

**FISH & RICHARDSON P.C.**

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**VIA EMAIL**

June 12, 2009

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**Re:** *Google Inc. adv. Function Media, L.L.C.*  
United States District Court - Eastern District of Texas Marshall Div.  
Civil Case No. 2:07-cv-279 (CE)



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TWIN CITIES

WASHINGTON, DC

Dear Jeremy:

I am writing to address a number of outstanding discovery issues that we believe can be resolved in fairly short order. Given the number of emails in the past week or so regarding various issues, we hope to consolidate the discussions here in an effort to move the ball forward. Please let us know if we are missing anything.

**Witnesses:** In your email dated June 8, you asked that we narrow the list of persons with knowledge to reach a manageable number of witnesses for both depositions and trial. We agree this makes sense, but we need your help in order to make this work. We have eleven witnesses confirmed for deposition in the next two months and are currently working on three others, all pursuant to Function Media's requests and in spite of our lack of agreement on the scope of the topics noticed. As you know, we have been requesting for several months that Function Media narrow its asserted claims, which will assist us in narrowing the identified witnesses. In addition, since March 3, 2009, Google has been asking for confirmation of the remaining issues on which Function Media requires testimony for deposition notice one, topics 1 and 2. We have confirmed dates for the witnesses we hope will cover what remains, but per our letter on May 27, we are still waiting for confirmation from you on the issues you would like to cover. We ask this not to be unreasonable or obstreperous, but rather to ensure that we can prepare the witnesses to close out these topics. We offered our first set of technical witnesses under similar circumstances, and as we predicted, additional witnesses are required. In order to contain the number of witnesses and allow Google to offer complete testimony, we ask that you please confirm your expectations for topics 1 and 2 from notice one. We are happy to discuss this further.

We understand that the remainder of notice one is superseded by notice three, served on June 8, 2009 and that you prefer to wait until all supplemental production is complete. I address the supplemental production below, and we are more than happy to confirm a date for these topics that is mutually agreeable, without prejudice to our objections to the topics noticed.

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Regarding notice two, served on April 19, 2009, many of the 34 topics in that notice again appear to be duplicative of one another. Further, some of these topics could have been addressed by the witnesses we produced on March 3-5, 2009 and some of them will be covered by at least one of the personal capacity witnesses.

Notwithstanding our objections, we have confirmed dates for witnesses that will cover the topics relating to infrastructure (topics 1-13), accounting (topics 14-23, 31, 33), licensing (topics 24-29), and acquisitions (topic 30). To the extent that the notice two topics overlap with those in notice three, we expect that the more recent notice supersedes; let us know if that is incorrect. We are still waiting for clarification on topics 32 and 34.

We hope to resolve questions of scope prior to these depositions. This will help us minimize the number of witnesses and the expense to both sides. For example, you have asked for a witness to cover all acquisitions and licensing, whether related to the accused products and related technology or not. As you can imagine, no one person at Google has such knowledge. Preparing a witness regarding topics of this breadth could require dozens of people to assist. Further, Google has produced documents regarding ads-related licensing and acquisitions and we believe the depositions ought to cover the same scope. Without waiving our objections, we propose sharing with Function Media a comprehensive list of licenses that will allow the parties to reach a compromise short of discovery on every license Google has ever entered.

Regarding the witnesses you have informally requested in their personal capacity, we have confirmed dates with those that are U.S. employees and are not high-level executives. Messrs. Ranganath and Kinnier are no longer with Google and but we have just located them and will be representing them. Mr. Ranganath is now with ChoiceVendor in San Francisco, and Mr. Kinnier is with Khosla Ventures. With respect to Rohit Dhawan, who is now based in Sydney, we would ask to replace him with someone local in the same subject matter. With respect to Sridhar Ramaswamy, we have explained that his position changed since Google listed him as a witness and that his testimony is likely to be duplicative of that offered by other technical witnesses. We propose penciling in a date at the tail end of the deposition schedules with the goal of revisiting the issue then as to whether his testimony is necessary in light of the other testimony Google has provided.

Function Media has also asked for the depositions of the highest level executives at Google, all of whom are going to offer testimony that is duplicative of other witnesses. For example, media reports notwithstanding, the technical witnesses steeped in the product have and will offer testimony regarding how that product works at a level of detail that Ms. Wojcicki cannot. Those same witnesses have primary responsibility for the development of the product. Given Ms. Wojcicki's critical role at the company, as well as that of the CEO and the founders, we ask that

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Function Media assess whether the disruption to Google's business is actually necessary after deposing the other fourteen witnesses that are currently contemplated based on Function Media's requests.

**Supplementing Google's document production:** You have asked Google to supplement its production in a number of ways that the parties could not have anticipated and we address each of these in turn below.

You have asked for all deposition transcripts and exhibits, pleadings, orders, expert reports, affidavits, and hearing transcripts in every ads-related patent case involving Google, whether closed or ongoing. The burden imposed by this request cannot be overstated. Additionally, each case involves a protective order that must be respected. We can make specific items from closed cases available upon request and pursuant to the appropriate notice and redactions required by the applicable protective order, but Google cannot be expected to produce to you every item from every ongoing patent case.

