Polaris IP, LLC v. Google Inc. et al Doc. 432 Att. 2

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC, Plaintiff,	§ § §	
v.	§	Civil Action No. 2:07-cv-371-ce
GOOGLE, INC., et al.,	§ §	JURY TRIAL DEMANDED
Defendants.	§ §	

BRIGHT RESPONSE, LLC'S DRAFT PROPOSED JURY INSTRUCTIONS FOR USE AS PRE-TRIAL INSTRUCTIONS TO THE JURY

Bright Response, LLC (formerly known as Polaris IP, LLC) ("Bright Response") files this set of proposed pre-trial jury instructions pursuant to the docket control order requiring, among other things, an exchange of proposed jury instructions among the parties. Bright Response reserves the right to revise, supplement, and otherwise amend these instructions as the case progresses through trial and through the July 28, 2010 pre-trial conference and pursuant to any other conferences or hearings, formal or informal, with the Court concerning the matter of jury instructions.

Good morning, Ladies and Gentlemen of the Jury. Let me give you a brief summary of what to expect here today and for the next [ ] days of this trial. Very shortly, I will give you some preliminary instructions, which are general and apply to this case and other cases tried in this Court. It will not, at this time, give you a detailed explanation of the law that applies to this case. That will be done at the conclusion of the case before closing arguments to assist you in carrying out your duties as members of this jury. After I give the preliminary instructions, I have given each side [__] minutes to make an opening statement. As you recall, the party that brings the lawsuit is referred to as the Plaintiff. The Plaintiff has the burden of going forward in this case. So the Plaintiff will present opening statements first and witnesses first. A witness is initially taken on what we call direct examination. After direct examination, there is cross-examination by the Defendants, the Defendants being the three parties here against whom the lawsuit is brought. This entire process repeats itself until the Plaintiff rests its case. Then the Defendants will call witnesses on direct examination. The Plaintiff will be able to cross-examine those witnesses until each Defendant rests its case. Then there can be rebuttal testimony by the Plaintiff. After that process is completed, I will give you the final jury charge and there will be closing statements. Each party has been allotted a certain amount of time to conduct its direct examination, cross-examination, and rebuttal. Opening statements are not counted against that time. If you have any difficulty understanding any of the witnesses or the lawyers, please let me know. You will soon be given jury notebooks, which will contain information that has been allowed by the Court, in which there is room for you to take notes in addition to other information that you may find helpful in remembering the witnesses and their testimony throughout the trial. With those comments, I will now give you your preliminary jury instructions.

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. The jury is the judge of the facts. And then the final jury charge, I will give you some detailed instructions on how to judge the credibility of witnesses. I'm the judge of the law, and I will apply the law that is appropriate in this case through my initial instructions and through my final jury charge. You will then have to apply to those facts the law as the Court will give it to you. You must follow that law whether you agree with it or not. Nothing the Court may say or do during the course of the trial is intended to indicate, and should be taken by you as indicating, what your verdict should be. The evidence from which you will find the facts will consist of the testimony of witnesses, items that we call exhibits that are received into evidence, and any stipulations that are entered into by the attorneys. A stipulation is essentially an agreement that if testimony was taken on a certain topic, the testimony would result in a finding as stipulated by the parties.

There are certain things that you should not consider in arriving at your verdict. Statements, arguments, and questions by lawyers are not to be considered by you as evidence. You may have the question of "why do we have an opening statement or a closing statement if you cannot consider it in arriving at your verdict?" The answer is that an opening statement is designed to allow the attorneys to outline what they expect their case to be, what they expect the testimony to be, and perhaps what the exhibits are to show. It is only an outline. It should not be relied upon by you in reaching your verdict.

Similarly, objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe the evidence that the other side has offered is improper under our rules. You should not be influenced by the objection or by the Court's ruling on it. If the objection is sustained, you must ignore the question. If it is overruled, you must

treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction. Testimony that the Court has excluded or told you to disregard is not evidence and should not be considered by you in reaching your verdict. In addition, anything you may have seen or heard outside the courtroom is not evidence. It must be disregarded. You are to decide this case solely on the evidence presented here in the courtroom. Do not do any research concerning this case on the Internet or otherwise, and do not try to do any independent investigation as Members of the Jury. You are to decide this case based upon what takes place in the courtroom.

