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organizations I talked about getting together to create an industry initiative called Making Measurement Make Sense, a goal of which was to shift from a served impression to a viewable impression in terms of establishing whether there was a felt need to do so?
A. I would have to analyze this document carefully and see where that led me to other things that I might need to see in order to form that opinion.
Q. So as you sit here today, learning that those four groups from online advertising got together to create the initiative to move from a served to a viewable impression is insufficient for you to conclude that the industry had a felt need to introduce a viewable impression standard?
A. Simply reading a few paragraphs from this document is not enough for me to form an opinion with respect to the felt need.
Q. Do you know what the Internet Archive or Wayback Machine is?
A. I am familiar with the Wayback Machine, yes.
Q. Okay. Let me give you what has been marked

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as Rich Media Club Exhibit 2029. This is a capture from the Wayback Machine of the status of the Measurement Now website as of 2012, July 21st.
MR. GREENLEAF: I object to the relevance of this document, the authentication of it and it is hearsay.
Q. Reviewing this document, do you have an understanding that this is the homepage of the Making Measurement Make Sense initiative?
A. It says "Making Measurement Make Sense" across the top and it has what looks like general information about the Making Measurement Make Sense.
Q. You see the Media Rating Council logo in the middle of the circle in the middle of the page?
A. It says "Media Rating Council" in the middle of that logo.
Q. And you see the 4A's logo, the ANA logo and the IAB logo on the right-hand side of the picture of the woman?
A. I see those logos on the right-hand side.
Q. And we just established those four agencies

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or groups got together to create the Making Measurement Make Sense initiative?
A. We established that that's what the IAB 2013 report says, yes.
Q. Do you have any reason to doubt that this is the homepage of the Making Measurement Make Sense initiative as it was captured by the Internet Archive on July 21st, 2012?
A. I have no way to say one way or the other.
Q. Meaning you can't offer any testimony about a reason to doubt that that is what this is?
A. As I said, I can't give an opinion one way or another, including in that direction.
Q. Let's look at the -- well, if you look at the homepage, do you see there's an FAQ tab along the top?
A. I do see on Exhibit 2029 where it says FAQs along the top.
Q. I'm going to give you what's marked as Rich Media Club Exhibit 2030.
MR. GREENLEAF: Again, objection as to relevance, hearsay and authentication.
MR. BERTEN: Is your position that long-felt need is irrelevant?
MR. GREENLEAF: Well, no.

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MR. BERTEN: Okay. Do you think this doesn't address long-felt need?
MR. GREENLEAF: I don't know.
MR. BERTEN: Okay.
MR. GREENLEAF: That's why I'm objecting to relevance.
MR. BERTEN: Okay.
Q. Let's look at the FAQ page. This is, as you can see, another page from the Internet Archive. This one is dated 2012, July 22nd. And do you see that it's a series of questions and answers, right?
A. So I think there are two questions in there, and so, I mean, the first one being that this is the FAQ page, or something dated whatever.
Q. It is the FAQ page dated 2012, July 22nd from the Internet Archive?
A. I have no way of knowing that one way or the other.
Q. That's what it says across the top, right?
A. It does say across the top. The URL there is consistent with Wayback machines, URLs for what you've just described.
Q. Do you have any reason to doubt content that is captured by the Wayback Machine is the

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same thing as the Internet Archive?
A. There could be loads of ways to doubt that the Wayback Machine is accurate.
Q. You've used it yourself, haven't you?
A. Yeah, I have.
Q. Do you rely on it as being accurate when you use it outside the context of this IPR?
A. I guess it depends what you mean by rely on as being accurate."
Q. Have you submitted in any of your work websites printed out from the Internet Archive?
A. Probably, yes.
Q. And when you did that, was it because you thought that the Wayback Machine accurately captured the status of that webpage as of the date that the capture was made?
A. I would consider the Wayback Machine to be generally accurate, but I would also try to confirm whatever it showed me with, in some manner if it was something that was important.
Q. How would you go about confirming the content of the Wayback Machine for a site like Measurementnow.net in 2023 for the way the

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site looked in 2012?
A. I'm not sure. I'd have to spend some time looking online to see what I could find that might confirm it or look for other documents that said similar things to increase the confidence that it's accurate.
Q. All right. So I want to just read a few of these questions and answers. The first is, "who's involved in Making Measurement Make Sense?" Do you see that?
A. Yes, I do see that heading.
Q. And you see that it describes the 3MS as a joint undertaking of the IAB, the ANA and the 4A's, full stop. Those are the same groups we've been talking about?
A. I'll give you that.
Q. By "that" you're referring to --
A. Exhibit 2028.
Q. Same groups, right? The IAB, the ANA and the 4A's?
A. Exhibit 2028 also mentions the MRC.
Q. We're going to get to the MRC in a minute, but it does mention those same three organizations, IAB, ANA and 4A's?
A. Exhibit 2030 says what you read and those

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are the same acronyms that are used when they talk about the 3MS in Exhibit 2028.
Q. Exhibit 2030 goes on to say that "these organizations engage Bain & Company to facilitate and manage the initiative. MediaLink, LLC provided guidance in Phase 1. The Newspaper Association of America, NAA, and the Online Publishers Association, OPA, also joined the initiative as supporters. In total, nearly 50 industry executives were part of the 3MS steering committee and working teams. In addition, 3MS engaged over 150 other industry participants across the ecosystem." Have I read that correctly?
A. I believe so, yes.
Q. Do you have any reason to doubt that the 3MS initiative involved a coalition of organizations and industry executives who were focused on the 3MS principles?
A. So reading what it says here, it doesn't say anything about, that I see in that, under that heading about 3MS principles. Maybe I'm missing something.
Q. Let's go down to where it does talk about those principles. Three questions later it

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says, "what are 3MS's five guiding principles of digital measurement?" Do you see that?
A. I do, yes.
Q. Principle No. 1, why don't you read that out loud, please.
A. The whole paragraph or just the heading?
Q. The heading.
A. Principle No. 1, "move to a viewable impressions, in quotation marks, standard and count real exposures online."
Q. And the next part of that says, "today we count served impressions as recorded by ad servers. Often ad units are not in a viewable space to the end-user or fail to fully load on the screen, potentially resulting in substantial over-counting of impressions. Viewable exposures are increasingly the norm across other media and better address the needs of brand marketers." Do you see that?
A. Yes, I see that.
Q. Am I correct that this coalition of industry organizations and executives got together in part in support of Principle No. 1 of moving the industry to a viewable impression

standard?
A. I don't know one way or the other whether that's true.
Q. What else do you think they were doing?
A. That assumes that I think they were doing anything at all.
Q. I agree that you're reluctant to agree that this is what the industry was doing in 2012 and 2013, but you don't have any reason to doubt the documents that I put in front of you that demonstrate that the industry made this a priority?
A. I have no reason to doubt or accept that. All I have is the document you've given me.
Q. Let's look at another part of the site. This is the benefits page from the Making Measurement Make Sense initiative.
MR. GREENLEAF: This is Exhibit 2032. Objection, relevance, hearsay and authentication.
Q. In terms of the benefits, you again see that the 3MS objectives included shifting digital measurement from a served to a viewable impression standard?
A. What I see is that on Exhibit 2032 under the