Regarding the Overture litigation, although Function Media is free to obtain much of this from PACER, Google has located its case files in off-site storage maintained by its counsel in that matter, and we plan to make the non-privileged materials available for inspection.

Regarding patent applications, we understand that Function Media located some applications that it believes should have been included in Google's original production. To date, Google has produced over eighteen thousand pages of applications and application-related materials. Google performed a good faith and reasonable search for patent applications pertaining to the alleged infringing features of the Accused Products. Google has also been transparent about its approach to the issue, as specified in its response to topic number 21 in Function Media's document requests (see my letter dated July 31, 2008) and response to Rog. No. 7 in Google's Supplemental Responses to Function Media LLC's First Set of Interrogatories. Google is happy to supplement its production with the applications Function Media identified, which, as you know, are publicly available on the USPTO Public PAIR system. Moreover, as patent applications have come to our attention—even without your prompting—they have been produced, as evidenced by the additional Bates numbers identified below with respect to Rog. No. 7; Google will continue to do so. We trust Function Media is doing the same; please tell us if you are not. If you would like to discuss this further, please reasonably narrow your request.

Regarding new custodians you raised on June 8, we understand that Function Media now seeks to broaden the custodian data pulls by adding materials from eight additional witnesses. As we discussed on June 7, we are amenable to reasonable, targeted searches through additional custodian materials. An examination of the

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names Function Media has identified suggests that collecting data from many of the suggested custodians will not be a fruitful endeavor, considering their focus area and/or the discovery already provided. For example, Vishal Sharma and Kripa Krishnan appear to work in areas wholly unrelated to the products and issues in this litigation. Google is open to targeted pulls for witnesses from whom it has not yet collected and is open to full custodial pulls where that is reasonable, but we cannot agree to fulfill your June 8 request.

To the extent that Function Media seeks materials regarding the break down of revenue for taxation purposes between the US and foreign countries, we fail to see the relevance of this information because Google's reported revenue in these countries has an orthogonal relationship to served revenue for taxation purposes. Reported revenue, as Google's SEC materials note, is determined based on the billing addresses of Google's advertisers, where as the focus of the claims, which pertain to publishing ads to particular locations (regardless of which side's construction is used). We fail to see how the allocation for tax purposes is relevant.

Regarding the wikis and email alias, the wikis were searched and responsive, non-objectionable materials provided in Google's initial Rule 3-4 production in May 2008 and as additional materials have been located, non-objectionable materials were produced from these data sources. We could not find an active alias for [council@google.com](mailto:council@google.com).

**Source Code:** Google first produced source code over thirteen months ago, including twelve thousand pages pertaining to the accused products. It was not until January of this year that you raised any deficiency regarding that production. We are happy to supplement the code production if Function Media can be specific about the code files that are missing. Based on our discussion on June 11, I understand that Function Media sought the following: (1) the AdWords GXP files pertaining to your infringement contentions (there were 149 additional GPX files produced for your inspection February 23, 2009, though your expert thought there should be around 200), (2) the AdWords and AdSense API and internal code that takes data received from the API and inserts it into a database; (3) the AdWords Editor Code; (4) additional GXP files for AdSense for Search Online users (if there are any); and the ContentAdResponse and ContentAdRequest modules. On June 11, you indicated that Google's production regarding request nos. (2) and (3) (save for the APIs) were sufficient. With respect to (4), you now ask for the auction and rephil code, but I note that in our discussion on August 6, 2008 you said you did not want this code. We are still unclear what is missing from number (1). Again, Google is happy to supplement its production, but needs clarification regarding what Function Media wants.

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**Interrogatory responses:** You asked Google to supplement its interrogatory responses in view of recent production materials. Additional materials that we expect to identify in each of the interrogatories is provided below and subject to verification:

1. Rog. No. 1: G065863-907, G067820-48, G069328-70, and G069372-85;
2. Rog. No. 2: G069386-166695;
3. Rog. No. 3: G068212-891 (MediaSpan/Chris Kempton) and G068892-9217 (Sandilee Mathers);
4. Rog. No. 5: G068205-10;
5. Rog. No. 6: G067863-8203, G16696-732 (note that we have located another ads-related patent license and have requested permission from the licensor to disclose the agreement; you may call me if you would like more information, though I cannot yet say the patentee's name or identify the patents); and
6. Rog. No. 7: G067863-8203 and G069386-166695.

**Special accounts:** You asked for Google to open special AdWords, AdSense, and MCC accounts for your experts. As you know, your client already has AdWords and AdSense accounts. I explained months ago that the AdWords account can be promoted to an MCC account. We are not sure what you are looking for here, and note that you are welcome to open new accounts at any time without activating them.

**Mr. Hasan:** You asked whether we intend to depose Mr. Hasan. The answer is yes, but we still need your response on the continued depositions on Ms. Stone and Mr. Dean regarding their assertion that they are entitled to an earlier date of invention, as well as metadata for the documents produced and identified pursuant to Rule 33(d) that allegedly corroborate the prior invention. We intend to proceed with Mr. Hasan's deposition once we have closed out the inventor depositions on this topic.

As noted above, we have tried to be comprehensive in responding the many requests that you and your colleagues have sent in the past week. Please let us know if there is anything we have overlooked.

Very truly yours,



Jason W. Wolff

JYW/cdj