

1 P. CRAIG CARDON, Cal. Bar No. 168646
 BRIAN R. BLACKMAN, Cal. Bar No. 196996
 2 KENDALL M. BURTON, Cal. Bar No. 228720
 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
 3 Four Embarcadero Center, 17th Floor
 San Francisco, California 94111-4106
 4 Telephone: 415-434-9100
 Facsimile: 415-434-3947
 5

6 TIMOTHY H. KRATZ (Admitted *Pro Hac Vice*)
 LUKE ANDERSON (Admitted *Pro Hac Vice*)
 7 MCGUIRE WOODS, L.L.P
 1170 Peachtree Street, N.E., Suite 2100
 8 Atlanta, Georgia 30309
 Telephone: 404.443.5500
 9 Facsimile: 404.443.5751

10 Attorneys for DIGITAL ENVOY, INC.

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

14 DIGITAL ENVOY, INC.,
 15 Plaintiff/Counterdefendant,
 16 v.
 17 GOOGLE, INC.,
 18 Defendant/Counterclaimant.

Case No. C 04 01497 RS

**DIGITAL ENVOY'S SUPPLEMENTAL
 BRIEF IN SUPPORT OF DIGITAL
 ENVOY'S MOTIONS TO COMPEL.**

**[Filed Pursuant to Court at Hearing on
 June 22, 2005]**

The Honorable Richard Seeborg

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I. INTRODUCTION

1 Google continues to mount an all-out effort to avoid meaningful discovery in this case.
2
3 First, it attempts to impose on Digital Envoy significant preliminary burdens of essentially proving
4 its case, not contemplated by the discovery rules, before Google will engage in discovery.
5 Second, Google has complained loudly that responding to Digital Envoy's discovery requests
6 would be "burdensome." Digital Envoy in an effort to use the meet and confer process to address
7 Google's complaints, offered to modify its discovery requests to minimize Google's alleged
8 "burden." In response, Google has refused to budge, despite Digital Envoy's significant reduction
9 in the scope of its relevant discovery requests, still insisting that Digital Envoy must offer
10 "evidence" of its entitlement to the requested information. Finally (and perhaps most distressing),
11 Google continues to misrepresent the factual context in which Digital Envoy is seeking discovery
12 by minimizing the value and importance of Digital Envoy's technology in Google's AdSense
13 products and misconstruing the damages available to Digital Envoy due to Google's
14 misappropriation. This case should be decided on the merits, not on the basis of Google's ability
15 to maneuver through the discovery process. For these reasons, the Court should grant Digital
16 Envoy's motions to compel.

II. ARGUMENT & AUTHORITIES

A. Digital Envoy Is Entitled to Conduct Discovery of Information and Documents Relevant to Its Claims and Defenses In This Case.

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20 Federal Rule of Civil Procedure 26(b) provides that: "Parties may obtain discovery
21 regarding *any matter, not privileged, that is relevant to the claim or defense of any party. . . .*" See
22 Fed. R. Civ. P. 26(b). In interpreting the federal rules, "[t]he Supreme Court has consistently held
23 that the discovery rules should be accorded a 'broad and liberal scope.'" *Contratto v. Ethicon,*
24 *Inc.*, 225 F.R.D. 593, 595 (N.D. Cal. 2004) (citing *Schlegenhaut v. Holder*, 279 U.S. 104, 114-115
25 (1964)). Thus, "[u]nless information is specifically privileged or otherwise protected by statute, it
26 is discoverable under Rule 26(b)(1)." *Contratto*, 225 F.R.D. at 595.

27 Digital Envoy has propounded discovery requests seeking information relevant to its claim
28 that Google misappropriated Digital Envoy's trade secrets by licensing Digital Envoy's

1 technology to third parties as part of Google's AdSense programs in violation of the parties'
2 Licensing Agreement. Specifically, Digital Envoy is seeking limited information and documents
3 related to Google's negotiation and licensing of its AdSense programs to third parties, as well as
4 the magnitude and detail of the revenue Google earned as a result of its utilization of Digital
5 Envoy's technology. Digital Envoy's legitimate and legally-sanctioned discovery requests are no
6 wild goose chase or fishing expedition. Here, Google cannot dispute that:

- 7 i) Google's AdSense programs made use of and were enhanced by Digital Envoy's
8 technology for geo-targeting purposes; and
- 9 ii) Google earned substantial revenues from its AdSense programs.

