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

LEXOS MEDIA IP, LLC,	§	
	§	
v.	§	Case No. 2:16-CV-00747-JRG-RSP (Lead)
	§	
APMEX, INC.,	§	

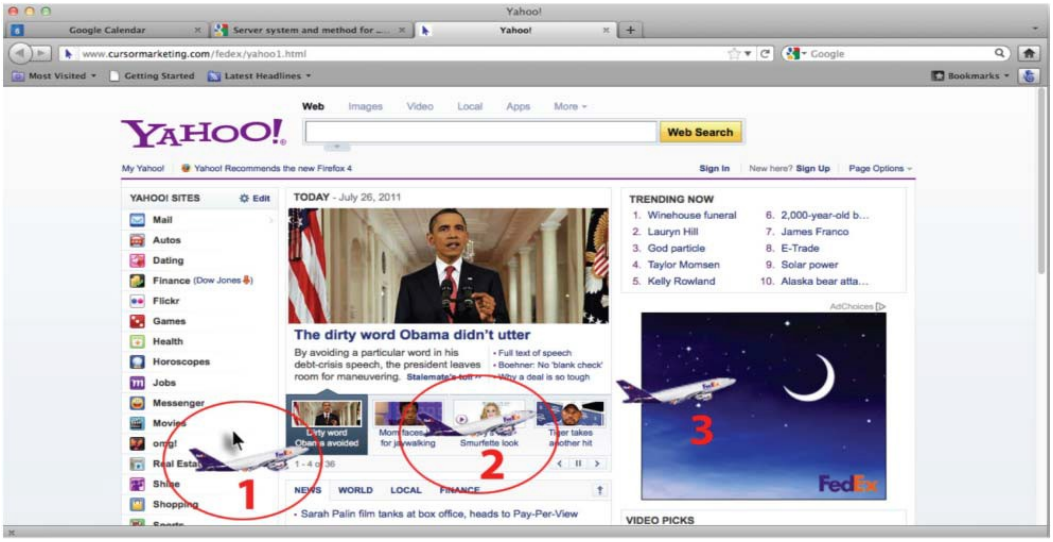
EARLY CLAIM CONSTRUCTION OPINION AND ORDER

Lexos Media IP, LLC ("Lexos") filed a series of now-consolidated patent infringement actions against defendants who maintain online retail websites. The amended complaints accuse the defendants of infringing two United States Patents, U.S. Patent No. 5,995,102, and U.S. Patent No. 6,118,449. The patents generally relate to server systems and methods for modifying a cursor image on a website. On motion from Defendants, the Court concluded that early claim construction would assist the parties in narrowing or potentially resolving their dispute. An early claim construction hearing was held on March 15, 2017. The Court now enters the following claim construction order.

BACKGROUND

The '449 patent is a continuation of the '102 patent, and the two patents share the same specification. The patents' backgrounds primarily discuss existing limitations with advertising on websites, including small and sometimes unnoticeable banner ads, and pop-up ads that can be easily avoided, or worse, ignored. *See, e.g.*, '102 patent at 1:10-2:26. The patents therefore describe a need for "a simple means to deliver advertising elements, i.e., logos, animations, sound, impressions, text, etc., without annoyance of totally interrupting and intrusive content delivery, and without the passiveness of ordinary banner and frame advertisements which can be easily ignored." *Id.* at 2:27-33.

The patents describe numerous examples in which cursor images are modified to an image that represents some or all of the subject matter being displayed on the website. In one "Fizzy Cola" embodiment, for example, a generic cursor image takes "the appearance of a 'Fizzy Cola' bottle when a 'Fizzy Cola' banner advertisement appears among the display data of a popular search engine's site." *Id.* at 17:5-9. This example is similar to one of Lexos' commercial embodiments:



See Dkt. No. 79 at 3.

The claims include recitations of this and similar applications, although all claims are not limited to advertising. Representative claim 70 of the '102 patent recites (in relevant part):

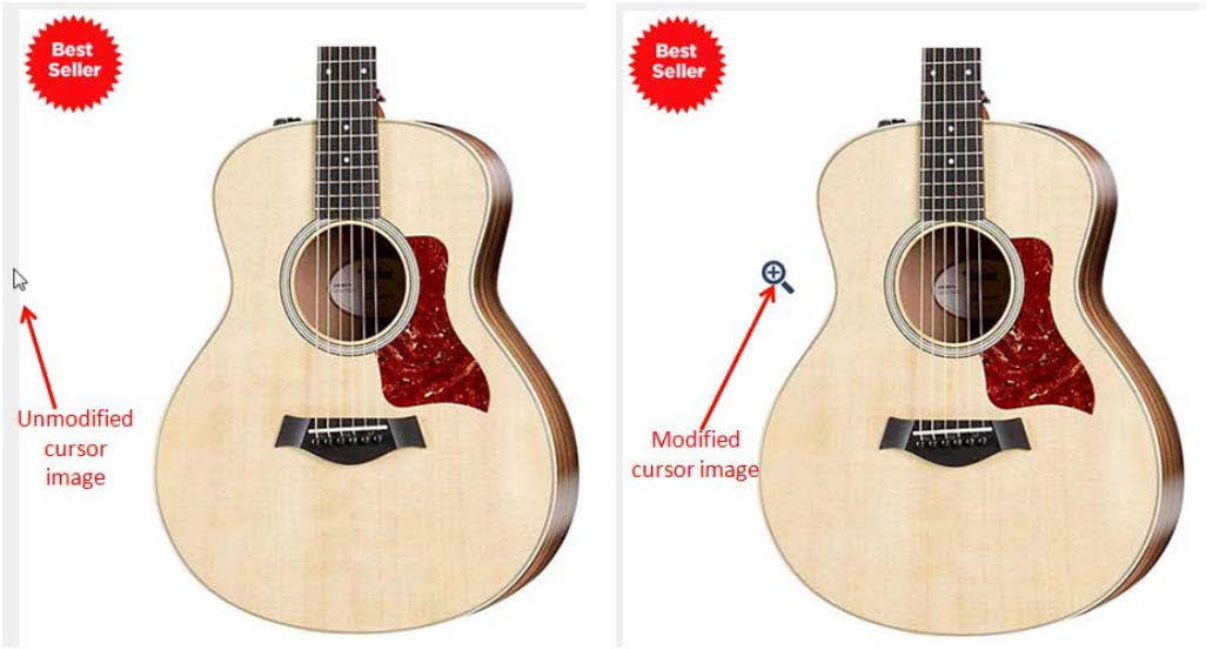
> A server system for modifying a cursor image to a ***specific image*** having a desired shape and appearance displayed on a display of a remote user's terminal, said system comprising:
>
> cursor image data corresponding to said specific image;
>
> cursor display code, said cursor display code operably to modify said cursor image; and
>
> a first server computer for transmitting specified content information to said remote user terminal, . . . , said cursor display instruction and said cursor display code operable to cause said user