heading 3MS Objectives, it says, "shift digital measurement from a served to a viewable impression standard."
Q. Okay. This is Exhibit 2031, the two involved.
MR. GREENLEAF: Same objection, relevance, hearsay, authentication.
Q. Again, I'll represent to you that Exhibit 2031 is a printout from the Internet Archive of the Measurementnow net website, this time the Who's Involved page. Do you see what is described as a Blue Ribbon Task Force?
A. I see the heading, Blue Ribbon Task Force, yes.
Q. So is it your understanding that the Making Measurement Make Sense initiative included the creation of a Blue Ribbon Task Force?
A. I have no way to know that one way or the other.
Q. That's what the document says, right?
A. The document has a heading on it, Blue Ribbon Task Force, and some names listed under it.
Q. Do you have any reason to doubt that the Making Measurement Make Sense initiative created a Blue Ribbon Task Force?

A. I have no way to give an opinion on whether they created a Blue Ribbon Task Force one way or the other.
Q. Okay. We've now looked at some additional documents regarding the Making Measurement Make Sense initiative. Combining the documents that were the website, Making Measurement Make Sense and the IAB 2013 report, do you agree that the industry had a felt need to move from the served impression to the viewable impression?
A. Looking at these documents did not change my opinion about that.
Q. Meaning you still don't have one?
A. That's correct.
Q. Go back to Exhibit 2028, Page 16.
MR. GREENLEAF: Can we go on break for a second?
MR. BERTEN: Sure.
(Break taken)
BY MR. BERTEN:
Q. We're on Page 16 on Exhibit 2028. Last paragraph, second column, do you see there's a discussion there that the viewable impression standard is expected to be

released in the first quarter of 2014?
A. I see that, yes.
Q. And that the organization that was in charge of establishing and managing the process of developing, testing and institutionalizing measurement standards with regards to the program was the Media Rating Council?
A. That looks like you've paraphrased that correctly, yes.
Q. And the MRC was going to release the new standard to coincide with the lifting of the advisory of the MRC issued against transacting on viewable impressions first in 2012 and updated in November of 2013. Do you see that?
A. Again, you've paraphrased, and I didn't pick up on anything that was inconsistent.
Q. This document describes the MRC as the group that was in charge of developing, testing and institutionalizing the measurement standards, right?
A. In charge of establishing and managing that process, yes.
Q. So I'll represent to you that the MRC, among

other things, is an accreditation agency that was set up at the request of Congress in the 1960s to have at that time the television and radio industries self-regulate in terms of their own efforts to monitor things like TV viewership. I'm not expecting you to agree with that, but I'm just giving you that as a background about the Media Rating Council, that part of what they do is accreditation. They have accredited companies to comply with the viewable impression standard that ultimately the industry moved to. Do you know who the first company they accredited was?

A. No, I do not.

Q. Would it surprise you to know that it was RealVu?

A. It wouldn't surprise me one way or the other

Q. Would it surprise you to learn that RealVu acquired its accreditation using the Rich Media Club technology and that the accreditation was awarded in 2010?

A. I have no knowledge of that one way or the other.

Q. If that is, in fact, the case, would that

affect your opinions in terms of objective indicia of non-obviousness if an independent agency accredits RealVu's use of Rich Media Club's technology as the first technology to verify viewable impressions?

A. That's not something I'm able to give an opinion on just listening to something that you said.

Q. I have the letter. I'll show you that. I'm showing you what has been marked as Rich Media Club Exhibit 2017. Why don't you take a minute to review that.

MR. GREENLEAF: Same objection, relevance, hearsay, authentication.

Q. Just let me know when you've reviewed it.

A. (Witness examines document) I've read that.

Q. Okay. Do you see where George Ivie, who is the executive director and CEO of the MRC, is telling Mr. Edwards that the MRC has voted in favor of accreditation of Rich Media Worldwide's RealVu Viewable Impression, the service, Ad Impressions Statistics?

A. I see that it says that on this, on Exhibit 2017, yes.

Q. Do you have any reason to doubt that the MRC

accredited Rich Media Worldwide's RealVu Viewable Impression Ad Impression Statistics in April of 2010?

A. The only information I have with respect to that is this piece of paper that you've given me, so I can't form an opinion on that one way or the other.

Q. So this has happened a lot today when I asked you if you have any reason to doubt and you answer by saying you can't form an opinion one way or another. And by not being able to form an opinion one way or another, that includes not being able to offer any reason to doubt that the MRC did this accreditation?

A. When I can't give an opinion one way or another, that includes both reason to doubt and reason to believe.

Q. All right. And the fact that the MRC accredited RealVu's viewable impression ad impressions statistics in 2010 in no way affects your opinion as an objective indicia of non-obviousness?

A. I would have to do significant analysis to form an opinion regarding that.

Q. I indicated earlier that RealVu was the first company accredited by the MRC in terms of viewability solution. I'm going to give you what is marked as Rich Media Club Exhibit 2035.

MR. GREENLEAF: Same objection, relevance, hearsay, authentication.

Q. This is a document that was obtained, as you can see from the URL on the bottom of the page, from a website called Volunteer Landing, and it posts a story that was obtained, if you flip the page to Page 3, from NetNewsCheck.com. I want to direct your attention to the paragraph on Page 2 that starts -- well, let me back up. This document is entitled Online Standards Inch Closer to Standardization. Do you see that?

A. I see where it says that on this document, yes.

Q. It's discussing again the same thing we've been talking about, the Making Measurement Make Sense initiative. Do you see that?

A. This includes mentioning the Making Measurement Make Sense initiative.

Q. And if you flip the page to -- I want to

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focus on the bottom of Page 2, and I'll just read the paragraph that explains this. Quote, "the 3MS committee isn't exactly starting from scratch. The MRC's rigorous accreditation process, through which it can take metrics products years to pass, has a number of products both within and at the finished end of its pipeline that are addressing some of these standards. Ivie," and that's George Ivie, "pointed to a product accredited over two years ago by Salt Lake City-based RealVu, for instance, which he said 'essentially invented viewability,' along with other products currently under review by comScore, Nielsen and Omniture." Do you see that?

A. I see where it says that, yes.

Q. So George Ivie, who's quoted in the article, and you'll see up top if you think that there might be a different Ivie, if you look at the second full paragraph, it says, "perhaps one of the most important validations came from George Ivie, CEO and executive director of New York-based Media Rating Council." Do you see that?

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A. Yes.

Q. The article also says what I had told you previously that the MRC is a private, non-profit organization established by the industry in the 1960s at the urging of the U.S. government and charged with auditing and accrediting audience measurement research. Do you see that?