10 Based on these undisputed facts, Digital Envoy is entitled to discover the nature and
11 magnitude of Google's licensing scheme for purposes of establishing Google's liability and
12 Digital Envoy's damages. Digital Envoy has even attempted, through the meet and confer
13 process, to modify and more finely target its discovery requests in response to Google's
14 complaints regarding the alleged burdensomeness of Digital Envoy's discovery requests. *See* June
15 28, 2005 Letter from Robert J. Waddell, Jr. to David H. Kramer, attached hereto as Exh. A.
16 Google has refused any meaningful compromise and remains steadfast in its refusal to produce
17 relevant and proper discovery information. *See* July 2, 2005 E-mail from David H. Kramer to
18 Robert J. Waddell, Jr., attached hereto as Exh. B. Google continues to insist, as a condition of
19 responding to discovery requests, that Digital Envoy meet a higher burden than that imposed by
20 the Federal Rules. For these reasons, the Court should grant Digital Envoy's motions to compel.

21 **1. Digital Envoy's discovery requests regarding AdSense are inclusive – covering**
22 **both AdSense for Search and AdSense for Content.**

23 As an initial matter, Digital Envoy is properly seeking documents and information related
24 to Google's AdSense programs including both AdSense for Content and AdSense for Search.
25 Google's assertion that the Amended Complaint addresses only AdSense for Content is betrayed
26 by the actual allegations in the Amended Complaint. By way of example, in its Amended
27 Complaint, Digital Envoy alleges:

1 At the time of the Agreement, Google had just begun to sign agreement with other
2 Internet companies to power search services on those companies' sites. However,
3 Google did not supply advertising services to third party sites at that time, had not
4 contemplated providing such services and did not disclose to Digital Envoy its
5 intention to enter this business.

6 *See* Amended Complaint, ¶ 35 (emphasis in original). Digital Envoy also expressly *describes* how
7 (i) Google's providing advertisements on third party websites to which it was providing web
8 search services (the so-called AdSense for Search Program or "AFS") and (ii) Google's
9 syndication of advertisements on third party sites (the so called "AdSense for Content Program" or
10 "AFC") both violate License Agreement. *See id.*, ¶¶ 37 – 39 (under the bolded heading "Google
11 Misuse of Digital Envoy's Technology").

12 Indeed, repeatedly throughout the Amended Complaint, Digital Envoy refers generally to
13 Google's "AdSense Program." Nowhere in the Amended Complaint does Digital Envoy limit its
14 allegations to AdSense for Content. In fact, nowhere in the Amended Complaint does Digital
15 Envoy even distinguish between the two programs. Digital Envoy plainly and explicitly alleges
16 that Google's incorporation of Digital Envoy's technology into "AdSense" – *all of AdSense* –
17 constitutes a violation of the License Agreement. Digital Envoy's ability to conduct discovery of
18 relevant issues should not be hindered by Google's late-breaking effort to impose its own
19 extremely narrow reading of Digital Envoy's allegations on the discovery process.

20 **2. Digital Envoy is entitled to discover the identity of Google's Network Members**
21 **which utilized Digital Envoy's technology.**

22 There is no dispute that Google employed Digital Envoy's technology in products that
23 Google licensed to third parties. *See, e.g.*, Transcript of June 22, 2005, Motions Hearing
24 ("Transcript"), copy attached hereto as Exh. C, at 46 (Google's counsel conceding that Digital
25 Envoy's technology "is used in everything"). Therefore, the essence of Digital Envoy's discovery
26 requests is to learn precisely, *i.e.*, by name and contract, which third parties acquired access to
27 Digital Envoy's technology through the AdSense programs. *See* Exh. A. In addition, Digital
28 Envoy is seeking to learn about Google's marketing to and communications with those third

1 parties to ascertain the precise nature of Google’s use of Digital Envoy’s geo-targeting technology.

