

1 MORRISON & FOERSTER LLP
 MICHAEL A. JACOBS (Bar No. 111664)
 2 mjacobs@mofo.com
 MARC DAVID PETERS (Bar No. 211725)
 3 mdpeters@mofo.com
 DANIEL P. MUINO (Bar No. 209624)
 4 dmuino@mofo.com
 755 Page Mill Road, Palo Alto, CA 94304-1018
 5 Telephone: (650) 813-5600 / Facsimile: (650) 494-0792

6 BOIES, SCHILLER & FLEXNER LLP
 DAVID BOIES (Admitted *Pro Hac Vice*)
 7 dboies@bsfllp.com
 333 Main Street, Armonk, NY 10504
 8 Telephone: (914) 749-8200 / Facsimile: (914) 749-8300
 STEVEN C. HOLTZMAN (Bar No. 144177)
 9 sholtzman@bsfllp.com
 1999 Harrison St., Suite 900, Oakland, CA 94612
 10 Telephone: (510) 874-1000 / Facsimile: (510) 874-1460
 ALANNA RUTHERFORD (Admitted *Pro Hac Vice*)
 11 575 Lexington Avenue, 7th Floor, New York, NY 10022
 Telephone: (212) 446-2300 / Facsimile: (212) 446-2350 (fax)
 12

13 ORACLE CORPORATION
 DORIAN DALEY (Bar No. 129049)
 dorian.daley@oracle.com
 14 DEBORAH K. MILLER (Bar No. 95527)
 deborah.miller@oracle.com
 15 MATTHEW M. SARBORARIA (Bar No. 211600)
 matthew.sarboraria@oracle.com
 16 500 Oracle Parkway, Redwood City, CA 94065
 Telephone: (650) 506-5200 / Facsimile: (650) 506-7114
 17

18 *Attorneys for Plaintiff*
 ORACLE AMERICA, INC.

19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA**
 21 **SAN FRANCISCO DIVISION**

22 ORACLE AMERICA, INC.
 23 Plaintiff,
 24 v.
 25 GOOGLE, INC.
 26 Defendant.

Case No. CV 10-03561 WHA
**ORACLE AMERICA, INC.'S
 OPPOSITION TO GOOGLE'S DAUBERT
 MOTION**
 Dept.: Courtroom 9, 19th Floor
 Judge: Honorable William H. Alsup

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1 Plaintiff Oracle America, Inc. (“Oracle”) opposes Defendant Google, Inc.’s (“Google”) motion
2 to exclude the opinions and testimony of Oracle’s damages expert, Prof. Iain M. Cockburn. (Google
3 Inc.’s Brief In Support Of Daubert Motion (Dkt. No. 171) (hereinafter “Motion”).) Google fails to meet
4 the threshold for exclusion of expert opinion established by *Daubert v. Merrell Dow Pharmaceuticals,*
5 *Inc.*, 509 U.S. 579 (1993), and its progeny. Google’s motion rests on mischaracterizations of Prof.
6 Cockburn’s methodology, factual disputes, and erroneous statements of the law, and its arguments
7 largely distill down to assertions that, as it views the evidence, the infringed patents and copyrights are
8 not really important to either Oracle or Google, and that Google’s acts of infringement are not really
9 closely related to the billions of dollars in revenues it earns each year from Android. These issues
10 provide no basis to exclude or limit Prof. Cockburn’s testimony. Google does not contend that Prof.
11 Cockburn is unqualified to provide expert testimony, or that the reasonable-royalty analysis he uses is
12 flawed. In the absence of valid attacks on Prof. Cockburn’s actual methodology or qualifications,
13 Google’s *Daubert* motion fails.

14 INTRODUCTION

15 The intellectual property at issue in this case is immensely valuable for both Oracle and Google.
16 Oracle, formerly Sun Microsystems, has practiced the patents-in-suit and copyrighted materials
17 embodied in the Java platform for well over a decade. After Oracle acquired Sun for \$7.4 billion, Larry
18 Ellison, Oracle’s CEO, described Java as “the single most important software asset we have ever
19 acquired.” (Declaration of Fred Norton Ex. A (hereinafter “Norton Decl.”).) And Eric Schmidt, then
20 Google’s CEO, recently stated: “Google is positioning itself to earn \$10 billion or more per year in the
21 mobile device business, thanks to its Android operating system.” (Norton Decl. Ex. B.) As described
22 below, and as will be explained by both fact and expert witnesses at trial, the patents and copyrights at
23 issue are an essential part of both the Java platform and the Android platform.

24 Long before the infringement began, Google recognized that, in order to protect its advertising-
25 based business model, it needed to find a way to ensure that its web search technology was widely
26 available on mobile devices. Google repeatedly recognized that the mobile space is critical to the future
27 of Internet advertising and, consequently, the future of Google’s entire business. Meanwhile, Google’s
28 top competitors were making inroads into the mobile platform space, threatening to lock Google out

1 from markets for complementary search and other applications. Google concluded that, to respond to
2 that threat, it had to offer an “open” platform that would provide Google unfettered access to the mobile
3 environment for its core search and advertising products. The evidence will demonstrate that Google
4 had no effective alternatives to the Java intellectual property if it wanted to accomplish that objective.

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Indeed, faced with a significant head start by competitors in the mobile
8 space, including Apple’s iPhone, Google needed a competitive smartphone platform immediately.
9 Developing such a platform from scratch was not a viable option. Tapping into Java, with its well-
10 established, feature-rich development environment and massive developer community, solved Google’s
11 problem.

12 The core importance of Oracle’s intellectual property to Google is confirmed by the negotiating
13 record of the parties. Over the course of four years, Google engaged in three rounds of licensing
14 negotiations with Sun in connection with Android. Google repeatedly rejected the reasonable licensing
15 terms that Sun offered and ultimately chose to willfully infringe Oracle’s intellectual property and
16 release the Java-based Android platform, [REDACTED]

17 [REDACTED] Google did so because it was unwilling to accept the
18 terms that Sun proposed, which would have obliged Google to pay up-front royalties and an additional
19 royalty expressed as a percentage of Android-based advertising revenues, and to share control over the
20 Android ecosystem with Sun (thereby providing Sun a substantial revenue stream in addition to
21 royalties paid by Google). The combined value of this control and royalty structure would have been in
22 the billions of dollars.

23 In analyzing the value of the infringed intellectual property and modeling the outcome of a
24 hypothetical license negotiation between Oracle and Google just before the infringement began, Prof.
25 Cockburn properly takes into account the value of the technology to Oracle, Google’s need for that
26 technology, the harm to Oracle from allowing Google to use the technology in the manner it chose, the
27 enormous value to Google from being able to exploit the technology, and the absence of competitively
28 viable alternatives.

