

EXHIBIT D

HON. MARSHA J. PECHMAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC.; APPLE, INC.; eBAY, INC.;
FACEBOOK, INC.; GOOGLE INC.;
NETFLIX, INC.; OFFICE DEPOT, INC.;
OFFICEMAX INC.; STAPLES, INC.;
YAHOO! INC.; AND YOUTUBE, LLC,

Defendants.

Case No. 2:10-cv-01385-MJP

**OFFICE DEPOT’S NON-
INFRINGEMENT CONTENTIONS**

1 Pursuant to Local Patent Rule 121(a), defendant Office Depot, Inc. (“Office Depot”)
2 submits these Non-Infringement Contentions in response to Interval Licensing’s Infringement
3 Contentions, served on December 28, 2010. Charts for each patent-in-suit are attached hereto as
4 Appendices A-D. Pursuant to the Local Patent Rule 121(a), Office Depot’s Non-Infringement
5 Contentions are limited to those claims asserted by Interval Licensing.

6 Interval Licensing’s Infringement Contentions, in attempting to explain that Office Depot
7 technologies allegedly infringe the asserted claims, suggest erroneous and improper
8 interpretations of the asserted claims. Office Depot, by providing Non-Infringement contentions
9 in response to Interval Licensing’s erroneous and improper claim interpretations, in no way
10 agrees with, and in fact, squarely rejects aspects of Interval Licensing’s proposed interpretations
11 of the asserted claims.

12 Moreover, Interval Licensing’s Infringement Contentions are deficient in multiple
13 respects and do not provide Office Depot with sufficient information to understand the complete
14 bases for Plaintiff’s infringement allegations. Given these deficiencies, Office Depot has
15 attempted to understand Plaintiff’s construction of the asserted claims in order to identify its
16 Non-Infringement Contentions. Accordingly, these Non-Infringement Contentions may reflect
17 alternative positions as to claim construction and scope. By including contentions based on
18 Plaintiff’s apparent claim construction or any other particular claim construction, Office Depot is
19 not adopting Plaintiff’s claim construction, nor is it admitting to the accuracy of any particular
20 claim construction, or that any claims are valid and sufficiently definite. Nothing in these Non-
21 Infringement Contentions should be understood or deemed to be an express or implied admission
22 or contention with respect to the proper construction of any terms contained within the asserted
23 claims.

24 In addition, Office Depot contends that the asserted claims of the patents-in-suit are
25 invalid for failing to comply with the written description, enablement, regards as the invention,
26 and definiteness requirements pursuant to 35 U.S.C. § 112. As a result, Office Depot’s Non-
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1 Infringement Contentions are made in the alternative, and should in no way be seen as
2 admissions (1) as to the proper construction or scope of the claims of the patents-in-suit, or (2)
3 that any of the patents-in-suit meet the written description, enablement, regards as the invention,
4 or definiteness requirements. Finally, as set forth in Office Depot's invalidity contentions,
5 Office Depot contends that the asserted claims are invalid for failure to satisfy the conditions of
6 patentability set forth in 35 U.S.C. § 1 et seq., including 35 U.S.C. §§ 102, 103 and/or 112. As a
7 result, Office Depot cannot infringe an invalid claim.

8 In the event that the asserted claims are construed by the Court, Office Depot reserves the
9 right to amend its Non-Infringement Contentions. Office Depot further reserves its right to serve
10 amended Non-Infringement Contentions for any other good cause, including but not limited to
11 Interval Licensing amending its Infringement Contentions in any way and/or positions that
12 Plaintiff or expert witness(es) take concerning claim construction and/or infringement.

13 Office Depot bases these Non-Infringement Contentions on its current knowledge,
14 understanding and belief as to the facts and information available as of the date of these
15 contentions. Office Depot has not yet completed its investigation, collection of information,
16 discovery, or analysis relating to this action. Additional discovery may require Office Depot to
17 supplement or modify these contentions, as contemplated by Local Patent Rule 124.

18 Furthermore, Office Depot has not received all of the documents, including third-party
19 documents, that may be relevant to its Non-Infringement Contentions, nor has Office Depot had
20 the opportunity to take the depositions of the named inventors of the asserted patents or other
21 persons having potentially relevant information. Accordingly, Office Depot reserves its right to
22 further amend or supplement these contentions as it discovers new documents or information.

23 Interval Licensing's Infringement Contentions did not provide any contentions regarding
24 indirect infringement or infringement under any provision other than Section 271(a) of the Patent
25 Act. As such, there are no indirect infringement contentions to which Office Depot could
26 respond in these Non-Infringement Contentions. Furthermore, Interval Licensing has now
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1 waived any assertion of indirect infringement against Office Depot and any infringement under
2 any provision other than Section 271(a) of the Patent Act. To the extent that Interval Licensing
3 were allowed to revive a claim of indirect infringement, Office Depot reserves the right to
4 provide responsive non-infringement contentions at that time.