2 *See id.*

3 The information Digital Envoy seeks is plainly relevant for many reasons:

- 4 • To ascertain which third party web sites had access to Digital Envoy’s technology,
5 when they had it and under what circumstances in was provided (e.g., through a
6 request from the third party, an offering by Google, or by the terms of the AdSense
7 licensing agreement between Google and the third party);
- 8 • Because Google admits that it “licenses” AdSense to third parties, Digital Envoy
9 requires copies of these licenses to ascertain for itself whether its technology is
10 included within them (and thus, “licensed” to third parties in violation of the clear
11 prohibition in the Licensing Agreement). Digital Envoy further needs the
12 communications related to these licenses to understand how Google represented the
13 geo-targeting features to these customers and the extent to which geo-targeting
14 affected those customers’ decision to deploy AdSense;
- 15 • Because many of the largest web sites received geo-targeted ads from Google, in
16 violation of the License Agreement, they are unwilling to buy it directly from
17 Digital Envoy, or, instead, they would purchase it from Digital Envoy at a reduced
18 price because a large portion of their need was already being met by Google,
19 thereby resulting in harm to Digital Envoy’s potential market;
- 20 • Google operates a pay-per-click business model with its advertisers. Each
21 agreement it has with different advertisers has varying terms. Digital Envoy
22 therefore needs to discover how much each of Google’s advertisers paid Google in
23 order to calculate the amount of damages and whether the individual advertisers
24 elected geo-targeting at all. Without this information, Digital Envoy has no way of
25 knowing which (and how many) of Google’s advertisers geo-targeted through
26 Google; and
- 27 • Digital Envoy seeks to discover, from each of these advertisers, how important the
28 availability of geo-targeting was in their decision to advertise with Google. Digital
29 Envoy needs to discover how Google marketed Digital Envoy’s geo-targeting
30 technology (*i.e.*, did Google describe this as “sharing” the technology with the
31 advertisers?);
- 32 • Digital Envoy seeks to discover what other targeting attributes Google offered its
33 potential advertisers in order to balance the importance of geo-targeting relative to
34 other targeting technologies; and
- 35 • Digital Envoy also needs these documents to determine which, if any, of Google’s
36 advertisers were actual or potential clients of Digital Envoy.

1 In an effort at compromise, and in order to address Google complaints regarding the
2 alleged burdensomeness of responding to the discovery requests, Digital Envoy has proposed a
3 preliminary modification of its requests that limits Google’s “burden” significantly:

- 4 • Digital Envoy has offered to limit its requests of the broadest scope essentially to
5 Google’s top-100 customers for which Google would provide copies of the relevant
6 agreements, and documents and communications related to the agreements and
7 their negotiation.¹ *See* Exh. A;
- 8 • For Google’s premium customers, Google would be required to produce the
9 agreements between Google and those customers (because those agreements are
10 described as “heavily negotiated” in Google’s filings with the SEC) and all
11 communications with those customers referring or relating to the provision by such
12 Google Network Member of the Internet Protocol Addresses (“IP Addresses”) of its
13 users/visitors to Google (as well as referring or relating to a Google Network
14 Member’s failure to provide, or agreement or request not to provide, IP Addresses
15 of its users/visitors to Google) and those communications that refer or relate to geo-
16 targeting by those customers. *See id.*; and
- 17 • For Google’s remaining ad network members, Google would only be required to
18 identify those Members who utilized Digital Envoy’s technology and produce a
19 sufficient set of exemplar standard contracts in order to inform Digital Envoy of the
20 nature of the licensing arrangement between Google and these third parties.

21 Digital Envoy’s proposed modification significantly limits Google’s “burden” by reducing
22 the number of customers and negotiations to somewhere in the neighborhood of 100 negotiations
23 – not “hundreds of thousands” as Google suggests. (Indeed, to the extent that Google’s
24 representations are correct, Digital Envoy is scaling the request down by a factor of more than a
25 1000.) Google’s counter-offer to produce information related only to those customers for which
26 “Digital Envoy can offer some evidence that it lost a licensee because Google offered geotargeting
27 in [AdSense for Content]” simply will not do. *See* Exh. B. *First*, Google’s proposal misrepresents
28 Digital Envoy’s obligations in the discovery process. Federal Rule of Civil Procedure 26 does not
require that Digital Envoy “prove” its case on Google’s terms prior to receiving relevant
discovery.