1 Google misconstrues or misunderstands Prof. Cockburn’s report in multiple key respects. For
2 example:

- 3 • Google falsely claims that Prof. Cockburn concludes that Oracle is owed anywhere
4 from \$1.4 to \$6.1 billion in damages. (Motion at 1, 16, 19). He does not. His
5 opinion is that the total damages that should be awarded to Oracle is \$2.6 billion.
(Weingartner Decl. Ex. A (hereinafter “Cockburn Report”) ¶ 8.)
- 6 • Google wavers between asserting that Prof. Cockburn applies a 20 percent royalty
7 rate (Motion at 2, 8) and a 50 percent royalty rate (Motion at 20), suggesting that
8 either was applied arbitrarily. Neither figure is correct. In fact, Prof. Cockburn does
9 not preordain a royalty rate; rather, he applies a careful set of analytical steps, based
10 on the evidence of what the parties would have considered had they entered into a
11 license that permitted Google to do precisely what it has done, to derive an
economically supportable royalty rate. (Cockburn Report ¶ 8 (opining that damages
would be split between a \$0.9–\$1.4 billion up-front payment plus a revenue share of
between 10 and 15 percent of Google advertising revenues on Android phones).)
- 12 • Google claims that Prof. Cockburn’s calculations would award a royalty based on the
13 “worldwide revenues from advertising displayed on Android phones.” (Motion at 9.)
14 In fact, Prof. Cockburn’s royalty calculations are based on the **incremental** value to
15 Google of Android compared to (and subtracting) the revenues it would have made if
16 there been no Android and Google earned all of its mobile advertising revenues from
17 other platforms. (Cockburn Report ¶ 264.)
- 18 • Google claims that Prof. Cockburn’s damages calculations are inflated by his
19 consideration of the fragmentation of Java. (Motion at 1, 6–7, 11.) In fact, while the
20 adverse consequences of fragmentation are important in informing Prof. Cockburn’s
21 analysis of how a reasonable royalty would be structured, the dollar amount that
22 Prof. Cockburn currently assigns to fragmentation is **zero**. (See Cockburn Report
Exhs. 12, 25, 26.)
- 23 • Google contends that Prof. Cockburn calculates damages through 2025. (Motion at
24 15.) In fact, Prof. Cockburn carefully divides up past and future damages and, after
25 considering a range of possible end dates from 2018 to 2025, concludes that the
reasonable royalty would likely run through 2021 – well short of the 2025 expiration
of the last patent at issue. (Cockburn Report ¶ 216.)
- 26 • Google claims that Prof. Cockburn is “ignoring the time-honored *Georgia-Pacific*
27 analysis” (Motion at 8) when, in fact, his report specifically considers each and every
Georgia-Pacific factor as part of the hypothetical negotiation, and reiterates his
28 thoughts regarding each factor in a separate Appendix. (Cockburn Report App’x C.)

In short, by relying on these mischaracterizations, Google attacks a straw man – a poor and inaccurate
caricature of Prof. Cockburn’s report – rather than the methodology and analysis Prof. Cockburn
actually employs. A *Daubert* motion cannot rest on a misapprehension of the opinions it seeks to

1 challenge. Prof. Cockburn’s actual methodology is consistent with accepted economic principles and
2 the law of patent and copyright infringement.

3 Prof. Cockburn’s damages analysis and calculations are supported by an abundance of evidence
4 and are reasonable in light of the parties’ commercial relationship and the magnitude of the profits at
5 stake. Prof. Cockburn’s overall calculation of \$2.6 billion in damages over a more than ten-year period
6 averages to approximately \$200 million per year out of the billions that Google stands to make from
7 Android. This analysis is patently reasonable and well-grounded in fact, law, and economics. Google
8 may dispute certain factual premises and assumptions employed by Prof. Cockburn, but those disputes
9 do not provide a basis for a *Daubert* motion.

10 **SUMMARY OF THE COCKBURN EXPERT REPORT**

11 Prof. Cockburn is a Harvard-educated professor of Finance and Economics and Everett W. Lord
12 Distinguished Faculty Scholar at the Boston University School of Management. He has provided
13 testimony in numerous cases concerning intellectual property damages and has never had his testimony
14 or opinions rejected on the basis of a *Daubert* challenge.

15 The hypothetical license approach that Prof. Cockburn applies in this case is routinely used by
16 damages experts in patent and copyright cases. Prof. Cockburn analyzes the hypothetical negotiation
17 by taking into account the anticipated gains to Google and anticipated losses to Oracle caused by the
18 infringement, allocating the result according to the Nash Bargaining Solution, a standard, accepted
19 methodology first posited by Nobel Laureate John Nash in the 1950s and widely used by economists to
20 model bargaining outcomes. Google does not challenge either the hypothetical license methodology or
21 the Nash Bargaining Solution – nor could it. Both the courts and the expert consulting firm retained by
22 Google in this case support them, the latter in an article published just last week. (*See, e.g.*, Norton
23 Decl. Ex. E) (article by Dr. Gregory Leonard’s consulting group, NERA Economic Consulting,
24 describing the methodology used by Prof. Cockburn as “rooted in rigorous, well-established economic
25 theory”).

26 Prof. Cockburn begins with an analysis of the value of the patents and copyrights at issue to
27 both Oracle (in the form of its importance to Java) and Google (in the form of its importance to
28 Android). (Cockburn Report ¶¶ 18–32, 122–33.) Recognizing that discovery is still ongoing and that

1 other witnesses – including engineers whose depositions have not yet been taken and technical experts
2 whose reports have not yet been submitted – will testify as to the technical benefits provided by the
3 intellectual property at issue, Prof. Cockburn provides his opinion as to the importance of the patents
4 and copyrights based on a combination of the evidentiary record thus far in the case, discussions with
5 Oracle’s technical expert, and (as instructed by the Court) “assumed fact scenario[s].” (Dkt. No. 56 at ¶
6 12.)

7 Next, Prof. Cockburn identifies the value that a prudent licensee would have placed on obtaining
8 the rights to the intellectual property at issue. (Cockburn Report ¶¶ 33–91, 98–104, 112, 196–229.) In
9 an extensive and detailed analysis based on Google’s documents, including its contemporaneous profit
10 and loss statements and revenue projections, Prof. Cockburn opines that Google would have anticipated
11 that its infringement would generate significant revenues from a variety of sources. (*Id.* ¶ 196.) To
12 calculate the present value of Google’s anticipated profits, he then subtracts out Google’s projected
13 costs and applies a discount rate that Google itself uses. (*Id.* ¶¶ 201–16.) He does *not* assign values in
14 his damages calculations to a number of other benefits of Android to Google, including its strategic
15 benefits to Google’s other businesses.¹ (*Id.* ¶ 218.) Finally, Prof. Cockburn subtracts out the value of
16 Google’s next best alternative – which he concludes would have been to rely on non-Google, non-Java
17 platforms to propagate Google advertising in the mobile environment – to estimate the “*incremental*
18 value” of the infringement, including the conservative assumption that Android did not expand the
19 market (*i.e.*, Google would have advertising revenue on precisely the same number of mobile units
20 irrespective of Android’s existence, even though it is very likely that the competitiveness of Android
21 has made the total number of units larger in the real world). (*Id.* ¶¶ 230–78 (emphasis in original); *see*
22 *also* Norton Decl. Ex. F at 259 (Google’s expert, Dr. Leonard, noted that a “sound economic approach”
23 is to ensure that the reasonable royalty “reflect[s] the incremental value (in dollars) of the patented
24 technology to the defendant as compared to the next best alternative.”).) The result is an anticipated
25

26 _____
27 ¹ Prof. Cockburn’s decision not to calculate damages from these sources rested in large part on
28 Google’s refusal thus far to produce evidence about its non-mobile business in discovery. When Oracle
asked a third-party source for this data, it refused even to sell that data to either Oracle or to Prof.
Cockburn because of its relationship with Google.