A. Yes.

Q. Does the fact that George Ivie, the CEO and executive director of the MRC, says that RealVu essentially invented viewability, in his words, qualifies as an objective indicia of non-obviousness?

A. So reading a couple of paragraphs from this document doesn't change the fact that I would have to do a careful analysis to come up with a conclusion regarding secondary considerations.

Q. If someone in Mr. Ivie's position says, in his view, that RealVu, quote, "essentially invented viewability," that sort of comment from the CEO of the MRC would not be sufficient, in your mind, without further study to qualify as an objective indicia of non-obviousness?

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A. Knowledge of a statement like that would not change the fact that I can't form an opinion regarding the secondary considerations without careful analysis.

Q. Of course you did none of that analysis before you signed your report?

A. When you say "that analysis," what are you referring to?

Q. We already started this morning by establishing that you didn't consider any of the secondary or objective indicia of non-obviousness when you formed your opinions.

A. I don't think that's what we did earlier today.

Q. You don't recall going through nine different objective indicia of non-obviousness and your inability to identify a single thing that you did in terms of researching any of those?

A. I remember you asking if I could identify specific investigations that I did with respect to each of those and that I could not recall one way or another those. As I

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sit here today, that's my recollection.

Q. I'd like to know what I'm missing. I don't think you did a secondary consideration analysis. Am I wrong?

MR. GREENLEAF: Objection, asked and answered, argumentative.

Q. It is both asked and answered and a touch argumentative, and it's both of those things for the reason that I didn't see it in your report and you haven't been able to identify a single thing that you did. And I want to know whether you're going to tell the Board or not that you conducted an objective, a consideration of the objective indicia of non-obviousness.

A. What exactly is the question?

Q. Did you conduct consideration of any objective indicia of non-obviousness before you signed your report?

A. My analysis in preparing my declaration included considering the secondary -- I lost the phrase. Anyway, the secondary considerations.

Q. It is your sworn testimony that when you put that declaration together, you considered

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the objective indicia of non-obviousness?
A. Yes.
Q. How?
A. It was part of my analysis that I considered these. I can't pull out specific bits of my analysis in relation to anything. I'm not sure how I would answer that question with regard to anything at all.
Q. How did you consider industry praise?
A. We've been through this before. Your question seems to be to identify a specific investigation that I've done and, as I said before, I can't do that as we sit here today.
Q. We're not going to go back through each of the nine. I'll just tell you flat out, I don't understand how you can say you considered them when you didn't investigate any of them, so that's my confusion. If you can explain it to me, explain it. How did you consider them when you didn't investigate any of them?
A. So I didn't say that I didn't investigate any of them.
Q. I think you did. Let me put it this way.

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You're not in some later report going to say, "I investigated whether there was any industry praise of the invention of the viewable impression by RealVu or Rich Media Club"?

MR. GREENLEAF: Objection. You don't have to answer that question. You can say whatever you want in your declaration and he can object to your declaration.

Q. I'll ask the question this way. If you do that work, you're going to do it after today's deposition. You haven't done it already.
A. Sorry. What's the question?
Q. The question is, if you sign a declaration that says, "I investigated the existence of industry praise," that's going to reflect work that you've done after today's deposition and not before it?

MR. GREENLEAF: Objection, mischaracterizes testimony.

A. I wouldn't agree with that, no. I wouldn't necessarily agree with that, no.
Q. Okay. Do you know whether Google now makes use of viewable impression standards?

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A. I don't recall anything about whether Google uses viewable impressions as a standard.
Q. You don't know whether that's something that they moved to?
A. I don't know one way or another whether they moved to that, no.
Q. Do you think Google's moving to a viewable impression standard would reflect either commercial success of the viewable impression standard or industry praise of that standard?
A. I would have to do a careful analysis to form that opinion one way or the other.
Q. Relatedly, did you ask the lawyers representing Duration Media what Duration Media's revenue is from its --
A. I don't recall, but I'm quite sure I wouldn't have asked that.
Q. What level of revenue -- assume for me, if you will, that Duration Media infringes the '329 patent and that all of its products and services infringe that patent. Would their commercial success be relevant in your analysis of the objective indicia of non-obviousness?

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MR. GREENLEAF: Objection to the hypothetical, vague, assumes facts not in evidence.

Q. I am asking you to assume the infringement.
A. I would have to give that careful analysis in order to form an opinion on that.
Q. Well, you can just ask Kevin right now what Duration Media's revenue is. Is that something you're prepared to do?
A. No.
Q. So, again, I'll go back to my hypothetical. Assuming that Duration Media's services infringed the '329 patent, would their revenue be relevant to your analysis as an objective indicia of non-obviousness of commercial success?

MR. GREENLEAF: Object, asked and answered.

A. That would be something I would have to give careful thought and analysis to in order to form an opinion.
Q. And you haven't given that analysis any thought prior to today's deposition?
A. I haven't done the analysis of that hypothetical, no.

Q. You haven't even asked Duration what their revenue is?
A. As far as I recall, I have not asked Duration what their revenue is.
Q. All right. Let's see what Google is up to. I'll give you what's previously been marked Rich Media Club Exhibit 236.
MR. GREENLEAF: Objection, vague, authentication, relevance, hearsay.
MR. BERTEN: I want to address the hearsay objection. I guess I want to know whether Duration Media is actually going to stand on it. If this is a printout from ThinkWithGoogle.com bearing the Google logo and discussing how viewability is measured in May of 2015, are you going to object to the introduction of this exhibit on hearsay grounds?
MR. GREENLEAF: I already have.
MR. BERTEN: I want to know what's your standing by it because I want to know whether we're going to have to go out and get this authenticated by Google in this IPR.
MR. GREENLEAF: You do what you want to do.

MR. BERTEN: No, it's up to you because you're the one who's made the hearsay objection and you're saying that the document cannot be relied upon as an accurate statement that Active View is Google's viewable impression measurement technology, which is what I want to establish. And I want to know whether we're going to have to go to the Board and get permission to go out and confirm that this is the case with Google.
MR. GREENLEAF: I am not going to give you any legal advice.
MR. BERTEN: I'm not asking for legal advice. I'm asking how we're going to proceed with this IPR. Are we going to go out and get testimony from Google to confirm the authenticity of this document for the truth of what it says? You're the one who's made the hearsay objection. If you're going to stand by it, we're going to have to go ahead and potentially get testimony from Google, testimony from Volunteer Landing, testimony from the Media Rating Council, testimony from George Ivie.