¹ Digital Envoy has previously offered evidence that these customers represent the most likely
direct Digital Envoy customers and prospects. *See* Declaration of Robert Friedman In
Support of Digital Envoy’s Motions to Compel, ¶ 9.

1 *Second*, Google’s counter-offer appears to be based on Google’s miscomprehension of the
2 law related to Digital Envoy’s misappropriation claim and the damages available under California
3 law. Google’s licensing of Digital Envoy’s technology to third parties, as prohibited by the
4 Licensing Agreement, constitutes misappropriation for which Digital Envoy is entitled to damages
5 in the form of Digital Envoy’s actual losses, Google’s unjust enrichment, or, if the other bases for
6 damages are unavailable, a reasonable royalty. *See* Cal. Civ. Code § 3426.3; *see also Vermont*
7 *Microsystems, Inc. v. Autodesk, Inc.*, 138 F.3d 449, 452 (2d Cir. 1998) (recognizing that California
8 law permits recovery of damages measured either by the plaintiff’s losses or by the profits unjustly
9 received by the defendant). Directly relevant to Digital Envoy’s claim, and the statutory damages
10 to which it is entitled, is information related to the magnitude and nature of Google’s
11 misappropriation. This is the discovery to which Digital Envoy is entitled and all that Digital
12 Envoy seeks.

13 **3. Digital Envoy is entitled to discovery the quantity and nature of the revenue**
14 **Google derived from its products utilizing Digital Envoy’s technology.**

15 Through its interrogatories numbered 6, 10 and 11, Digital Envoy is seeking a detailed
16 analysis of the revenue Google achieved through its products utilizing Digital Envoy’s revenue.
17 Based on the multiple methods for establishing damages for misappropriation under California
18 law, *see* Cal. Civ. Code § 3426.3, this information is plainly relevant to Digital Envoy’s claims
19 and, thus, discoverable. *See* Fed. R. Civ. P. 26. Google has responded to Digital Envoy’s request
20 by making generalized claims of “burdensomeness.” *See* Exh. B. However, Google has yet to
21 state with specificity *what* is so difficult about providing the revenue numbers Digital Envoy
22 seeks. Digital Envoy has stated to Google its willingness to modify this request in an effort to
23 alleviate Google’s alleged “burden” or to accept documents from which this information is
24 derived, provided the conditions of Federal Rule of Civil Procedure 33(d) are met. Google has
25 refused to respond meaningfully to Digital Envoy’s offer and continues to make generalized
26 complaints that the information Digital Envoy seeks would be “difficult” to provide. Google’s
27 objection is improper and provides neither Digital Envoy nor the Court the ability to address
28

1 Google’s complaints. Under these circumstances, Google should be compelled to respond to
2 Digital Envoy’s legitimate requests for relevant information.

3 **4. Google has failed to meet its burden that the discovery Digital Envoy seeks is**
4 **“burdensome.”**

5 As a court in this district has previously held,

6 Only *undue* burden or expense provides a potential basis for relief from legitimate
7 discovery demands. Undue burden requires parties to show more than expense or
8 difficulty. Rule 26(c) authorizes a protective order when discovery would be
9 unduly burdensome. This requires more than some expense or difficulty, especially
in the case of a party to the action.