1 incremental profit to Google [REDACTED], depending on the projected revenue
2 figures applied and the length of time for which they are applied, ranging from ten years (2018) to
3 seventeen years (2025, the latest expiration date of any patent in suit). (Cockburn Report Ex. 24.)

4 On the other side of the bargaining table, Prof. Cockburn analyzes what Oracle’s position would
5 have been in the hypothetical license negotiation by evaluating the revenue and other benefits that it
6 reasonably would have expected to lose if it entered into the hypothetical license. (*Id.* ¶ 134–95.) Prof.
7 Cockburn analyzes and quantifies two separate components of this anticipated harm: the loss of Sun’s
8 own planned Java/Linux-based smartphone operating system that could not compete if Google gave
9 away essentially the same technology for free, and losses to its pre-existing Java revenue streams as a
10 result of the infringement. (*Id.* ¶¶ 135–56.) Prof. Cockburn also analyzes the harm from further
11 “fragmentation” of the Java platform only as an input in dividing damages between an up-front
12 payment and a running share of Android revenues. (*Id.* ¶¶ 158, 303–06.)

13 Finally, Prof. Cockburn uses the gain to Google and the loss to Oracle to understand the overall
14 value to be attained by the parties entering into the bargain. (*Id.* ¶¶ 280–85.) Prof. Cockburn calculates
15 that Google would reasonably have expected to gain \$4.8 billion through 2021, while Sun/Oracle would
16 reasonably have expected to lose \$410 million, for a net total of \$4.4 billion in gains from cooperation.
17 (*Id.* ¶ 287.) Applying the Nash Bargaining Solution, Professor Cockburn evenly splits the gains
18 between the two parties, on the assessment that the parties would have had equal bargaining power.
19 (*See* Norton Decl. Ex. F at 263 (Google’s expert, Dr. Leonard, describes how “economic models of
20 bargaining” provide that “when two companies are sufficiency patient and are roughly equally patient,
21 the gains to trade will be approximately equally divided.”).) Thus, as a result of cooperation, each party
22 would gain \$2.2 billion. Because Oracle came into the negotiation already expecting to earn \$410
23 million (an amount that would be lost as a result of granting this license), the amount that Google would
24 have paid to Sun, in October 2008 present value, is approximately \$2.6 billion: \$2.2 billion plus \$410
25 million. (Cockburn Report ¶ 287; Ex. 25.) Prof. Cockburn then uses the available evidence to divide
26 this royalty into past and future damages amounts, and between an upfront payment and a share of
27 Android revenues.

1 **STANDARD OF REVIEW**

2 As Google appears to agree, expert testimony is admissible under Federal Rule of Evidence 702
3 if it “rests on a reliable foundation and is relevant to the task at hand.” *Daubert*, 509 U.S. at 597.
4 “[T]he rules of evidence do not demand perfection. Rather, a court need only determine whether the
5 reasoning and methods underlying the expert testimony are reliable, and whether they have been
6 properly applied to the facts.” *Gutierrez v. Wells Fargo & Co.*, No. C 07-05923 WHA, 2010 WL
7 1233810, *11 (N.D. Cal. Mar. 26, 2010). “When the methodology is sound, and the evidence relied
8 upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above
9 this minimum threshold) may go to the testimony’s weight, but not its admissibility.” *i4i Ltd. P’ship v.*
10 *Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010), *aff’d on other grounds*, -- S. Ct. --, No. 10–290,
11 2011 WL 2224428 (June 9, 2011).

12 Google does not dispute that Prof. Cockburn’s reliance on a hypothetical negotiation and the
13 Nash Bargaining Solution comports with sound methodological standards, nor could it. *See, e.g.*,
14 *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1384 (Fed. Cir. 2001) (the Federal
15 Circuit has “endorsed the conceptual framework of a hypothetical negotiation between patentee and
16 infringer as a means for determining a reasonable royalty”); *i4i*, 598 F.3d at 854 (“We have consistently
17 upheld experts’ use of a hypothetical negotiation and *Georgia-Pacific* factors for estimating a
18 reasonable royalty.”). Thus, the sole issue for this motion is whether Prof. Cockburn properly applied
19 that methodology to the facts. He has. Accordingly, Google’s motion should be denied.²

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21
22 _____
23 ² Google has submitted its own expert declaration in support of its *Daubert* motion. (Declaration of Dr.
24 Gregory K. Leonard, Ph.D. (Dkt. No. 175).) But *Daubert* is not a battle of the experts. “Where experts
25 may reasonably differ as to the proper calculation of damages or harm, ‘[v]igorous cross-examination’
26 and ‘presentation of contrary evidence’ are the ‘traditional and appropriate means’ of attacking their
27 opinions.” *Gutierrez*, 2010 WL 1233810, at *10 (quoting *Daubert*, 509 U.S. at 596); *see also S.M. v.*
28 *J.K.*, 262 F.3d 914, 921 (9th Cir. 2001) (“A court may admit somewhat questionable testimony if it falls
within the range where experts might reasonably differ, and where the jury must decide among
conflicting views.” (quotations and citation omitted)), *amended by* 315 F.3d 1058 (9th Cir. 2003). The
appropriate place for Google to present Dr. Leonard’s opinion is in a rebuttal report or at his deposition.

1 **ARGUMENT**

2 The law is clear. “Only if the expert’s opinion is so fundamentally unsupported that it can offer
3 no assistance to the jury must such testimony be excluded.” *Fresenius Med. Care Holdings, Inc. v.*
4 *Baxter Int’l, Inc.*, No. C 03-1431 SBA, 2006 WL 1390416, *3 (N.D. Cal. May 18, 2006). Prof.
5 Cockburn far surpasses this “liberal standard of admissibility.” *Dorn v. Burlington N. Santa Fe R.R.*
6 *Co.*, 397 F.3d 1183, 1196 (9th Cir. 2005).

7 **A. Prof. Cockburn’s Calculations Do Not Rely On Any Unrecoverable Categories of**
8 **Damages**

9 Google contends that Prof. Cockburn improperly considered (1) Google’s advertising revenues
10 from Android phones, (2) Oracle’s “lost profits” resulting from the infringement, and (3) certain
11 fragmentation harms. (Motion at 9–11.) The first and second are legally incorrect; the third simply
12 mischaracterizes Prof. Cockburn’s report.