5 Plaintiff did not serve any contentions to establish infringement under the doctrine of
6 equivalents for any element of any asserted claim. There is no requirement for Office Depot to
7 disclose the grounds that would defeat such an allegation had it been asserted, nor is there
8 anything to which Office Depot can respond. Office Depot also contends that no claim is
9 infringed under the doctrine of equivalents. Furthermore, to the extent that Plaintiff later asserts
10 infringement of any Office Depot product under the doctrine of equivalents, Office Depot
11 reserves the right to amend its Non-Infringement Contentions to assert that Plaintiff is barred
12 from asserting certain aspects of its theory of alleged infringement under the doctrine of
13 equivalents (1) by virtue of the doctrine of prosecution history estoppel, on the basis of, among
14 other things, narrowing amendments that the applicant made to the claims of any asserted patent
15 during the original prosecution and/or in the reexamination of any asserted patent; (2) because
16 certain of the elements asserted by Plaintiff to be infringed under the doctrine of equivalents
17 were present in the prior art or otherwise encompass subject matter that could not have been
18 patented by Plaintiff; and/or (3) because certain of the elements asserted by Plaintiff to be
19 infringed under the doctrine of equivalents were disclosed in, but not claimed by, any asserted
20 patent. Furthermore, Interval Licensing has now waived any assertion of infringement under the
21 doctrine of equivalents against Office Depot.

22 In addition to the non-infringement grounds set forth in the accompanying charts, Office
23 Depot does not infringe any asserted claim on account of the reverse doctrine of equivalents.
24 “[W]here a device is so far changed in principle from a patented article that it performs the same
25 or similar function in a substantially different way, but nevertheless falls within the literal words
26 of the claim, the [reverse] doctrine of equivalents may be used to restrict the claim and defeat the
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1 patentee's action for infringement.” *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S.
2 605, 608-609, 70 S.Ct. 854, 94 L.Ed. 1097 (1950). This is an alternative ground for non-
3 infringement because, as explained in the accompanying charts, what is accused does not
4 perform the same or similar function and does not fall within the literal words of any asserted
5 claim. What is accused is so different in principle from the asserted claims that it falls outside
6 the equitable scope of the claims. These fundamental differences are illustrated by the “field of
7 the invention,” “background,” and “summary of the invention” sections of each asserted patent,
8 whose descriptions and requirements are a far cry from what Plaintiff has accused in its
9 infringement contentions, and demonstrate that what Plaintiff accuses is not even in the same
10 “field” as the alleged “invention” and does not use its principles. (’682 Patent at 1:23 – 3:2; ’507
11 Patent at 1:8 – 7:52). For example, what Plaintiff accuses is not described by any of the
12 following descriptions in the ’682 Patent:

13 FIELD OF THE INVENTION

14 The present invention relates generally to communications and computer
15 networks. More specifically, alerting users to dynamic content accessible via a
16 communications or computer network that is of interest at the time of the alert is
disclosed.

17 BACKGROUND OF THE INVENTION

18 The use of the Internet, and in particular the World Wide Web, and other
19 communication and computer networks has grown dramatically in recent years.
20 The emergence of technologies for broader bandwidth communications, better
21 compression technology, and new and less expensive digital recording and
imaging technology, have all contributed to explosive growth in the volume and
22 diversity of content available via communication and/or computer networks, such
as the World Wide Web.

23 However, this proliferation of content, such as audio, image, and video
24 content, presents certain challenges from the perspective of users seeking content
25 of current interest. First, the sheer volume of content available makes it difficult
26 for users to find the content in which they are most interested in accessing at any
27 given time. Apart from having to sort through the enormous volume of content
available, much of the content of potentially greatest interest, at least to many
users, is dynamic. At certain times, a file or other electronic resource may be of
great interest while at other times, or perhaps even most of the time, it is not of
great interest or not interesting at all.

1 For example, thousands of and perhaps in excess of a hundred thousand
2 web cameras, or "webcams", are in use. Webcams are cameras used to provide
3 images of a target of interest via a site on the World Wide Web. Images are
4 updated in varying manners and at varying intervals, depending on the site. A
5 webcam might be used, for example, to provide images of a watering hole in
6 Africa. Typically, users would access a website associated with the webcam to
7 view activity at the watering hole. However, there would be many periods during
8 which nothing of particular interest (e.g., no animals, etc.) would be happening at
9 the watering hole. Conversely, there would be occasional periods when activity of
10 great interest would be occurring, such as the presence of a rare or endangered
11 animal at the watering hole. Users would have no way of knowing when such
12 activity would be occurring, and might miss the most interesting images if they
13 did not happen to check the website at the right time. The same problems arise
14 with respect to files or other electronic resources other than webcam content
15 provided via the World Wide Web, including other media such as audio.

