IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PERSONALIZED USER MODEL, L.L.P., Plaintiff, v. GOOGLE INC., Defendant.	)	C.A. No. 09-525-LPS **JURY TRIAL DEMANDED**
GOOGLE, INC. Counterclaimant, v. PERSONALIZED USER MODEL, LLP and YOCHAI KONIG Counterdefendants.	)	**PUBLIC VERSION**

LETTER TO THE HONORABLE LEONARD P. STARK
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Dated: August 30, 2012
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VIA ELECTRONIC FILING
The Honorable Leonard P. Stark
United States District Court
District of Delaware
844 North King Street
Wilmington, DE 19801

PUBLIC VERSION

Re: *Personalized User Model LLP v. Google Inc.*, C.A. No. 09-525-LPS

Dear Judge Stark:

Google respectfully files this letter in response to PUM's August 29, 2012 letter.

PUM's Supplemental Expert Report Should be Stricken. PUM argues that its supplemental infringement report that includes YouTube Videos and Google+ is somehow "solely" about [redacted] because these products use [redacted]. (D.I. 382.) But these products are not co-extensive with [redacted]. Indeed, both pre-date [redacted]. PUM also does not represent it need not refer to [redacted] functionality of YouTube Videos and Google+ to prove its infringement case. Nor could it given the several [redacted] aspects of these products that are the subject of PUM's supplemental report, including those detailed in Google's August 29 letter. (*See* D.I. 381.) Again, none of the other previously non-accused functionalities of these new products have been the subject of discovery or investigation by Google's counsel and its experts.

PUM also argues that Google's agreement to PUM's request to reopen discovery "solely" as to [redacted] somehow suggests that Google consented to PUM's addition of YouTube Videos and Google+ to the case. (D.I. 382.) This argument is disingenuous at best. PUM initially requested information relating to a change in Google's privacy policy that PUM argued indicted personalized search results and ads. (Ex. A.) After Google pushed back, PUM further argued that "any documents relating to whether Google's change in its policy reflects Google's change to relevant aspects of the accused systems" are relevant. (Ex. B) (emphasis added). Thus, from the beginning of the parties' discussions of [redacted], PUM's request was for information regarding how [redacted] was used in accused products. PUM continued to push for documents and threatened a motion to compel if Google did not produce the [redacted]-related materials. To avoid burdening the Court, Google agreed to reopen discovery on the limited [redacted] functionality. Never did Google agree that PUM could add new products, and had PUM indicated this was its intention, Google would not have agreed to the stipulation regarding reopening discovery in the first instance. Rather, as made clear by the stipulation, the new discovery and supplemental report was to deal "solely" with [redacted] functionality. PUM is now trying to construe Google's cooperation as an agreement to greatly expand the scope of the case, when exactly the opposite is true.

PUM additionally contends that Google is asking for "yet another extension of time" for expert reports. (D.I. 382.) To be clear, Google is not seeking an extension of time.[1] Google believes the supplemental infringement report should be stricken. But, if it is not stricken, then Google needs an extension to prepare its rebuttal, which is only fair. Google now needs to locate and interview relevant witnesses, analyze relevant documents, and review source code regarding these products, including the functionalities addressed in the supplemental infringement report, and Google's experts need to get up to speed on these issues as well. (*See* D.I. 381.) And, once again, although PUM points to Google's agreement to the existing schedule, Google had no idea that PUM would attempt to add new products to the case. (*Id.*) As discussed above, Google understood that PUM's request was for information regarding [redacted] use in the accused products, and it negotiated the schedule based on that understanding.

It Would Be Wasteful and Inefficient to Set a Trial Date at This Time. The Court should not set a trial date at this time for the reasons set forth in Google's August 29 letter. (D.I. 381.) PUM argues that the Court should not delay setting a trial date based on a motion to stay pending reexamination that Google has not yet filed. Google, however, plans to file its motion to stay pending reexamination today. At the very least, the Court should resolve that motion and Google's motion to dismiss for lack of subject matter jurisdiction before setting a trial date.

Additionally, PUM asserts that a trial date should not be delayed due to the reexaminations because they will be "hard fought" and appealed to the Board of Patent Appeals and Inferences and then the Federal Circuit. The likelihood of PUM being successful on appeal, however, is very low. The PTO rejected all asserted claims of the '276 patent on seven separate grounds. PUM will have to show that the Central Reexamination Unit was wrong on all of those grounds to achieve a reversal. This is a significant hurdle. Moreover, in July 2012 (the most recent month for which statistics are available), the BPAI reversed the Central Reexamination Unit's decision on *ex parte* reexaminations only about 10% of the time. And a recent article reported that in *inter partes* reexaminations, the BPAI agreed with the Examiner 82% of the time, and completely reversed the Examiner only 17.8% of the time. (Ex. C.) Thus, there is a high likelihood of ultimate cancellation of the asserted claims in this case.

The Court Should Allow 60 pages for Summary Judgment Briefing. Google disagrees with PUM's suggestion that the parties should be restricted to two summary judgment motions of 40 pages total. This is not sufficient for a complex case like this. Google intends to file three motions: non-infringement, invalidity, and ownership. The sheer breadth of PUM's claims necessitates that the parties have 60 pages for summary judgment briefing. PUM suggests that it is unlikely that summary judgment will be granted because this case has been "hard fought." That PUM thinks it will be able to defeat summary judgment is no reason to deny Google its chance to seek summary judgment. There is no dispute regarding the relevant facts. For example, there is no dispute as to how the accused products actually operate. And invalidity based on prior art is a common issue for summary judgment. As for ownership, while PUM will argue there are factual issues, the lack of a genuine issue of fact is clear from PUM's own interrogatory responses and documents.

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[1] As Google previously explained, it is disingenuous for PUM to suggest that all of the extensions to the expert discovery schedule were initiated by Google. (*see* D.I. 371.)

Respectfully,

/s/ Richard L. Horwitz

Richard L. Horwitz

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