10 *U.S. v. American Optical Co.*, 39 F.R.D. 580, 587 (N.D. Cal. 1966) (emphasis in original)
11 (citations omitted). Google attempts to shift the burden to Digital Envoy by claiming it will have
12 to engage in a significant document production in order to respond, “[b]ut the fact that the
13 production of documents may involve inconvenience and expense is not alone a sufficient reason
14 for refusing discovery which is otherwise appropriate.” See *U.S. v. \$160,066.98 from Bank of*
15 *America*, 202 F.R.D. 624, 628 (S.D. Cal. 2001) (internal citations omitted). Google has yet to do
16 anything but claim general “inconvenience and expense” of responding to Digital Envoy’s
17 discovery requests. To be sure, Digital Envoy’s requests may call for a significant amount of
18 information; however, the amount of information at issue is directly related to the magnitude of
19 Digital Envoy’s claim. Google should not be allowed to avoid its obligations in the discovery
20 process by pointing to the magnitude of the problem of its own creation (*e.g.*, through Google
21 licensing of Digital Envoy’s technology to a huge number of third parties).

22 **B. In Its Effort to Avoid Any Significant Discovery In This Case, Google, Through Its**
23 **Counsel, Has Consistently Misrepresented the Facts of the Case to the Court.**

24 Digital Envoy takes significant issue with Google’s counsel’s repeated
25 mischaracterizations to the Court of the facts of the case and the nature of Digital Envoy’s claims.
26 Ostensibly, Google’s counsel is attempting to minimize the merits of Digital Envoy’s case and to
27 shape the Court’s impression of the relevance of the information sought by Digital Envoy’s
28

1 discovery requests. Because these mischaracterizations arguably relate directly to Digital Envoy's
2 motions to compel, Digital Envoy cannot let Google's counsel's statements go unaddressed.

3 **1. Contrary to the facts, counsel for Google erroneously asserts that third party**
4 **web sites “do not care” about geo-targeting.**

5 During the course of the June 22 hearing, Google's counsel repeatedly minimized the
6 importance of Digital Envoy's geo-targeting technology. *See, e.g.*, Exh. C at 48 (“Geotargeting
7 isn't mentioned in Google's materials to publishers” and third parties “have no idea whether the
8 ads their getting are geotargeted or not”), 54 (third party web sites “don't know” whether they are
9 getting geo-targeted advertisements) and 55 (Other advertising networks, such as DoubleClick and
10 Advertiser.com “don't care” about geo-targeting). Counsel's statements are simply not true, and
11 are directly and repeatedly contradicted by statements of his client and others. By way of
12 example,

- 13 • Google has clearly stated the importance of geo-targeting and the fact that in its
14 own words “publishers are very excited to use it.” *See, e.g.*,
15 <http://searchenginewatch.com/searchday/article/php/3099591>, copy attached as
16 Exh. D (quoting Google “We want ***all*** the ***syndication partners*** [*i.e.*, AdSense
Publishers] to work with [regional targeting], and generally they are ***very excited***
to do it” emphasis added);
- 17 • Google itself emphasizes the importance of geo-targeting to ***publishers*** on its own
18 website. *See, e.g.*, http://www.google.com/adsense/greenwich2000?hl=en_GB,
19 copy attached as Exh. E, (quoting a publisher/customer “We were attracted to
20 Google for several reasons, the main one being that Google is the only company
21 which has the ability to link content to local audience advertising”);
22 http://www.google.co.uk/services/adsense_tour/page4.html, copy attached as Exh.
23 F, (noting that ads are targeted by geography, so global businesses can display local
24 advertising with no additional effort and use AdSense in multiple languages);
25 <http://www.google.com/adsense/ourhometown>, copy attached as Exh. G, (quoting
26 customer “‘Relevant ads appear on relevant pages.’ And, he adds, ‘The advertising
27 information is so unique. *We're seeing ads that are geographically appropriate . . .*
28 *..*”); <http://www.google.com/adsense/wifinder>, copy attached as Exh. H (quoting
customer “Google's AdSense lets us show geographically targeted ads” and that
“AdSense advertising revenue is consistent enough to hire an employee dedicated
to improving geographical listings, increasing the effectiveness of WiFinder.com
searches”).
- Geo-targeting is clearly important to Google's advertisers:
<http://siliconvalley.internet.com/news/article.php/3098431>, copy attached as Exh. I
 (“[Geo-targeting is] an incredibly powerful tool for local and regional advertisers . .