That's your, entirely within your control about whether you're going to stand on those hearsay objections.
MR. GREENLEAF: What do you mean by "stand by" my hearsay objections?
MR. BERTEN: I mean if you're going to argue that these documents are inadmissible because they contain hearsay, are we going to have to fly over the country and take a bunch of needless depositions because you won't agree that these documents are authentic and can be admitted for the truth of what they contain?
MR. GREENLEAF: So I think we've kind of run into this problem a few times recently, similar ones. I have my rights at the Board within the rules to object to exhibits. What you do in response to those objections is entirely up to you. I'm not telling you what you should or should not do. I have a right to make an objection, you have a right to do what you can do within the Board's rules and procedures to respond to my objections. I'm not going to give you any advice and --

MR. BERTEN: Well, let's just do this now because we can -- actually, we can go off the record and we'll discuss this on the record and we'll get in front of the Board with the discovery that Duration Media is insisting that we provide if they're going to stand by the hearsay objections. We can go off the record.
(Break taken)
BY MR. BERTEN:
Q. I've given you Exhibit 237, but I didn't ask you -- I'm sorry, 236, but I had not yet asked you any questions about it because we're trying to address the hearsay objection.
MR. GREENLEAF: We're on the record now?
MR. BERTEN: Yes.
BY MR. BERTEN:
Q. If you look at Exhibit 2036, do you see where it states that Active View is Google's viewable impression measurement technology?
A. I do see that, yes.
Q. If you go down the page, do you see the paragraph that says, "in December 2014, using

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Google's Active View technology, we found that 56 percent of all display ads didn't even have a chance to be seen"?
A. I see that, yes.
Q. Do you know if Google conducted a study in 2014 where they found that 56 percent of all display ads didn't even have a chance to be seen?
A. That's what this sentence here appears to say.
Q. And it goes on to say in the next paragraph, "what is the industry doing about it?" And it talks about "in 2013, the Interactive Advertising Bureau and the Media Rating Council began an 18-month industry effort working in sync with hundreds of major agencies, advertisers, publishers and technology providers, including Google, to develop a collective industry standard to measure viewable impressions?
A. That's what it says here, yes.
Q. This is another document supporting a felt need by the industry to move to a viewable impression standard, is it not?
A. That's not something I could give an opinion

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on without further analysis.
Q. What is that further analysis going to entail?
A. A lot of reading.
Q. Reading what?
A. Reading things like all the documents that you've given to me.
Q. So you're going to read the documents, and what else?
A. Just generally speaking about my analysis because I can't speak specifically about what would happen here, but I would look for other documents to read that might be relevant.
Q. Have I at least demonstrated to you that felt need of the industry to move to the viewable impression is something that you should investigate?
A. What do you mean by "should"?
Q. Well, you say in your report that you should consider the objective indicia of non-obviousness, one of the objective indicia is long-felt need, and I've shown you document after document of concern in the advertising industry about moving to a

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viewable impression standard. Is what I've shown you enough that you, in your position of a careful expert, that it's something you think you should now consider?
A. So I'm not completely clear on the question, but maybe I can answer. I'm saying that in order to -- speaking generally, in order to form an opinion on long-felt need, I would have to analyze a lot of relevant things.
Q. And I guess I'm asking a threshold question. Is what you've seen today, call it openers, is it enough to suggest to you that the industry did have a need to adopt a viewable impression standard?
A. I can't form an opinion on that one way or the other without doing more analysis.
Q. This is Exhibit 2037.
MR. GREENLEAF: Same objection, hearsay, relevance, authentication.
Q. I'll represent to you that this is a document that comes from the URL at the bottom of the page. It's a Google support page that again is discussing Active View. And you've not heard of Active View before today's deposition, have you?

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A. I may have, but not that I recall, no.
Q. But having looked at Exhibits 2036 and 2037, do you understand that Active View is Google's solution to measuring viewability?
A. I understand that on Exhibit 2036 it says Active View is Google's viewable impression measurement technology.
Q. Do you know whether Google provides Active View information to its advertisers so that they can get an understanding of what percentage of their ads were actually viewable?
A. I have no direct knowledge of that one way or another.
Q. And nothing in Exhibit 2037 educates you on whether Google provides Active View statistics to its advertisers so they can determine what percentage of ads are viewable?
A. I haven't read this in any detail, but this document seems to be talking about providing information on viewable ads presumably to Google advertisers.
Q. Did you read the institution decision in

this case?
A. Is that one of the exhibits here?
Q. No. It's the decision by the Board instituting the review.
MR. GREENLEAF: I just gave him a copy.
Q. It's Paper 9.
A. A lot of these documents contain the same sort of thing. I can't say for sure that this is something I did or not, but I've certainly seen what's in here, generally speaking.
Q. This isn't your work. This is a decision by the PTAB granting institution of the IPR that Duration Media filed. My first question is, have you seen this decision where the Board instituted the IPR?
A. I'm almost certain that I did. I don't want to say things for certain unless I have a very specific memory of it, but I believe that I have, yes.
Q. And you're aware, then, that the Board rejected at least two parts of your opinion?
A. If you want to point me to those so I can -- otherwise, I'll have to flip through it to

find what you're referring to.
Q. First of all, you had an opinion that part of the claim at issue in this case was optional and, therefore, not a claim limitation?
A. To answer your previous question, this is listed on my materials considered, so yes, I definitely did look at that, and then --
Q. Hang on a second.
A. Sorry.
Q. I don't want you to be wrong on the record, but what you just said cannot be correct.
A. I'm sorry. I'm referring back to this Exhibit 1009.
Q. Your opinion?
A. No, the decision you asked about in the previous question.
Q. Let's clean up the record. This document, the decision, doesn't have an exhibit number on it. It is called Paper 9 in the upper right-hand corner.
A. Yes.
Q. And I think you said, "I considered this in considering my opinion," but it cannot have been because it came after your opinion was

submitted?
A. Oh, yes. You're absolutely correct. I apologize for muddying up the record on that. I mixed up some No. 9s.
Q. My question was, are you aware that the Board rejected at least two of the positions that you took in your declaration?
A. I believe that's correct. I'm just checking to verify that I'm remembering correctly.
Q. So the two that I'm focused on is, the first one is that you suggested as a matter of -- I'll rephrase the question.
The first one is that you suggested that part of Claim 1 was optional and, therefore, not a claim limitation, and the Board rejected that position and said no, the in response to determination step is, in fact, a claim limitation.
A. I do remember that, yes.
Q. And they also rejected your view that the Krassner reference was 102(b) prior art?
A. Yes, I recall that as well.
Q. And they instead said that the Krassner reference qualified under USC Section 102, Subsection E?

A. Yes, I remember that, too.
Q. But they said that the Safe Haven exception to 103, if it can be demonstrated that the '329 patent and the Krassner reference were commonly owned, that you couldn't use the Krassner reference as an invalidating obviousness piece of art. Do you remember that conclusion by the Board?
A. That sounds generally familiar, yeah.
Q. Are you aware of any basis to assert that the Krassner reference and the '329 patent were not commonly owned?
A. Can you refer me to the paragraph of the decision so I don't have to flip through and find it? Oh, they don't have paragraphs. The page number.
Q. So if you look on Page 12 and the top of 13, on Page 12 they quote Section 103(c) of the patent law and on Page 13 they write the sentence, "prior art under pre-AIA Section 102(e) may not render a claim obvious under Section 103 where both patents were commonly owned or assigned at the time the invention was made." Do you see that?
A. I see where it says that, yes.