> terminal to display a ***modified cursor image*** on said user's display in the shape and appearance of said specific image, . . . , ***said specific image including content corresponding to at least a portion of said information to be displayed on said display of said user's terminal***, ...

'102 patent at 23:15-46 (emphasis to relevant language added).

* * *

Shortly after the Court held a scheduling conference, Defendants Musician's Friend, Inc., Guitar Center Inc., and Costco Wholesale Corporation moved for early claim construction. *See* Dkt. No. 60. These defendants alleged a pattern by Lexos of serially filing groups of cases and then settling those cases before claim construction. According to the defendants, Lexos' infringement theory is implausible because the patent claims cannot possibly cover the accused websites, e.g., websites in which a cursor disappears and is replaced by a magnifying glass icon when the user hovers the cursor over an image that can be magnified:



See Dkt. No. 79 at 4 (citing Defendant Musician's Friend accused website).

The Court granted the defendants' motion, reasoning that early claim construction would aid in the speedy resolution of this and future cases involving the '102 and '449 patents. *See* Dkt. No. 70 at 1-2 (citing Fed. R. Civ. P. 1). The Court thereafter stayed all further deadlines in the case and scheduled an early claim construction hearing for March 15, 2017. Dkt. No. 77. On March 6, 2017, Lexos and Defendants Musician's Friend and Guitar Center filed a joint motion to dismiss. Costco and one other defendant, Saks Incorporated, remained for the early claim construction hearing.

DISCUSSION

Claim construction begins with the language of the claims. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-14 (Fed. Cir. 2005) (en banc); *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). When interpreting claim language, courts consult the intrinsic record, which includes the specification and prosecution history. *Phillips*, 415 F.3d at 1315-17. The specification is "the single best guide to the meaning of a disputed term." *Id.* at 1315 (citation omitted).

A. The Parties' Proposed Constructions

After the early claim construction briefing, the parties resolved their dispute concerning the phrase "modifying a cursor image" and "modified cursor image." The parties agree that these phrases should mean "changing or replacing the form, shape or appearance of a cursor image." *See* Dkt. No. 83-1. Two additional phrases remain in dispute—"specific image" and "content corresponding to at least a portion of said information to be displayed."

1. "specific image"

Plaintiff's Proposal	Defendants' Proposal
"the cursor image displayed on the remote user's terminal after it has been modified"	"an image selected based on the subject matter displayed, not an individual user interface state or the current state of the user interface"

Lexos contends that its proposal is consistent with the language of the claims because the claims repeatedly recite that the "cursor image" is modified into the "specific image," and thus the specific image must be the image that is displayed on the user's screen after the cursor image is modified. *See* Dkt. No. 79 at 9-10. Such claim language, according to Lexos, is consistent with the remainder of the specification's description of the term "specific image." *Id.*

There are two problems with Lexos' construction. First, Lexos' construction includes the phrase "cursor image." The "specific image" is not the "cursor image" because the phrase "cursor image" appears elsewhere in the claims, and there is a "general presumption that different terms have different meanings." *See Chicago Bd. Options Exch., Inc. v. Int'l Sec. Exch., LLC*, 677 F.3d 1361, 1369 (Fed. Cir. 2012). While the specification uses "cursor image" and "specific image" interchangeably, the claims that issued use both phrases to refer to different images. "[T]he language of the claim frames and ultimately resolves all issues of claim interpretation." *Abtox, Inc. v. Exitron Corp.*, 122 F.3d 1019, 1023 (Fed. Cir. 1997). In sum, the "cursor image" recited in the claims is the image that appears before the cursor image is modified into the specific image. Lexos' construction fails to properly account for this distinction.

Second, Lexos' construction ignores the word "specific." Neither party cites a dictionary definition of "specific," but the common meaning of "specific" indicates that something has particular characteristics. Lexos' construction of "specific image" effectively means nothing more than a "modified" cursor image. Such a construction is inconsistent with the specification. Aside from the claims' use of the word "specific," the claims clarify that the "specific image" includes "content corresponding to at least a portion of said information to be displayed" on the screen. This additional limitation relates the *content displayed within* the "specific image" to the content being displayed on the screen. A few examples of the "specific image" include "rendering the

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