13 **1. Prof. Cockburn Correctly Considers Google’s Anticipated Android-Related**
14 **Advertising Revenues**

15 Google does not challenge the accuracy of Prof. Cockburn’s calculations and projections, which
16 are based mainly on Google’s own documents. Instead, it argues that Prof. Cockburn should have
17 assigned zero projected revenue to the infringement because Google does not derive any money directly
18 from the “sale” of Android software. (Motion at 9–10.) Google’s contention fails as a matter of law
19 and common sense. The idea that an infringer can immunize itself against damages, no matter how
20 much it profits from infringement, so long as it does not charge directly for the infringing product
21 would fly in the face of intellectual property law’s fundamental purposes. The courts have rejected this
22 argument.

23 Prof. Cockburn appropriately considers the gains that Google reasonably expected to flow from
24 its infringement. Although Android itself is nominally “free”, the record makes plain that Google
25 expected to earn billions of dollars from Android, largely through advertising on Android devices.
26 Google’s executives have stated publicly that “Android is hugely profitable” (Norton Decl. Ex. G at 9),
27 and that revenue from Android is “large enough to pay for all of the Android activities and a whole
28 bunch more” (Norton Decl. Ex. H). As Google executive Jonathan Rosenberg recently stated about
Google’s open-source strategy for Android, “This is not philanthropy. When the web is better, more

1 people use it more often, and that means they search more often.” (Norton Decl. Ex. I at 6.) Had
2 Google sought a license instead of infringing, Google and Oracle would certainly have considered and
3 accounted for those revenues because they determined the “anticipated amount of net profits that the
4 prospective licensee reasonably thinks he will make.” *Georgia-Pacific Corp. v. U.S. Plywood Corp.*,
5 318 F. Supp. 1116, 1121 (S.D.N.Y. 1970). It is nonsense to think that the parties would negotiate with
6 blinders on, ignoring the fact that Google, a company in the advertising business, expected to
7 significantly boost its advertising revenues through Android. In fact, Sun and Google discussed these
8 anticipated revenues in their initial negotiations. [REDACTED]

9 [REDACTED] There
10 is no reason to pretend now that these revenues do not exist, or would not have been considered in a
11 hypothetical license negotiation.

12 The case law establishes that Prof. Cockburn was entitled to consider Google’s ancillary
13 revenues under the *Georgia-Pacific* framework. Under *Georgia-Pacific* factor six, Prof. Cockburn
14 considered “[t]he effect of selling the patented specialty in promoting sales of other products of the
15 licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented
16 items. . . .” 318 F. Supp. at 1120. Google’s own expert, Dr. Leonard, has approved this exact
17 methodology: “The additional profits from sales of noninfringing products that the licensor and licensee
18 stand to make by practicing the patent at issue can be explicitly considered in determining the licensee’s
19 maximum willingness to pay and the licensor’s minimum willingness to accept for the patent.”

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21 ((Dr. Gregory K. Leonard & Dr. Lauren J. Stiroh eds., NERA 2005) (Norton Decl. Ex. J).

22 The Federal Circuit has also held that consideration of associated gains is appropriate. For
23 example, in *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, a reasonable-royalty case, the defendant
24 supplied infringing display racks to its customers for free in order to help display and sell unpatented
25 eyeglasses. 750 F.2d 1552, 1567 (Fed. Cir. 1984). The court held that the district court had improperly
26 excluded evidence of profits from eyeglass sales, notwithstanding the fact that no patent-in-suit covered
27 them, because the defendant “used the patented invention in promoting sales of” the eyeglasses. *Id.* at
28 1568. Thus, “the extent of the profits from such sales could be relevant in determining the amount of a

1 reasonable royalty. If, for example, sales were increased because of the infringing use of the displays,
2 that fact could affect the amount of royalties a potential licensee would be willing to pay.” *Id.* Other
3 cases have reached a similar result in holding that an expert may consider the sales of non-infringing
4 products and indirect revenue streams. *See, e.g., Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700,
5 710–11 (9th Cir. 2004) (plaintiff need only demonstrate “causal nexus” between the infringer’s profits
6 and infringement); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 930-34, 941 (2005)
7 (holding that “there is no question that . . . MGM [may] go forward with claims for damages” under a
8 theory that defendants generated income by selling advertising space on free software); *Garcia v.*
9 *Coleman*, No. C-07-2279 EMC, 2009 WL 799393 (N.D. Cal. Mar. 24, 2009) (denying judgment as a
10 matter of law to defendant where testimony established a causal nexus between sale of non-infringing
11 wine and infringing label).

12 The decisions Google relies on do not preclude consideration of its advertising revenues. First,
13 each of those decisions *upholds* a jury damages award. Second, two consider lost profits, not a
14 reasonable royalty, and are inapposite on that basis alone. *Paper Converting Mach. Co. v. Magna-*
15 *Graphics Corp.*, 745 F.2d 11 (Fed. Cir. 1984). *Kalman v. Berlyn*, 914 F.2d 1473, 1484-85 (Fed. Cir.
16 1990). The remaining opinion upheld a jury’s award of both lost profits and a reasonable royalty
17 because the evidence at trial was sufficient to show that the patented feature drove demand for the
18 entire product – a principle that Prof. Cockburn considers, and which is discussed further below.

19 *Fonar Corp. v. Gen. Elec. Co.*, 107 F.3d 1543, 1552–53 (Fed. Cir. 1997). None of these cases provides
20 a basis to exclude Prof. Cockburn’s testimony.

21 Prof. Cockburn’s analysis of the incremental benefit to Google of its infringement is consistent
22 with *Trans-World* and other pertinent caselaw. Google’s executives have admitted that Android is
23 more profitable to Google than other mobile platforms, *see* Norton Decl. Ex. G at 9,³ and Prof.

24
25 ³ Eric Schmidt: “[T]he evidence we have is that the people who use Android, search twice as much as
26 everything else. So, clearly there is more revenue associated with those searches. Other thing, of
27 course, is if they are using Android systems, the revenue that we share and the searches are shared with
28 the operator, but not with anybody else. So, again, it's more lucrative. So, not only is there more
searches, and there’s more ads, but it's also more lucrative. So, on that basis alone, Android is hugely
profitable”

1 Cockburn’s analysis ensures that only Android-related revenues attributable to the infringement are
2 counted. Prof. Cockburn was not required to ignore those substantial benefits, taken from Google’s
3 own documents. Google’s motion to exclude Prof. Cockburn’s testimony regarding incremental
4 revenues from advertising revenue should be denied.