Q. Okay. So did you do an analysis after you received this opinion to see if the '329 patent and the Krassner reference were commonly owned?
A. No, I did not.
Q. Did you look, for example, at the covers of each of the patents to see who the assignee was?
A. I can't recall for sure one way or another.
Q. Why don't you do it now. You have the Krassner in front of you, it's Exhibit 102. I'm sorry, 1002. We're comparing now Exhibit 1001, which is the '329 patent, and 1002, which is the Krassner reference. Do you agree with me that on the face of both patents, they both are assigned to Rich Media Club, LLC, one's in Miami Beach, Florida, and the other is in Salt Lake City, Utah?
A. Yes, that's what it says is the assignee.
Q. And in both cases, the name of the company is the same, Rich Media Club, LLC?
A. Yes, other than capitalization, which I assume is irrelevant.
Q. Would you agree with me that the face of

the patents create a prima facie case that the Krassner reference and '329 patent were commonly owned at the time of the invention?
A. That's not something I can give an opinion on.
Q. Why not?
A. Because that's a legal conclusion, and I'm an expert.
Q. But you're also a lawyer?
A. I am also a lawyer, yes.
Q. And your declaration has legal conclusions in it.
A. I suppose -- well, what are you referring to, just so we're thinking about the same thing?
Q. Your declaration says that you thought the Krassner reference was 102(b) prior art.
A. That's correct, yes.
Q. So you were able to make that conclusion, although it was incorrect?
A. Right, that's correct, I guess. Hang on, sorry.
Q. What prevents you from making a prima facie conclusion that from the face of the patents

the Krassner reference and the '329 patent are commonly owned?
A. I'm just trying to find my conclusion about 102(b) so I can refresh my memory as to exactly what I said, and I'm not finding it easily, so...
Q. I can tell you where it is. Page 15, Paragraph 37.
A. There we go, yes. My conclusion that Krassner is prior art under 102(b) is based on the technical opinion, my expert opinion that the '329 patent claims new matter, and if there's a legal argument that that's 103(e) instead of 102(b), then that's outside of what I can provide as an opinion.
Q. Just so I'm clear, you're saying a conclusion that two references are commonly owned based on reviewing the assignment on the face of the patent is something you are not qualified to render an opinion on?
A. I can read just like anyone else that the assignee on the front of both of these is the same.
Q. And what I asked you was whether that is a prima facie case of common ownership, and

I thought I heard you say you're not qualified to answer that question.
A. I don't know exactly what I said, but that's not an opinion that I can give here.
Q. Well, are you qualified to give that opinion?
A. If by "qualified" you mean am I a lawyer, then the answer is yes.
Q. And as you said, you can read that both and you know what a prima facie means, being a lawyer, right?
A. I have certainly learned that at some point along the way, but whether that's fresh in my memory, being able to analyze it now is a completely different question.
Q. I'm trying to understand the limits of your, what you consider your qualifications to be. I'm not hearing you say now that you're not, that you're -- there's too many negatives in that sentence.
I've asked you if the fact that the assignee on both the Krassner reference and the '329 patent is the same, Rich Media Club, LLC, whether that presents a prima facie case of common ownership, and I don't understand your position. Is it that you

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don't know if it presents a prima facie case, you're unqualified to do it, or you're unwilling to answer that question?
A. So that's not something I've given an opinion on so I would have to give it careful thought, and that's also not my role in this case. I'm not acting as an attorney. I'm not providing opinions as to, on wholly legal matters.
Q. Well, it's not a wholly legal matter, is it? It's a legal matter based on an underlying fact of common ownership.
A. And I've given my opinion on that fact, which is that the assignee written on the front of this is the same.
Q. So as a matter of first impression, does it appear to you that the two references are commonly owned?
A. All I can say is that the assignee on the front of these is the same.
Q. And for whatever reason, you will not agree that that means that they're commonly owned?
A. The reason being that there's a legal definition for that that I haven't done the analysis on.

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Q. Is it a legal definition or is it just a fact?
A. I guess you'd have to tell me.
Q. If they are commonly owned, do you agree that Ground 1 of the petition fails because Krassner cannot be used as a prior art reference?
A. That's something I haven't done the analysis on and would have to think carefully about in order to provide an opinion.
MR. BERTEN: Why don't we see if we can short-circuit that and I can ask Mr. Greenleaf if Krassner and the '329 patent are commonly owned, whether they're going to continue to assert Ground 1 of the petition?
MR. GREENLEAF: No answer.
MR. BERTEN: Okay. Then we've got to continue.
Q. Why don't we take a look at the petition and Ground 1. The petition is Paper 1. You have a copy of it. We've been looking at it.
A. Yes.
Q. It says Petition for Inter Partes Review at the top.

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A. Yes, I have that.
Q. And if you turn to Page, top of Page 17 -- I'm sorry, bottom of 17, top of 18, the first ground is "Krassner in view of Badros and optionally Harkins renders obvious Claims 1 to 10."
A. I see that, yes.
Q. And you see, as you flip through the detailed explanation, that multiple elements of your analysis rely on Krassner for Ground 1?
A. Yeah, that's correct.
Q. And would you agree with me, then, that if Krassner is not, cannot be used as a prior art reference under 103(c), that Ground 1 fails?
A. I don't think I can make that conclusion, no.
Q. Why not?
A. Because you said if it can't be used under 103(c), I think, and I haven't done the analysis, and it's well outside of my role to determine if there's some other way that it could be.
Q. Well, let's break those down into two different things. I was about to say you're an expert, but I want to make sure I

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understand the limitations of that. You're not an expert in online advertising, are you?
A. What would you consider an expert in online advertising?
Q. Your expertise is in computer programming in general, correct? You don't have a history of dealing with online advertising other than the testimony that we talked about earlier today?
A. Yeah, I think that's fair to say, yes.
Q. None of your practical experience dealt with programming as it related to online advertising?
A. Do you mean aside from the cases that I worked on in relation to online advertising?
Q. That's correct.
A. The reason I'm thinking is because I've had various grad students and things. I can't recall any of them having worked directly with online advertising.
Q. You're not an expert in the history of the development of online advertising and specifically with the history of moving from a served impression standard to a viewable impression standard?

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A. I think that's probably fair to say, yeah.
Q. Okay. So understanding that your expertise is in, let's call it computer programming in general, you are permitted to answer questions based on assumptions. You understand that, right?
A. I would characterize my expertise more broadly than that, but still computer systems and software, et cetera, and I understand that I'm allowed to use my experience.
Q. But my question is, do you understand that one of the aspects of testifying as an expert is that you're able to consider hypotheticals or questions that are based on assumptions?
A. Is your question is that something I'm capable of doing? If that's your question, then the answer is yes.
Q. So I want you to assume that Krassner cannot be used as an obviousness reference, assume that, based on 103(c). Is that assumption clear?
A. I understand the words, yeah.
Q. Okay. If Krassner cannot be used based on that assumption, do you agree that Claim 1 in the petition fails?