9 As a result, there is a need for a way to alert users to web content or other
10 electronic resources available via a communications or computer network that are
11 of interest at a particular time. To meet this latter need, there is a need to provide
12 a way to become aware that dynamic web content or an electronic resource other
13 than web content is of interest at a given time, and to quantify the degree or level
14 of current interest. In addition, there is a need to consider the interests of a user
15 when determining which web content or other electronic resources likely will be
16 of the greatest interest to the user.

13 There is also a need to ensure that interested users receive alerts with
14 respect to web content or other electronic resources that are of interest only to a
15 relatively small community of users, or that are of interest on only relatively rare
16 or infrequent occasions. There is a risk, otherwise, that indications of current
17 interest regarding such files and other electronic resources would be masked by
18 more voluminous or frequent activity with respect to more widely popular or
19 pervasive resources or types of resources (such as pornography sites on the World
20 Wide Web).

18 SUMMARY OF THE INVENTION

19 Accordingly, alerting users of items of current interest is disclosed. The
20 level of current interest of a particular file or other electronic resource is
21 determined based on indications received from alerting users. One or more users
22 receive an alert that the item is of current interest. Normalization of the level of
23 current interest of a file or other resource, such as to adjust for items of current
24 interest to a small community or for items of current interest only infrequently,
25 also is described.

23 It should be appreciated that the present invention can be implemented in
24 numerous ways, including as a process, an apparatus, a system, a device, a
25 method, or a computer readable medium such as a computer readable storage
26 medium or a computer network wherein program instructions are sent over optical
27 or electronic communication links. Several inventive embodiments of the present
invention are described below.

26 Disseminating to a participant an indication that an item accessible by the
27 participant via a network is of current interest is disclosed. In one embodiment, an

1 indication that the item is of current interest is received in real time. The
2 indication is processed. The participant is informed that the item is of current
3 interest.

4 In one embodiment, a computer is configured to receive in real time an
5 indication that an item is of current interest; process the indication; and inform a
6 participant that the item is of current interest. A database, associated with the
7 computer, is configured to store data relating to the item.

8 In one embodiment, a computer program product for disseminating to a
9 participant an indication that an item accessible by the participant via a network is
10 of current interest comprises computer instructions for receiving in real time an
11 indication that the item is of current interest; processing the indication; and
12 informing the participant that the item is of current interest.

13 These and other features and advantages of the present invention will be
14 presented in more detail in the following detailed description and the
15 accompanying figures, which illustrate by way of example the principles of the
16 invention.

17 In providing these Non-Infringement Contentions, Office Depot objects to Interval
18 Licensing's identification of the "Accused Devices" in its Infringement Contentions. Local
19 Patent Rule 120(b) defines an Accused Device as an "accused apparatus, product, device,
20 process, method, act, or other instrumentality." Local Patent Rule 120(b) required Interval
21 Licensing to identify the Accused Device "by name or model number, if known" and to provide
22 a claim chart for each Accused Device. Interval Licensing has failed to follow Local Patent Rule
23 120(b) requiring it to specifically identify Accused Devices. It instead admits that it has
24 provided only "exemplary (but not exhaustive) detailed infringement assertions" and it purports
25 to accuse "the operation of all webpages that contain functionality that is substantially similar to
26 the infringing functionality" identified in Interval Licensing' claim charts. Interval Licensing
27 has not followed the rule that it provide a claim chart for each Accused Device. Plaintiff's
Infringement Contentions also violate Local Patent Rule 120(b)-(c) to the extent they fail, with
respect to method claims, to identify the party that allegedly performs all the recited steps of the
method, or the alleged direct infringer that makes, uses, or sells a product or service that meets
all the claim limitations. Office Depot reserves the right to argue that the claim limitations are
not performed by a single party and that there is no basis to assert that Office Depot is liable
under a joint infringement theory.

1 While Office Depot sets forth in these contentions many reasons why Plaintiff will be
2 unable to show infringement, it remains Plaintiff's burden to show that every limitation is
3 satisfied by each accused instrumentality. To the extent that Office Depot's Non-Infringement
4 Contentions do not specifically refute each and every contention by Plaintiff, this should not to
5 be construed as an admission that the contention in any way suggests that an accused
6 instrumentality satisfies any claim limitation, or that any claim limitation may be overlooked.

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8 DATED this 28th day of February, 2011.

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CERTIFICATE OF SERVICE

I certify that, on this 28th day of February, 2011, I caused to be served via e-mail Office Depot's Non-Infringement Contentions on all counsel for Plaintiff who have appeared in this action.

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