5 **2. Professor Cockburn’s Consideration Of Oracle’s Anticipated Losses From The** 6 **Infringement Is Appropriate**

7 Google’s attempt to preclude consideration of Oracle’s reasonably-anticipated losses (*see*
8 Motion at 10–11) cannot be reconciled with the mandates of *Georgia-Pacific*, common sense, or the
9 evidence in this case. Google cites no case for its proposition that it is improper to consider Oracle’s
10 anticipated losses, and several cases reject this argument. *See, e.g., SEB S.A. v. Montgomery Ward &*
11 *Co.*, No. 99 Civ. 9284 SCR, 2007 WL 3165783, *7 (S.D.N.Y. Oct. 9, 2007) (rejecting a lost-profits
12 damages assessment but nonetheless ruling that the court’s decision “does not mean that the jury could
13 not consider [the patentee’s] expectations of profits as part of a hypothetical negotiation”), *vacated on*
14 *other grounds*, 2008 WL 4540416 (S.D.N.Y. Oct. 1, 2008); *z4 Techs., Inc. v. Microsoft Corp.*, No.
15 6:06-CV-142, 2006 WL 2401099, *10 (E.D. Tex. Aug. 18, 2006) (rejecting defendant’s argument that
16 plaintiff’s expert’s royalty calculation was “improperly based on a lost profits model” because the
17 expert had “testified with regard to a hypothetical negotiation and based his royalty calculation on
18 hypothetical royalty rates, infringing units sold, revenue from the infringed products, and an
19 explanation of how he reached his damage amount”), *aff’d*, 507 F.3d 1340 (Fed. Cir. 2007).

20 Instead, *Georgia-Pacific* requires consideration of “the amount that a willing licensor would
21 have accepted,” including “the anticipated amount of profits that the prospective licensor **reasonably**
22 **thinks he would lose** as a result of licensing the patent as compared to the anticipated royalty income. . .
23 .” *Georgia-Pacific*, 318 F. Supp. at 1121 (emphasis added). This is exactly what Prof. Cockburn did.
24 (Cockburn Report ¶¶ 134–80.) For example, as reflected in Prof. Cockburn’s report, in 2006, Sun and
25 Google discussed the losses that Sun would experience as a result of Android. (*See id.* ¶ 144.) Having
26 infringed, Google now seeks to prevent consideration of those anticipated losses in order to pay a lower
27 royalty. That approach does not reflect what would occur in a real-world negotiation, and would
28 provide an incentive to infringe rather than seek a license. Google’s argument is meritless.

1 **3. Professor Cockburn Does Not Attach A Dollar Value To Fragmentation—But His**
2 **Consideration Of It Is Appropriate**

3 Google repeatedly states that a “substantial portion of Cockburn’s damages calculation is based
4 on so-called ‘fragmentation’” (*i.e.*, harm to the Java platform from loss of Java’s core “write once, run
5 anywhere” promise that has made it the programming environment of choice for millions of
6 developers). (Motion at 6, 11–12.) Google is wrong. Prof. Cockburn did not assign a dollar value to
7 fragmentation. (*See* Cockburn Report ¶¶ 181–95 (calculating Oracle’s expectations based on two
8 factors alone: forecasted Java ME and Acadia⁴ revenues); *id.* Exs. 12, 25, 26 (fragmentation adds zero
9 dollars to the total expected losses).)

10 Prof. Cockburn considers fragmentation only when analyzing the *structure* of the hypothetical
11 license because those harms are “difficult to precisely quantify.” (Cockburn Report ¶ 158); *see also*
12 *Sun Microsystems, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 992, 998 (N.D. Cal. 2000) (granting an
13 injunction after finding that harm to Sun’s revenues and reputation resulting from Microsoft’s
14 distribution of software products incorporating non-compliant Java Technology was “difficult to
15 quantify”). After examining evidence that the parties actually considered a license that included both
16 an up-front payment and a revenue share (*id.* ¶¶ 290–300), Prof. Cockburn concludes that Oracle would
17 have required, and Google would have paid, a large up-front payment to compensate Oracle for the
18 business risk Oracle would have incurred by licensing its technology to Google for Android, an open-
19 source and incompatible Java-based implementation (*Id.* ¶¶ 303–06).

20 Indeed, the evidence in this case will show that Sun and Oracle have vigorously defended
21 against fragmentation. [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED] Google chose to ignore Sun’s requests to protect the
25 integrity of its platform. [REDACTED]

26 [REDACTED]

27 ⁴ Acadia was the name of Sun’s plan for a complete Java/Linux-based smartphone stack. (Cockburn
28 Report ¶¶ 17, 135–42.)

1 [REDACTED]
2 [REDACTED]
3 Google not only distorts Prof. Cockburn’s analysis and disregards the evidentiary basis for that
4 analysis, it resorts to nonsensical statements in discussing fragmentation, arguing that Oracle “tolerated
5 fragmentation” (and presumably therefore placed a low value on it) because Oracle “offers a license to
6 allow . . . developers to continue writing Java variants *as long as those variants are tested for*
7 *compatibility with Java using the licensed Testing [sic] Compatibility Kit (‘TCK’).*”⁵ (Motion at 7
8 (emphasis added); *see also id.* at 20.) But the TCK is exactly the point. A licensee who runs the TCK
9 ships a *compatible* version of Java, which protects against fragmentation.⁶ Prof. Cockburn explains this
10 in his report. (*See, e.g.,* Cockburn Report ¶ 174.)

11 In any event, Google’s reliance on its critique of the “factual basis for Cockburn’s approach,”
12 *i.e.,* Sun’s purported “tolerance” of fragmentation (Motion at 7, 20), raises a simple factual dispute.
13 This dispute is properly resolved by the factfinder.

14 **B. Professor Cockburn’s Calculations Properly Account For The Value Of The**
15 **Intellectual Property At Issue**

16 Google contends that Prof. Cockburn failed adequately to address the “value of the patented
17 technology” and that he should have considered the technology on a “claim by claim” basis to calculate
18 damages. (Motion at 12–16.) Google misrepresents Prof. Cockburn’s report and misunderstands the
19 purpose of his analysis. Its argument is insufficient as a *Daubert* challenge and fails to consider this
20 Court’s express instructions to regarding an opinion-based, assumed-fact scenario. (Dkt. No. 56 at ¶
21 12.)
22

23 _____
24 ⁵ “TCK” actually stands for *technology* compatibility kit, as the documents Google cites explain.

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 First, Google improperly assumes that a damages expert must weigh in with technical expertise
2 before the technical expert has delivered his report. That is inconsistent with this Court’s case and
3 expert discovery schedule.

4 Second, Professor Cockburn did, in fact, carefully consider the value of the technology at issue.
5 The evidence so far indicates that the infringing patents and copyrighted code are core to Java and
6 provide significant improvements to existing technologies. Prof. Cockburn considered the fact that
7 neither Sun nor Oracle has ever licensed the patents or copyrights piecemeal and that Sun was not
8 bargaining with Google in 2006 for any kind of patent-by-patent license. (Cockburn Report ¶¶ 17–25);
9 *see also* Motion at 6 (admitting that Google and Sun negotiated a license for “the entirety of Java”).⁷
10 Prof. Cockburn considered that the evidence at trial will show that the “smallest salable infringing unit”
11 that practices the seven patents in suit is Android. *Cf. Cornell Univ. v. Hewlett-Packard Co.*, 609 F.
12 Supp. 2d 279, 288 (N.D.N.Y. 2009) (Rader, J., by designation). Google’s expert, Dr. Leonard, appears
13 to support this approach, as he wrote earlier this month that “[w]hen there are complementarities
14 between assets, such that the combined use of two or more assets is worth more than their individual
15 use, no unique way exists to apportion the overall value of the product among the assets (including the
16 patented technology at issue).” (Norton Decl. Ex. F, at 257.)