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A. That's not a conclusion that I can reach.
Q. Why not?
A. There may be other ways that it could be considered.
Q. How? Let's just go through the first element. Go to Page 19 of the petition. You're relying in the first element on Krassner for disclosing determining whether a predefined -- let me back up.
The second ground is Badros optionally with Harkins, correct?
A. Yes, that's correct.
Q. So all the first ground adds is Krassner?
A. In terms of the prior art that it's based on, yes.
Q. So to the extent that Krassner is eliminated from Ground 1, what's left of Ground 1 is just redundant with Ground 2, right?
A. So if Krassner, let's just, I don't know, doesn't exist, then I certainly wouldn't be able to rely on it in Ground 1.
Q. So my question, I want to know whether -- I think one of two things has to be true. If Krassner cannot be used as a 103 reference, either Ground 1 fails or it's redundant with

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Ground 2. Will you give me either one of those?
A. If you take out the "on 103" qualifier, yeah. If it doesn't exist, as far as I'm concerned here, it ceases to exist, then I'd have to look to see if it's redundant, but it certainly would be citing the same pieces of prior art.
Q. So in your parlance, if Krassner doesn't exist, in my parlance meaning it can't be considered, you agree with me that Claim 1 -- I'm sorry, Ground 1 either fails or is redundant with Ground 2?
A. If by redundant you mean cites the same prior art, then I would agree with that.
Q. I take it if I showed you the relevant assignments of Krassner and the '329 patent, that wouldn't put you in a position to opine as to whether they're commonly owned either, right?
A. That's correct.
Q. So you can't do it based on the face of the patents and you can't do it if I showed you the assignments of those two references to the same owner?

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A. I'm not sure what you're referring to when you say "can't do it."
Q. You can't tell me whether reviewing those -- I can't give you the assignments and then you can render an opinion on common ownership?
A. You giving me the assignments would not change the fact that I cannot give an opinion on common ownership as I sit here today.
Q. Okay.
A. I don't need a break immediately, but when you reach a reasonable stopping point, I wouldn't mind one.
Q. This is exactly that point.
A. I thought it kind of looked like that. That's why I brought it up.
Q. We're moving to a new topic.
A. That's what it looked like.
MR. BERTEN: Let's go ahead and take a break.
(Break taken)
BY MR. BERTEN:
Q. Dr. Smedley, I put in front of you a document that has been filed in the IPR identified as Paper No. 25. It is a request for rehearing

submitted by Duration and it relates to references that have the same name as Krassner and Badros, but are different than the references that are marked as Exhibits 1002 and 1003. Do you know anything about this issue of those other references that have the same name as Krassner and Badros?

A. I have, I guess, general knowledge of what you're talking about.

Q. It's something you talked to the Duration lawyers about?

A. Yes.

Q. If you look at Footnote 2 on Page 9 of this request for rehearing, the Duration lawyers say that "the undersigned clarifies that the clerical error was due to an associate failing to follow instructions to file the earlier-published versions of the same applications, and co-counsel missing that error had not been fixed." Do you see that?

A. I see where it says that, yes.

Q. You didn't see those earlier-published versions at any time prior to filing your report, did you?

A. When you say the "earlier-published versions," are you referring to the Krassner application that matured into this patent and the WIPO patent that kind of preceded Badros?

Q. Yes.

A. I have seen those.

Q. The question is you didn't see them at any time before you filed your declaration in this case, though, did you?

A. So I can't answer that definitively, but I probably saw the Krassner application but I can't be sure about the Badros, but I did in any case compare the specifications to see that they were the same.

Q. I want to be very clear on whether you considered the Krassner publication prior to signing the declaration in this case. If you look at Paragraph 35 of your declaration, that application is not listed as materials that you considered, is it?

A. So I have listed here, if I'm reading this correctly, the application, the file history of the application, 11/643,245.

Q. And that is the file history of Krassner?

A. That's the file history of the application -- yeah, that is the -- it's listed on the face of Krassner as continuation in part of, so I'm not sure exactly what all of that means.

Q. Well, in any event, your report is based on -- I'm sorry, your declaration is based on the Exhibit 102 issued version of Krassner, correct?

A. That's what is listed here under the materials considered. As I said, I compared that.

Q. And all of the references in your declaration are to Krassner, meaning U.S. Patent No. 10,380,602?

A. I believe you're correct that the references are to Exhibit No. 1002, but as I said, I compared all of these against the earlier application and the same.

Q. That earlier application has been expunged from the record in this IPR. That's what the request for rehearing is about. My question is with regard to Footnote 2 in the request for rehearing, if it was a clerical error not to use the earlier version of

Krassner, wouldn't every reference in your declaration need to have been modified?

A. You mean need to have been modified in order to correct the clerical error?

Q. To correct the fact that the Krassner version that you -- the Krassner version you relied upon was the published patent and not an earlier application version?

MR. GREENLEAF: Objection, vague.

A. I believe the only thing that would need to be done is to change the entry in the materials considered table in Paragraph 35.

Q. What about all the citations to various aspects of where you can find material in Krassner?

A. So I verified that those are all in there. I did not verify that the column numbers and line numbers would be the same, so those would have to be changed as well.

Q. Is it your sworn testimony that you based your declaration on the application version of Krassner as opposed to the '602 patent?

MR. GREENLEAF: Objection, vague.

A. I can't recall for sure if I was looking at the application or the patent when I wrote

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my declaration, but it would have been referring to the patent when I put in those column and line numbers, at least I believe that must be true, but I haven't gone and checked if those are correct in the patent as opposed to in the application.
Q. Do you have Badros in front of you?
A. I'm sure it's in the pile somewhere.
Q. It is 1003.
A. Here, yes, I have it.
Q. Do you agree with me that the impression module resides on the server?
A. In Figure 1 it shows the impression module inside a box marked Server 2.
Q. The impression module is labeled 36?
A. Yes. In that figure it is, yes.
Q. Do you agree with me that there's no teaching in Badros of the impression module being on the client side?
A. Unless I've given an opinion in that respect somewhere here, I'd have to go through and see if I can form that opinion as we sit here today.
Q. Well, I didn't read anything in your declaration that said anything about this one

