repeat the question?
Q. Sure. Prior to the invention of the '329 patent -- I'll rephrase the question.
Prior to 2009, is it your understanding that the way Internet ads were charged for was -- one way they were charged for was based on a served impression as opposed to a viewable impression?
A. As far as I know, and I'd have to look carefully, I don't recall if that's something I've given an opinion on or not. I'd have

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to go through some of this.
Q. I'm not sure whether you've given an opinion on it or not. I'm asking whether you're aware that prior to 2009, that one way that Internet ads were paid for was based on how many impressions were served as opposed to how many impressions were viewed?
A. I am aware that that was one way to bill or, you know, deal with online advertisement, yes.
Q. And are you also aware that at least some advertisers or others in the online Internet advertising ecosystem thought that that was a problem and they wanted to move to a viewable impression standard at least as of 2013?
A. That seems to be generally what they're talking about and what I read on Page 16.
Q. That the online advertising industry wanted to move from this served impression to a viewable impression?
A. I can't give an opinion generally on what the online advertising community went, but what you've described relates to what is on the page you had me read, and so if that

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page expresses the point of view of the online advertising community, then yes.
Q. To the extent the IAB represents the online advertising ecosystem, at least the IAB expresses in its annual report in 2013 that making this shift is important to be able to more fairly measure Internet advertising?
MR. GREENLEAF: Objection, vague.
A. They say here, for example, "the viewable impression is the key to making digital media measurement comparable to that of legacy media," and that suggests to me they think that's an important thing.
Q. And they actually go on to say at the end of that paragraph that "the foundational industry technology have only measured if an ad has been served, not how fully it rendered on the screen or how long it was present."
A. That's what it says.
MR. GREENLEAF: Objection, vague.
A. That's what it says there, yes.
Q. Do you agree that this document expresses a felt need on behalf of the IAB and the portion of the Internet advertising industry

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that it represents to move to a viewable impression standard?
MR. GREENLEAF: Objection, vague.
A. So I haven't formed an opinion on that, discussed what's on this page, and they're talking about viewable impressions on this page, they're talking about viewable impressions being important to them.
Q. And would you disagree with the characterization that the document is expressing a felt need to move to the viewable impression standard?
A. I'd have to analyze this document and think about that carefully to form an opinion.
Q. So as you sit here today, you don't have an opinion about whether this document expresses a felt need?
A. I haven't read the whole document, so no.
Q. You're not in a position to disagree with a characterization of this document expresses a felt need to move to the viewable impression standard?
A. I'm not in a position to agree or disagree to whether this document expresses a felt need.

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Q. So when a group like the IAB and others in the online advertising ecosystem go to the trouble of setting up an initiative called Making Measurement Make Sense whose primary goal, first goal is to shift from a served to a viewable impression standard, even that is not enough for you to opine that that group is expressing a felt need to make that change?
A. I would have to do a careful analysis to express an opinion on that one way or the other.
Q. What would that careful analysis entail?
A. Well, at the very least, reading this entire document.
Q. Well, a lot of this document doesn't deal with the Making Measurement Make Sense initiative, but the next page does, if you want to read parts of that.
So, for example, the top of the next page says, "one of the primary challenges faced in 2013 was to eliminate the high number of impressions that are unmeasurable for viewability." Does that express a felt need to make sure that ads

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are able to be measured for viewability?
A. I would have to do a careful analysis to determine whether anything in here expresses a felt need.
Q. I guess I'm wondering what else could you possibly want to see that would make you think there was an unmet need to move to a viewable impression standard. Can you think of anything else?
A. Sorry. What's the question?
Q. The question is, I presented you with a document that in 2013 shows you that a collection of agencies, the ANA, the 4A's, the IAB, got together, formed an initiative called Making Measurement Make Sense whose first goal was to move the industry from a served impression to a viewable impression. If that doesn't demonstrate to you a felt need to do that, what else could possibly convince you that the industry made this a priority and felt the need to do that?
MR. GREENLEAF: Objection, vague and mischaracterizing the document.
MR. BERTEN: Let's address those. How am I mischaracterizing the document?

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MR. GREENLEAF: You referred to ANA.
MR. BERTEN: Kevin, why don't you go back to Page 1. "In 2013, the Making Measurement Make Sense initiative founded by the IAB, the Association of National Advertisers, ANA, the American Association of Advertising Agencies, 4A's, and led by the Media Rating Council ended the year just months away from debuting revolutionary viewable impressions standards for transacting in display and video advertising."
Q. Is it mischaracterizing the document, sir, to say that the IAB, the ANA, the 4A's and the MRC got together to create the Making Measurement Make Sense initiative to move the industry from a served impression to a viewable impression?
A. You started off asking Kevin a question. But this seems to be a question for me now, or --
Q. It is a question to you. Your lawyer said I mischaracterized the document. He was referring to Page 16, perhaps forgetting Page 1 that indicated that the IAB, the ANA, the 4As and the MRC got together to create

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the Making Measurement Make Sense initiative whose first goal was to shift the industry from a served impression to a viewable impression. My question to you is, have I mischaracterized the document?
MR. GREENLEAF: Objection, vague.
A. It doesn't say right in that paragraph first goal. If you can point me to where it says that.
Q. First goal is on Page 16.
A. Okay. (Witness examines document) Where does it say that's the first goal?
Q. Under No. 1 where it says, "define impression, shift from a served to a viewable impression standard."
A. So you're, I don't know, representing that this is the order of their goals?
Q. It does have the No. 1 in front of it, doesn't it?
A. It does have the No. 1 above it, yes.
Q. Okay. And it also says, the line you read previously was that "the viewable impression is the key to making digital measurement comparable to that of legacy media," Page 16, second column, first sentence.

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A. Yes, it says that there.
Q. So my first question to you is, have I mischaracterized this document when I indicated that those organizations got together to create the Making Measurement Make Sense initiative in 2013?
A. That's not the same question you asked just a little while ago.
Q. All right. I'm going to ask the question again. Is it a mischaracterization of the document to say that the IAB, the ANA, the 4A's and the MRC got together to create the Making Measurement Make Sense initiative and that the first of the five-part solution for that initiative was to shift from a served to a viewable impression standard?
A. So the thing that they have the No. 1 is it's numbered one in their five-part solution.
Q. Have I mischaracterized the document?
A. It's numbered one. I'm not entirely sure what you mean by "first" other than the fact that it has No. 1 on it in this diagram.
Q. I'll go back to my original question which is in terms of addressing a felt need, what more would you want to see than the four