17 Importantly, Prof. Cockburn also considered ample evidence that suggests that the patents and
18 copyrights in suit are essential *to Android*, [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 _____
27 ⁷ It is also worth noting that Google has thus far withheld some of the evidence that may suggest that
28 apportionment is necessary. If ongoing discovery reveals facts that require revision of this analysis,
Professor Cockburn has acknowledged that he will “revise [his] analysis” (Cockburn Report ¶ 8.)

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] Even if Prof.

5 Cockburn were to ignore all of the evidence that showed that the intellectual property at issue and Java
6 were essential parts of Android’s strategy, efficiency improvements can form the basis for customer
7 demand. *Funai Elec. Co. v. Daewoo Elec. Corp.*, 616 F.3d 1357, 1375 (Fed. Cir. 2010).

8 Most importantly, Google’s disagreement that the patents and copyrights in suit drive demand
9 for Android is simply another factual dispute. After hearing all of the evidence in this case, including
10 technical expert testimony, the jury will be able to resolve the factual question of whether the
11 intellectual property at issue drove demand for Android. Google purports to cite different evidence in
12 order to come to a different conclusion, but “[t]he conflicting opinions merely create a credibility
13 question for the jury to resolve and [the] plaintiff is entitled to the benefit of every favorable inference”
14 in deciding a *Daubert* motion. *IGT v. Alliance Gaming Corp.*, No. 2:04-CV-1676-RCJ-RJJ, 2008 WL
15 7084605, at *11 (D. Nev. Oct. 21, 2008). As the Advisory Committee note to Rule 702 states,

16 When facts are in dispute, experts sometimes reach different conclusions based on
17 competing versions of the facts. The emphasis in the amendment on ‘sufficient facts or
18 data’ is not intended to authorize a trial court to exclude an expert’s testimony on the
ground that the court believes one version of the facts and not the other.

19 FED. R. EVID. 702, Advisory Committee Note.

20 None of Google’s cited decisions require exclusion of a damages expert’s testimony before the
21 technical expert has been able to present his report, and before the close of discovery. Each of the four
22 cases Google cites in support of its argument were decided after presentation of evidence at trial, not as
23 the result of a pre-trial ruling, much less a ruling before the close of fact discovery. (*See* Motion at 12–
24 16.) By contrast, decisions concerning *pre-trial* exclusion motions have rejected Google’s argument.
25 *See, e.g., Regents of the Univ. of Calif. v. Monsanto Co.*, No. C 04-0634 PJH, 2005 WL 3454107, *28
26 (N.D. Cal. Dec. 16, 2005).

27 Finally, in support of its argument that the patented technology is worthless, Google
28 misrepresents the time frame for Prof. Cockburn’s calculations, incorrectly asserting that “Cockburn

1 concludes that damages run throughout the life of the ‘720 patent no matter what.” (Motion at 15.)⁸ In
2 fact, Prof. Cockburn concludes that a reasonable royalty would cover a much shorter period, based on
3 his conservative assessment (based on experience with and research regarding product lifecycles) that
4 Android revenues will increase through 2015 and then decline to zero. (See Cockburn Report ¶¶ 215–
5 16.) Even though Oracle has every right to collect damages through 2025, the life of the ‘720 patent (or
6 even longer to account for the copyright infringement), the vast majority of the royalty proffered by
7 Prof. Cockburn is for infringement through 2018, around when the bulk of the patents expire. See *Zila,*
8 *Inc. v. Tinnell*, 502 F.3d 1014, 1019, 1026 (9th Cir. 2007) (“the ability to exact royalties runs to the last
9 of the patents providing monopoly protection.”). This is an appropriate calculation and is not subject to
10 attack under *Daubert*.

11 **C. Professor Cockburn’s Calculations Do Not Reflect Any “Legal Errors”**

12 Google contends that Prof. Cockburn (1) engages in double counting by offering an opinion on
13 future damages while Oracle seeks an injunction, (2) improperly includes revenues from international
14 sales, and (3) sets the date of the hypothetical negotiation in 2008. (Motion at 16–18.) None of these
15 attacks has merit.

16 **1. Professor Cockburn Does Not Double Count Future Damages**

17 Google’s representation of Prof. Cockburn’s treatment of future damages is selectively quoted
18 and misleading. Consistent with this Court’s Case Management Order (Dkt. No. 56 at ¶ 9), Prof.
19 Cockburn separately calculates past damages “through the date of the expert report” and future
20 damages. (Cockburn Report ¶¶ 319–20 & Exs. 29–30.) If an injunction is granted, then only past
21 damages need be awarded, in the form of the up-front payment plus revenue sharing from 2008 through
22 the date of trial. However, as the damages report and its calculations are due before the parties know
23

24 ⁸ Google’s assertions as to the value of the ‘720 patent represent a factual dispute and are not cognizable
25 on a *Daubert* motion. Oracle disputes Google’s assertion that the patent is valueless, and forthcoming
26 technical analysis will show that it provides substantial value to Android. Further, the fact that Oracle
27 licenses the ‘720 patent only “while they are licensing” certain other technologies (a point that Google
28 concedes), does not in and of itself render the patent valueless. (See Motion at 6); see, e.g., *Honeywell*
Int’l Inc. v. Universal Avionics Sys. Corp., 426 F. Supp. 2d 211, 226 (D. Del. 2006) (rejecting argument
that patented technology has “little value because it was allegedly ‘given away for free’” where it was
only given away to existing customers).

1 whether an injunction will be ordered, Prof. Cockburn includes a future damages calculation to be used
2 in the event that the Court and the parties opt for equitable relief in the form of an ongoing royalty.
3 Google “cites no authority for the proposition that an expert must expressly discount for the value of
4 any potential injunction in the content of his opinion as a prerequisite to providing expert testimony.”
5 *Monsanto*, 2005 WL 3454107, at *29.

6 **2. Professor Cockburn Does Not Improperly Include Worldwide Revenues**

7 Google erroneously argues that Prof. Cockburn’s damages calculation fails to exclude
8 “extraterritorial—and therefore noninfringing—activities.” (Motion at 17.) Google’s argument is
9 misplaced, as it raises a factual dispute concerning liability and the source of infringement for which the
10 record is still being developed, rather than a contention about damages.

11 First, Google appears to assert that *Oracle’s* current Java license revenues disproportionately
12 come from outside the United States, and concludes on that basis that *Google’s* revenues from its
13 Android-based infringement would as well, proclaiming that “up to 88% of Cockburn’s damages total
14 is not recoverable for infringement of a United States patent or copyright.” (*Id.*) The Court should
15 reject this bait-and-switch. The location of Java sales is irrelevant to the question of Google’s
16 infringement and the damages owed to Oracle as a result of Google’s sales.