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way or another, whether it was server side or client side, but you do agree with me that Figure 1 shows the impression module being a server-side system, correct?
A. It shows the impression module enclosed in the box labeled Server 2.
Q. Do you know whether any of the tests for viewability that had been developed used, accredited by the MRC reside on the server side or client side?
A. You're asking me about any of the systems that have been accredited by the MRC?
Q. I'm asking you, as you sit here today, are you aware of any viewability test that is conducted on the server side?
A. I'm not aware of that, server or client. I haven't given an opinion on that.
Q. You don't know whether, for example, the '329 patent teaches that the viewability test is something that occurs on the client side?
A. I don't recall giving an opinion on that one way or another.
Q. My question is not whether you gave an opinion on it. My question is, from your

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review of the '329 patent, do you recall whether the code that executes the viewability test is inserted into the client's browser or if it's performed by the server?
A. So I don't recall one way or another.
Q. Can you explain how the server would conduct -- well, can you explain to me how Badros teaches that a server-side system can conduct a viewability test?
A. Is that an opinion I provided?
Q. It's a question about Badros.
A. The answer is no, I haven't provided an opinion on that and it's not something I can provide an opinion about without careful analysis.
Q. So, as you sit here today, you're not aware of any teaching in Badros that explains how a server-side system can conduct a viewability test?
A. I would have to do careful analysis to form an opinion on that.
Q. Well, you're an expert in computer programming, right?
A. Among other things, yes.

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Q. Can you explain to me how you would program a computer to conduct a viewability test from the server?
A. Just randomly hypothetically in whatever kind of system? I would need a lot more information and likely a significant amount more time to be able to answer that question.
Q. Well, how much time is it going to take?
A. I have no idea. I haven't seen the system you're talking about.
Q. I want you to design it for me. If I challenge you to design a system based on the teaching in Badros where the server is going to conduct a viewability test, how would you do it?
A. That depends on so many factors that it would be difficult to even enumerate them as we sit here today.
Q. It would take some level of effort and work independent of what is taught in Badros for you to be able to do that?
A. It would take the expertise of a computer scientist.
Q. Do you know how much time and effort it would take a computer scientist to design a

system that resides on a server that can conduct a viewability test?
A. So I just want to clarify the question. Are you asking about how to do this within some existing system or to design kind of the whole system from scratch?
Q. Well, it's your opinion, is it not, that Badros and only Badros teaches a viewability test?
MR. GREENLEAF: Objection, vague.
MR. BERTEN: What's vague about it?
MR. GREENLEAF: Krassner teaches it, too.
A. Would you mind pointing me to where that opinion is given so I can take a look at it so I know what it is we're talking about?
Q. Sure. Why don't you look at the petition.
MR. GREENLEAF: Sorry. I don't see that Krassner teaches a visibility test. The '329 patent has it in there.
MR. BERTEN: I thought the same thing, but the '329 patent is the invention. It has the...
Q. The question is, for the references that you're relying upon, why don't you take a

look at the petition.
MR. GREENLEAF: He never testified that Badros is the only reference in existence that teaches the viewability test.
MR. BERTEN: I can clarify that, then. Thanks.
Q. The only reference you rely upon in the petition for teaching a viewability test is Badros?
A. I would have to -- if you represent that you checked and that's what you see, I won't argue with you, but I can't confirm that without checking it myself.
Q. Why don't we just take a look at Page 32 of the petition which we've already established the statements in the petition are your opinions, correct?
A. Yes.
Q. Claims 1 and 6, you would agree with me, describe a viewability test?
A. That would be one way to describe that.
Q. And you rely only on Badros in Ground 2, at least, for teaching the viewability test, correct?
A. In relation to claim element, the first one

with the viewability test. I'm only referring to Badros, the prior art references, yeah.
Q. Harkins doesn't teach a viewability test, does it?
A. I haven't given that opinion here, no.
Q. Part of your opinion is that the '329 patent introduced viewability with material that was added in 2009, correct?
A. That sounds familiar, yes.
Q. So Badros is the only reference that you, in your opinion, you're relying upon to teach the viewability step of Claims 1 and 6 of the '329 patent?
A. That's certainly the only one that I cite here, and I don't recall providing arguments in support of that somewhere else.
Q. And that's done through this impression module described in Badros, right?
A. I'd have to check to confirm that. I don't have all that on the top of my mind.
Q. If you look, for example, on Page 33, there's a reference, the Badros reference, Column 12, Lines 38 to 41 which are describing the impression module, and I'll just read what's

in there. "For instance, impression module 38 may determine whether an ad on a webpage of a user's browser is actually visible to the user." And the only thing you deleted out of that section of Badros is the No. 38. Do you know why you deleted out the No. 38 there?
A. Probably just because it makes it messy to have those in there.
Q. It's not because that's referring to the impression module on the server?
A. I certainly don't recall leaving it out because of that. I often leave out the numbers when I'm quoting descriptions of figures.
Q. So I'll go back to my question. There's no code in Badros, for example, that explains how the viewability test is actually accomplished, right?
A. I don't see any code. I don't remember seeing any code in Badros at all.
Q. And you didn't provide an opinion that a viewability test was generally known prior to Badros, right?
A. This is the one I wanted to check. I don't

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see that opinion here. I don't recall giving such an opinion.
Q. You did give an opinion that things like frames or different parts of a webpage were known prior to the '329 patent, right?
A. Yes, and that's what I was just checking.
Q. You didn't make a similar opinion that a viewability test was known at any point prior to Badros?
A. So under Ground 1 I give an opinion that Krassner discloses this, discloses the visibility test.
Q. Let's stay focused on Badros for now. I'll go back to Ground 1 in a second. Your declaration doesn't discuss the viewability test at all, right? Let me rephrase that.
Look at your opinion, if you would, for just a second. Starting on Page 21 through 26, do you have those in front of you?
A. Yes.
Q. So Paragraph 62 is the paragraph where you say it's your opinion that the references support Grounds 1 and 2 set forth in the petition for inter partes review. We talked

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about that earlier, remember?
A. Yes.
Q. And then Paragraphs 63, 64 and 65 all relate to the location of predefined areas such as using frames or frame sets, right?
A. Yes, yes. Well, 65 gets into the replacement advertisement.
Q. 65 gets into the replacement advertisement. 66 is your opinion that in response to language is an optional step and, therefore, not a claim limitation that was rejected by the Board. 68 says that you discuss the replacement ad portion, same with 69. 70 all relates to replacement ad and 71 relates to replacement ad. Do you agree with me that your declaration has no discussion independent of what's in the petition about the viewability test?
A. In the sections we've just gone through with the grounds, that's correct, yes.
Q. And everything leading up to that, though, is things like things you considered, your background, person of ordinary skill in the art, overview of the prior art?
A. And the priority date.

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Q. Exactly, priority date issue. There's no discussion in your declaration about the viewability test?
A. I think other than what you've described, yes, I think that's correct.
Q. But my point is that I didn't discover anything in your declaration, Exhibit 1009, about the viewability test?
A. It might be mentioned in the overview with the patent or something like that.
Q. In terms of what Badros teaches with regard to viewability test, it is solely limited to what's in the petition?
A. That sounds correct, yes.
Q. So understanding that if you look at Page 32, for example, for your position that Badros discloses a viewability test, my first question was there's no code in Badros for how to program a computer to conduct the test for viewability, correct?
A. That's correct, yeah.
Q. And we've already established that the impression module in Badros is on the server. So my question to you is, how do you program a server to conduct the test for viewability?

