

# **EXHIBIT E**

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

**STAPLES'S NON-INFRINGEMENT  
CONTENTIONS**

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

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

12 Moreover, Interval Licensing’s Infringement Contentions are deficient in multiple  
13 respects and do not provide Staples with sufficient information to understand the complete bases  
14 for Plaintiff’s infringement allegations. Given these deficiencies, Staples has attempted to  
15 understand Plaintiff’s construction of the asserted claims in order to identify its Non-  
16 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, Staples is not  
19 adopting Plaintiff’s claim construction, nor is it admitting to the accuracy of any particular claim  
20 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, Staples contends that the asserted claims of the patents-in-suit are invalid for  
25 failing to comply with the written description, enablement, regards as the invention, and  
26 definiteness requirements pursuant to 35 U.S.C. § 112. As a result, Staples’s Non-Infringement  
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1 Contentions are made in the alternative, and should in no way be seen as admissions (1) as to the  
2 proper construction or scope of the claims of the patents-in-suit, or (2) that any of the patents-in-  
3 suit meet the written description, enablement, regards as the invention, or definiteness  
4 requirements. Finally, as set forth in Staples's invalidity contentions, Staples contends that the  
5 asserted claims are invalid for failure to satisfy the conditions of patentability set forth in 35  
6 U.S.C. § 1 et seq., including 35 U.S.C. §§ 102, 103 and/or 112. As a result, Staples cannot  
7 infringe an invalid claim.

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

13 Staples 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. Staples has not yet completed its investigation, collection of information, discovery,  
16 or analysis relating to this action. Additional discovery may require Staples to supplement or  
17 modify these contentions, as contemplated by Local Patent Rule 124. Furthermore, Staples has  
18 not received all of the documents, including third-party documents, that may be relevant to its  
19 Non-Infringement Contentions, nor has Staples had the opportunity to take the depositions of the  
20 named inventors of the asserted patents or other persons having potentially relevant information.  
21 Accordingly, Staples reserves its right to further amend or supplement these contentions as it  
22 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 Staples could respond in  
26 these Non-Infringement Contentions. Furthermore, Interval Licensing has now waived any  
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1 assertion of indirect infringement against Staples and any infringement under any provision other  
2 than Section 271(a) of the Patent Act. To the extent that Interval Licensing were allowed to  
3 revive a claim of indirect infringement, Staples reserves the right to provide responsive non-  
4 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 Staples to  
7 disclose the grounds that would defeat such an allegation had it been asserted, nor is there  
8 anything to which Staples can respond. Staples also contends that no claim is infringed under  
9 the doctrine of equivalents. Furthermore, to the extent that Plaintiff later asserts infringement of  
10 any Staples product under the doctrine of equivalents, Staples reserves the right to amend its  
11 Non-Infringement Contentions to assert that Plaintiff is barred from asserting certain aspects of  
12 its theory of alleged infringement under the doctrine of equivalents (1) by virtue of the doctrine  
13 of prosecution history estoppel, on the basis of, among other things, narrowing amendments that  
14 the applicant made to the claims of any asserted patent during the original prosecution and/or in  
15 the reexamination of any asserted patent; (2) because certain of the elements asserted by Plaintiff  
16 to be infringed under the doctrine of equivalents were present in the prior art or otherwise  
17 encompass subject matter that could not have been patented by Plaintiff; and/or (3) because  
18 certain of the elements asserted by Plaintiff to be infringed under the doctrine of equivalents  
19 were disclosed in, but not claimed by, any asserted patent. Furthermore, Interval Licensing has  
20 now waived any assertion of infringement under the doctrine of equivalents against Staples.

21 In addition to the non-infringement grounds set forth in the accompanying charts, Staples  
22 does not infringe any asserted claim on account of the reverse doctrine of equivalents. “[W]here  
23 a device is so far changed in principle from a patented article that it performs the same or similar  
24 function in a substantially different way, but nevertheless falls within the literal words of the  
25 claim, the [reverse] doctrine of equivalents may be used to restrict the claim and defeat the  
26 patentee's action for infringement.” *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S.

1 605, 608-609, 70 S.Ct. 854, 94 L.Ed. 1097 (1950). This is an alternative ground for non-  
2 infringement because, as explained in the accompanying charts, what is accused does not  
3 perform the same or similar function and does not fall within the literal words of any asserted  
4 claim. What is accused is so different in principle from the asserted claims that it falls outside  
5 the equitable scope of the claims. These fundamental differences are illustrated by the “field of  
6 the invention,” “background,” and “summary of the invention” sections of each asserted patent,  
7 whose descriptions and requirements are a far cry from what Plaintiff has accused in its  
8 infringement contentions, and demonstrate that what Plaintiff accuses is not even in the same  
9 “field” as the alleged “invention” and does not use its principles. (’682 Patent at 1:23 – 3:2; ’507  
10 Patent at 1:8 – 7:52). For example, what Plaintiff accuses is not described by any of the  
11 following descriptions in the ’682 Patent:

#### 12 FIELD OF THE INVENTION

13 The present invention relates generally to communications and computer  
14 networks. More specifically, alerting users to dynamic content accessible via a  
15 communications or computer network that is of interest at the time of the alert is  
16 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  
22 imaging technology, have all contributed to explosive growth in the volume and  
23 diversity of content available via communication and/or computer networks, such  
24 as the World Wide Web.

25 However, this proliferation of content, such as audio, image, and video  
26 content, presents certain challenges from the perspective of users seeking content  
27 of current interest. First, the sheer volume of content available makes it difficult  
for users to find the content in which they are most interested in accessing at any  
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.

For example, thousands of and perhaps in excess of a hundred thousand  
web cameras, or "webcams", are in use. Webcams are cameras used to provide

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

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

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

#### 28 SUMMARY OF THE INVENTION

29 Accordingly, alerting users of items of current interest is disclosed. The  
30 level of current interest of a particular file or other electronic resource is  
31 determined based on indications received from alerting users. One or more users  
32 receive an alert that the item is of current interest. Normalization of the level of  
33 current interest of a file or other resource, such as to adjust for items of current  
34 interest to a small community or for items of current interest only infrequently,  
35 also is described.

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

42 Disseminating to a participant an indication that an item accessible by the  
43 participant via a network is of current interest is disclosed. In one embodiment, an  
44 indication that the item is of current interest is received in real time. The

1 indication is processed. The participant is informed that the item is of current  
2 interest.

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

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

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

16 In providing these Non-Infringement Contentions, Staples objects to Interval Licensing's  
17 identification of the "Accused Devices" in its Infringement Contentions. Local Patent Rule  
18 120(b) defines an Accused Device as an "accused apparatus, product, device, process, method,  
19 act, or other instrumentality." Local Patent Rule 120(b) required Interval Licensing to identify  
20 the Accused Device "by name or model number, if known" and to provide a claim chart for each  
21 Accused Device. Interval Licensing has failed to follow Local Patent Rule 120(b) requiring it to  
22 specifically identify Accused Devices. It instead admits that it has provided only "exemplary  
23 (but not exhaustive) detailed infringement assertions" and it purports to accuse "the operation of  
24 all webpages that contain functionality that is substantially similar to the infringing  
25 functionality" identified in Interval Licensing' claim charts. Interval Licensing has not followed  
26 the rule that it provide a claim chart for each Accused Device. Plaintiff's Infringement  
27 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. Staples 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 Staples is liable under a joint infringement  
theory.



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

7  
8 DATED this 28th day of February, 2011.

9  
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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 Staples’s Non-Infringement Contentions on all Plaintiff’s counsel who have appeared in this action.

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