17 Second, Google cites no authority for its contention that foreign sales associated with infringing
18 products categorically fall outside the measure of damages. Oracle has asserted four different theories
19 of patent liability in this case, arising under 35 U.S.C. § 271(a), (b), (c), and (f). Oracle has also
20 asserted copyright violations. Several of these theories would entitle Oracle to damages that would
21 include foreign sales. *See, e.g., Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1371 (Fed. Cir.
22 2008) (“[T]he Copyright Act does not explicitly require that sales be in the United States”); *Uniloc*
23 *USA, Inc. v. Microsoft Corp.*, 632 F. Supp. 2d 147, 155 (D.R.I. 2009) (holding that evidence of foreign
24 licenses may be included in damages calculation under § 271(a) in certain circumstances, and noting
25 that there was a jury question as to whether the accused product was “used” in the United States), *rev’d*
26 *on other grounds*, 632 F.3d 1292 (Fed. Cir. 2011); *Informatica Corp. v. Bus. Objects Data Integration,*
27 *Inc.*, 489 F. Supp. 2d 1075, 1083 (N.D. Cal. 2007) (foreign sales may fall within scope of § 271(f));

1 *DataQuill Ltd. v. Handspring, Inc.*, No. 01 C 4635, 2004 WL 1102309, at *5 (N.D. Ill. May 10, 2004)
2 (foreign sales may fall within scope of § 271).

3 To the extent that Google contends that some of its “activities” are “extraterritorial – and
4 therefore noninfringing,” or, in other words, that it is not liable for such conduct under 35 U.S.C. § 271
5 or 17 U.S.C. § 106, Google puts the cart (damages) before the horse (infringement). As a damages
6 expert, Prof. Cockburn assumes that the patents and copyrights in suit are valid and infringed, as he
7 must. (Cockburn Report ¶ 5); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir.
8 2009) (“The hypothetical negotiation . . . assumes that the asserted patent claims are valid and
9 infringed.”); *Design Ideas, Ltd. v. Things Remembered, Inc.*, No. 07-3077, 2009 WL 1259035, *4 (C.D.
10 Ill. May 6, 2009) (assuming for purposes of the *Daubert* motion that plaintiff can establish copyright
11 infringement). Any argument about the extent of infringement is a liability issue, not a damages issue,
12 and so is beyond the scope of a *Daubert* motion. *See, e.g., Tech. Patents, LLC v. Deutsche Telekom*
13 *AG*, 573 F. Supp. 2d 903 (D. Md. 2008) (“Just as it remains a question of fact whether the Defendants
14 are infringing the patents-in-suit under § 271(a), it remains a question of fact whether the foreign
15 activities are infringing under § 271(f).”). Google fails to discuss these legal principles.

16 Finally, Google does not identify a single piece of evidence that, if true, would render damages
17 for foreign sales unavailable as a matter of law. There is no evidence supporting Google’s position in
18 the negotiation history between Google and Sun and, indeed, it is plausible that the rate would have
19 been higher for a U.S.-only license. (*See, e.g.,* Cockburn Report ¶ 300 (citing Verizon and T-Mobile
20 revenue share contracts).)

21 Google has identified no error – legal, methodological, or factual – in Prof. Cockburn’s use of
22 Google’s revenue projections, and provides no basis to exclude his testimony.

23 **3. Professor Cockburn Correctly Assesses The Hypothetical Negotiation As Of** 24 **October 2008**

25 Prof. Cockburn’s use of October 22, 2008, as the date of the hypothetical negotiation is correct.
26 This Court recently held in both the patent and copyright contexts that the date of the hypothetical
27 negotiation is the date that the infringing product was first offered for sale in the United States.
28 *Conceptus, Inc. v. Hologic, Inc.*, No. C 09-02280 WHA, 2010 WL 5211454, *12 (N.D. Cal. Dec. 16,

1 2010); *Microsoft Corp. v. E & M Internet Bookstore, Inc.*, No. C 06-06707 WHA, 2008 WL 191346, *3
2 (N.D. Cal. Jan. 22, 2008). Other courts are in accord. *See, e.g., Applied Med. Res. Corp. v. U.S.*
3 *Surgical Corp.*, 435 F.3d 1356, 1364 (Fed. Cir. 2006).

4 The date when all of the accused functionalities were available for download, according to
5 Android’s website, is 2008, when the first Android phone was commercially shipped (October 22), the
6 Android 1.0 software developer kit (“SDK”) was available (September 23), and the Android source
7 code was released (October 21). (*See* Norton Decl. Ex. L (Android Timeline).) Google apparently
8 thinks that the “*early look*” SDK, available in November 2007, is the appropriate date for the
9 hypothetical negotiation (Motion at 18). But that early-look provided developers with only the
10 “opportunity to provide feedback and shape the SDK’s development.” *Id.* Google does not dispute that
11 the Android platform was not available on an open-source basis at this point, or that the SDK was only
12 in its nascent stages.

13 Equally important, the precise start date here is of little consequence. Prof. Cockburn cites
14 evidence that demonstrates that whether the negotiation took place in 2007 or 2008, Google’s and
15 Oracle’s expectations, concerns, and needs were substantially the same. (*See* Cockburn Report ¶¶ 37,
16 38, 47, 59, 66, 74, 78, 100–04, 109, 122, 124, 126–27, 135, 137, 141, 144, 164–65, 202, 221, 246, 249,
17 330.) *See also Lucent*, 580 F.3d at 1333 (patent law “permits and often requires a court to look to
18 events and facts that occurred thereafter and that could not have been known to or predicted by the
19 hypothesized negotiators”); *Honeywell Int’l, Inc. v. Hamilton Sundstrand Corp.*, 378 F. Supp. 2d 459,
20 464 (D. Del. 2005) (“the ascertainment of [a] hypothetical negotiation date does not rigidly foreclose
21 the factfinder from considering subsequent events.”). There was no disqualifying error in Prof.
22 Cockburn’s analysis.

23 **D. Professor Cockburn Considered Copyright Damages**

24 Google’s contention that Prof. Cockburn offers “no meaningful analysis regarding copyright
25 damages” (Motion at 24–25) flatly misrepresents Prof. Cockburn’s report. The report discusses the
26 copyrighted material reflected in Java class libraries, which is “important to the existing set of Java
27 developers upon which Google relied to write applications for Android.” (Cockburn Report ¶¶ 9, 21,
28 22, 24, 110, 112–13, 129–33, 232, 349). Copyright law enables a damages framework informed not

1 only by an infringer’s profits analysis (which Prof. Cockburn addresses in conclusion because it is
2 subsumed in his previous analysis), but also by a hypothetical license analysis, which Prof. Cockburn
3 here expressly applies to both the patent and copyright infringement at issue. *Polar Bear*, 384 F.3d at
4 708–09; cf. *Oracle Corp. v. SAP AG*, 734 F. Supp. 2d 956, 970–71 (N.D. Cal. 2010). Google’s
5 argument provides no basis for excluding Prof. Cockburn’s opinions regarding copyright damages.