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A. So the impression module in Figure 1 is illustrated as being a part of, within the box, Server 2.
Q. So how do you program the server to conduct the viewability test?
A. I can't answer that question specifically without knowing a lot more about the system, but it strikes me as the sort of task you could get any undergraduate student to do when they graduate.
Q. Well, you understand that for Badros to -- let me rephrase the question.
If an undergraduate student could do it, why can't you just explain it? How do you program it?
A. The question as to how do you program it, you sit down at the computer and write programs. To write a program, you need something more than just a vague -- an undergraduate student would be able to figure out what they needed to figure out in order to do that.
Q. As you sit here today, do you know of anybody in the online Internet advertising ecosystem that has ever programmed a server

to conduct a viewability test?
A. I'm not familiar with where they have put their viewability tests, so I can't answer that question one way or another.
Q. You don't know?
A. That's correct.
Q. You don't know where Duration Media's code resides, whether it's on the client side or the server side?
A. So I'm not sure what your question refers to, but I don't know where.
Q. You are aware that Duration Media does conduct a test for viewability, right?
MR. GREENLEAF: Objection, relevance.
A. What do you mean by "Duration Media does conduct a test for viewability"?
Q. Your employer, Duration Media, is in the business of selling second print ads that you can only sell if you've conducted a test for viewability, right?
A. They're my client, not my employer, just to be precise. And so then the question is whether I've investigated their products and how they work? Is that the question?

Q. That is the question. As you sit here today, do you know whether their viewability test code resides on the client side or the server side of the system?
MR. GREENLEAF: Objection, relevance.
A. This is like in relation to systems they have like deployed and are using currently?
Q. Yes.
A. I haven't investigated that, no.
Q. Let's go back to how you program the server again. What can you tell me about how the server gets programmed to conduct a test for viewability?
A. It would receive information from a client and conduct a test.
Q. Well, so it has to have information from the client, right?
A. Just speaking very generally, in order for a server to process information that exists on a client, that information, generally speaking, would have to be communicated to the server.
Q. Let's do one thing and I'll come back.
A. I'm going to need more frequent breaks as the

day goes on, so if this is a good point --
Q. That's fine. We can take a quick break.
(Break taken)
BY MR. BERTEN:
Q. So when we were talking about Ground 2 of the petition and teaching and your argument that Badros discloses a viewability test, you mentioned that Krassner also has viewability in Ground 1. Do you remember that?
A. Yes.
Q. If you look on Page 20 of the petition, it's 19 and 20, is that the section of Krassner that you were referring to?
A. Yes.
Q. So am I right that -- is it your opinion that Krassner's mention of the word "view" in Column 3, Lines 7 to 10 constitutes a viewability test?
A. That's not the opinion I've given here.
Q. Well, the petition writes as follows. "Krassner discloses" -- and I'm skipping the first two lines. The next, the italics part says, "of an ad content display page that is used to display an advertisement within a visible area." And then there's no

discussion of the language, an advertisement is in view, anywhere in the petition for Ground 1.
A. That's what you just read?
Q. No, I didn't.
A. Did I misshear something?
Q. You did. I'll just highlight my version again. I'll tell you what my belief is. I'll back up and ask some other questions.
It's your opinion that new matter was added in the continuation in part application that was filed in 2009 to what became the '329 patent, correct?
A. Yes.
Q. And, actually, during one of the breaks, Mr. Greenleaf and I were looking at how thick the '329 patent is compared to the Krassner reference. And you would agree that there's, that the '329 patent covers more pages than the Krassner reference, correct?
A. So we're comparing Exhibit 1001 against 1002?
Q. That's right, yes.
A. So 1001 is 50 pages longer.
Q. So there are 50 pages of additional material

added in '09 as compared to Krassner, right?
A. It's 50 pages longer, so...
Q. We talked earlier today that things like one of the new things that was added in '09 was Figure 51?
A. That sounds familiar.
Q. And I know it's your opinion that the phrases "predefined period of time" and "replacement advertisement" do not appear in Krassner, but do appear in the '329 patent with the new matter that was added, and that's why you say that the priority date of the '329 patent should be no earlier than April 3rd, 2009.
A. That's part of my reasoning, yeah.
Q. So understanding that new matter was added in the continuation part, looking only at Krassner, where is the viewability test taught?
A. I reference a bit in Column 3 starting at Line 7 and it talks about having a view inventory, and a little further down it talks about ad content, licensors can also barter their content for impression/views, and a

person of ordinary skill in the art would understand that in order to keep track of views, you have to do a test.
Q. Are you familiar with the concept of page views?
A. If by that you mean viewing a webpage, then yes.
Q. One of the standard metrics of determining whether a site has been visited is a page view?
A. I understand that page views are used within tracking advertising.
Q. And do you know if a page view makes a distinction like that that's taught in Figure 51 between the portion of the page that actually comes within the viewer's browser and the rest of the page that gets loaded?
A. I don't think that's something I've given an opinion on.
Q. My question is, do you understand there's a distinction between those things and, in fact, that's what the '329 patent is directed to, isn't it?
A. Sorry. What's your question?
Q. So my question is that you say that because

the Krassner reference uses the word "views," that that means that one of ordinary skill in the art would understand that there has to be a viewability test. Isn't that what you testified to?
A. Well, because it talks about inventory of views and bartering for views, not just the fact that it uses the word "view."
Q. So do you agree with me that Krassner does not teach how to do the viewability test?
A. Yeah.
Q. Just like Badros doesn't teach how to do its viewability test?
MR. GREENLEAF: Objection, vague.
A. Yeah, that's not a difficult thing to do, so...
Q. Do you know if it was difficult to do back at the time of the invention?
A. Speaking generally and not to its specific use in advertising, at the time of the invention, the people knew how to tell if something was on the screen.
Q. That's not an opinion you expressed in your declaration, correct? We've already been through that.

MR. GREENLEAF: Objection, vague, mischaracterizes testimony.
A. So when you say that is not an opinion, I take it that you're referring to what I just said about it being generally known how to tell if something was visible on the screen or not, and no, that's not an opinion that I expressed in here.
Q. Well, I guess I need to know, then, is it your opinion, that at the time of the invention of the '329 patent, it was known how you could tell whether, what was on someone's screen?
A. So if I understand your question, you're asking in 2009 could someone write code that determined, could you determine if something was visible on the screen?
Q. Yes.
A. Generally speaking, yes. Within this particular context, no, but within the Windows and MAC APIs, for example, if somebody clicked on the screen, you could figure out what object you clicked on.
Q. Putting clicks aside, I guess my first question is -- I want to make sure I