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. “[i]t could be used by national advertisers looking to message locally, speaking differently to different audiences”); <http://volokh.blogspot.com/2004/10/bellsouths-alliance-with-google.html>>, copy attached as Exh. J, (“Google is excited to add a new way to reach prospective advertisers, while continuing to provide users with relevant local information and advertisements”).

- Advertising.com and DoubleClick have not stated that geo-targeting is unimportant. In fact, Scott Spencer of DoubleClick actually testified:

Q. Has any web site publisher ever told DCLK that geo-targeting in general was important to participate in DART for Publishers?

A. Having geodata is important, yes.

Q. So publishers have said geo-targeting is important?

A. Yes.

Q. And who told you that?

A. Geotargeting is a common feature provided by every provider of ad serving solutions. ... It's in almost every RFP as a check box, do you have geo-targeting, yes.

Deposition of Scott Spencer at 49-50, relevant portions attached hereto as Exh. K. Likewise, Advertising.com’s Michael Polk did not testify that geo-targeting was unimportant or that publishers would not license geo-targeting directly from Digital Envoy, but rather that he does not work directly with publishers and that “it depends”, not that it would never happen. *See* Deposition of Michael Polk at 73-74, relevant portions attached hereto as Exh. L.

Therefore, contrary to the assertion of Google’s counsel, evidence that geo-targeting is important to Google’s AdSense customers is legion. Digital Envoy’s discovery requests seeking information related to Google’s licensing of its AdSense programs (and, necessarily, Digital Envoy’s technology included therein) is thus very relevant to the misappropriation claim.

2. Contrary to the law, Google misstates the basis for Digital Envoy’s recovery of damages.

Calling Digital Envoy’s damages theory “a pipe dream” and seeking to limit Digital Envoy’s potential damages to Google’s narrow interpretation of Digital Envoy’s “actual loss”, Google’s counsel misstates the available damages under California law. *See, e.g.*, Transcript at 55-56. As shown above, damages for misappropriation are available under three theories: actual

1 loss, unjust enrichment, or (if neither of the other two are available) a reasonable royalty. See See
2 Cal. Civ. Code § 3426.3(a).²

3 Google devotes its entire critique of Digital Envoy's damage theory to the actual loss
4 prong of recovery, and ignores the fact that Section 3426.3 permits Digital Envoy to recover
5 Google's unjust enrichment due to its unauthorized use of Digital Envoy's technology. See Cal.
6 Civ. Code § 3426.3(a). Therefore, Google's "pipe dream" analysis notwithstanding, the nature
7 and extent of Google's profits attributable to the misappropriation of Digital Envoy's technology
8 is directly relevant to Digital Envoy's claim that Google was unjustly enriched. See *University*
9 *Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 536 (5th Cir. 1974) (an appropriate
10 measure of damages for misappropriation of a trade secret are "the benefits, profits, or advantages
11 gained by the defendant in the use of the trade secret").

12 In addition, throughout the litigation and at the June 22 hearing, Google continues to
13 downplay the importance of the geo-targeting feature of its AdSense programs (despite the fact
14 that, based on one of the few documents that Google has thus far produced in discovery, Google's
15 internal business models show well over a 100% increase in click-thrus for a substantial portion of
16 its customer base due to use of Digital Envoy's geo-targeting).³ Digital Envoy therefore is
17 anticipating that Google will claim that the profits from its AdSense program are only minimally
18 attributable to its inclusion of Digital Envoy's technology in its effort to mitigate the effects of its
19 misappropriation. Digital Envoy is therefore entitled to demonstrate, through discovery, that
20 Google is understating the value of geo-targeting technology by pointing to Google's marketing,
21 negotiation, and agreements with third parties that point to those parties' expectations of and
22 benefits from geo-targeting capabilities through Google's provision of advertisements that will
23 induce the web site's visitor to click on the advertisement provided. Google's ability to provide
24

25 _____
26 ² Digital Envoy is also seeking punitive damages on the grounds that Google's
27 misappropriation was willful and malicious. See Cal. Civ. Code § 3426.3(c).

28 ³ See Deposition of Susan Wojcicki at Exh. 61, attached hereto as Exh. M.