6 **E. The Cockburn Report Reflects Careful Consideration Of The Relevant Evidence**
7 **And Market Realities**

8 Google argues that Prof. Cockburn “ignores record facts” in a number of respects. (Motion at
9 18–24.) Even if true (and it is not, as explained below), these are jury arguments, not a proper basis for
10 a *Daubert* motion. “The existence of other facts . . . does not mean that the facts used failed to meet the
11 minimum standards of relevance or reliability.” *i4i*, 598 F.3d at 855–56. Even where the data an expert
12 relies on is “imperfect, and more (or different) data might have resulted in a ‘better’ or more ‘accurate’
13 estimate in the absolute sense, it is not the district court’s role under *Daubert* to evaluate the correctness
14 of facts underlying an expert’s testimony. Questions about what facts are most relevant or reliable . . .
15 are for the jury.” *Id.* at 856 (quotations omitted).

16 **1. Professor Cockburn Carefully Considered Evidence Regarding The Substantial**
17 **Value Of Java**

18 Google’s allegations concerning the market value of Java rest on a fundamental misreading of
19 the evidence it cites. [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 _____

25 9 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] Crucially, none of these valuations reflect the value of the technology *to*
4 *Google*, which comprises the large majority of the value Prof. Cockburn calculated and allocated as part
5 of the hypothetical license negotiation. These simple evidentiary disputes – in which Google misreads
6 some figures and ignores others – are for the jury to resolve.

7 **2. Professor Cockburn Correctly Considered Other Licenses**

8 In yet another effort to disqualify Prof. Cockburn simply for not relying on the evidence that
9 Google prefers, Google attacks Dr. Cockburn for “ignoring Sun’s actual JavaME licenses” (Motion at
10 22) and for considering other mobile-related agreements (*id.* at 22–24). That attack is factually and
11 legally baseless. Dr. Cockburn, in fact, carefully considered, but distinguished on multiple bases, Sun’s
12 Java licenses. (Cockburn Report ¶¶ 335–36.) Google may prefer its own assessment of these licenses,
13 but that is for the jury to decide.

14 Furthermore, Prof. Cockburn’s opinions are not undermined simply because he considered other
15 mobile-related IP agreements, such as the one between Nokia and Qualcomm. Prof. Cockburn does not
16 conclude that any of those licenses are comparable under *Georgia-Pacific* and *Lucent*. Rather, he uses
17 the Nokia-Qualcomm agreement to demonstrate that it is not unprecedented to structure an agreement
18 to include both a substantial up-front payment and some form of revenue share (*id.* ¶¶ 342–44), and
19 uses the Nokia-Microsoft agreement to confirm that others have placed a high value on mobile platform
20 technologies, (*Id.* ¶ 341.)¹⁰ *Lucent* and its progeny, which rejected an expert’s opinion that licenses *are*
21 comparable, in no way bars Prof. Cockburn’s opinion that those agreements *are not* comparable. Any
22 concerns that Google has about Prof. Cockburn’s consideration of those agreements can and should be
23 addressed through cross-examination.

24
25
26 _____
27 ¹⁰ Contrary to Dr. Leonard’s contentions (Leonard Decl. ¶¶ 17–21), Prof. Cockburn carefully
28 considered Google’s potential use of other platforms, and decided that none was a suitable non-
infringing alternative. (Cockburn Report ¶¶ 230–78.)

1 **3. Professor Cockburn Correctly Considered A License for an Incompatible Version**
2 **of Java**

3 Google’s insistence that the hypothetical negotiation would have been for a compatible
4 implementation of the infringed technology, rather than the product Google actually created, asks this
5 Court to deny reality and disregard the law. (*See* Motion at 20–22.)

6 First, Google’s arguments about Java’s fragmentation prior to Android are simply factual
7 disputes that Oracle will vigorously contest. A plethora of evidence demonstrates that Java is a vibrant
8 platform and that Sun and Oracle have fiercely defended against fragmentation, for example, by
9 successfully suing Microsoft over conduct similar to Google’s here.¹¹ Additionally, Prof. Cockburn
10 addresses Google’s contentions in his report. Though he acknowledges that, “like all platforms, Java
11 has suffered from some degree of fragmentation even without Android,” [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 More to the point, Google is, in fact, using an incompatible implementation of Java. Its
15 witnesses have repeatedly admitted that Android has never passed the TCK, [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 Google insists that Prof. Cockburn should have placed greater emphasis on the narrow terms of the
19 license for which Sun and Google negotiated in 2006 (Motion at 19), but completely disregards Prof.
20 Cockburn’s broader view of those negotiations (*i.e.*, taking into account both the small up-front
21 payment and a revenue-share percentage for a license to create a compatible, shared implementation,
22 *plus* the substantial value that this implementation would have created for Sun compared to the
23 situation that was thrust upon it by Google’s actual infringement). Google cannot now seek a
24 compatible license, or invoke the benefit of FRAND commitments that apply only to compatible

25 _____
26 ¹¹ Google contends that in the Sun/Microsoft settlement, Sun valued the harm from fragmentation at
27 only \$20 million, but the parties entered into an agreement providing for up to \$1.35 billion payable by
28 Microsoft to Sun for use of Sun’s patents. The relevance of those agreements is a factual matter; it is
not grounds for a *Daubert* challenge.

1 licenses. In short, Google chose to infringe instead of working with Sun to create a compatible
2 implementation of the platform with joint control over the ecosystem. As many courts have observed,

3 The infringer would have nothing to lose, and everything to gain if he could count on
4 paying only the normal, routine royalty non-infringers might have paid. As said by this
5 court in another context, the infringer would be in a “heads-I-win, tails-you-lose”
6 position.

7 *Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1158 (6th Cir. 1978). To hold that
8 Google may reject Oracle’s licensing terms, infringe its IP, fragment its platform, and then pay only
9 what it would have paid for a narrower license in 2006, would be inconsistent with patent and copyright
10 law, and would provide an incentive for Google to infringe.

11 Finally, there is no support for the proposition that the hypothetical license must differ in scope
12 and dimension from the infringer’s actual implementation of the patents and copyrights at issue. Patent
13 damages “compensate for the infringement.” 35 U.S.C. § 284. Android has deprived Oracle of the
14 benefits that a compliant, shared implementation would have provided, and taken those benefits for
15 itself. A reasonable patentee would demand a higher royalty under those circumstances. Google
16 provides no support to the contrary.

17 CONCLUSION

18 For all the aforementioned reasons, Oracle respectfully requests that the Court deny Google’s
19 *Daubert* motion.

20 Dated: June 28, 2011

BOIES, SCHILLER & FLEXNER LLP

21 By: /s/ Alanna Rutherford
22 Alanna Rutherford

23 *Attorneys for Plaintiff*
24 ORACLE AMERICA, INC.