When we talk about evidence, you need to know that there are two types of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these, as well as other matters at the end of the case, but keep in mind that you may consider both types of evidence in arriving at your verdict. It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you guidelines for determining the credibility of witnesses at the conclusion of the case.

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means that you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it. When a party has the burden of proving any claim or defense by clear and convincing evidence. This burden of proof means that in order to find for that party you must have an abiding conviction that the truth of the party's factual contentions are highly probable. Such evidence requires a higher standard of proof than

proof by a preponderance of the evidence. You should base your decision on all the evidence, regardless of which party presented it. When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field, called an expert witness, is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it or not.

During the trial of this case, certain testimony may be read to you by way of deposition. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand, is usually presented under oath in the form of a deposition. Such testimony is entitled to the same consideration and, as far as possible, is to be judged as to the credibility and weighed and otherwise considered by the jury in the same way as if the witness had been present and had given, from the witness stand, the testimony read to you from the deposition. Some of these depositions may be shown by video.

Let me briefly now summarize the parties and the nature of the case. The Plaintiff, or the company that filed the lawsuit, is Bright Response, LLC, a company that will be referred to during this trial as "Bright Response." Now you have hear references as well to another name—Polaris IP, LLC, or "Polaris." That company changed its name to Bright Response, LLC soon after this lawsuit was filed. So do not be confused that some of the documents you may be presented with, or some of the evidence you may hear in this case, refers to "Polaris"—Bright Response and Polaris are the same company. The company just changed its name, and the company's name is now "Bright Response." The Defendants in this case are Yahoo! Inc., Google Inc., and AOL LLC and America Online, Inc. These Defendants will be referred to during this case as "Yahoo" and "Google," and in the case of both AOL LLC and America

Online, Inc.—"AOL." Bright Response is seeking damages for Yahoo's infringement, Google's infringement, and AOL's infringement of United States Patent No. 6,411,947 ("the '947 Patent"). Because sometimes a patent is referred to by the last three numbers, you will hear considerable evidence about the "'947 patent." You also may hear this patent referred to as the "Rice patent." This is because the name of the first inventor on the patent, as it was issued, is Amy Rice. A copy of the '947 patent, or the "Rice patent," is in each of your jury notebooks. You will have many chances during this trial to familiarize yourself with the patent.

Yahoo, Google, and AOL each seek a declaratory judgment of non-infringement and invalidity. At the conclusion of the trial, when I give you your final jury instructions, I will explain the appropriate burden to apply to each of the claims and defenses brought by the parties.

I will now explain generally the United States patent system, the parts of the patent, and how a person receives a patent. Patents are issued by the United States Patent and Trademark Office, and we commonly refer to that as the "PTO." The PTO is part of the United States government. The government is authorized by the United States Constitution to enact patent laws and issue patents to protect inventions. Inventions that are protected by patents may be of products or of methods for doing something. A patent is granted for a set period of time. During the term of the patent, if another person makes, uses, offers to sell or sells something that is covered by the patent without the patent owner's consent, that person is said to have infringed the patent. The patent owner enforces a patent against persons believed to be infringers in a lawsuit in a federal court, such as this one. To be entitled to patent protection, an invention must be new and non-obvious. A patent cannot legally take away from people the right to use that which was known or that which was obvious from what was known before the invention was made. That which was already known at the time of the invention is called "prior art." You will hear about

the prior art relating to the patents in suit during the trial, and I will give you more instruction about what constitutes prior art at the end of the case. Patents issued by the United State Patent Office are presumed to be valid. In this case, the validity of the patent in suit will be disputed, and it is ultimately your job to determine whether the patent is valid or invalid. You will also hear during this trial many terms that are unique to the patent system, to a patent, and to a patent infringement case. Those terms include some of the following.

Application - The initial papers filed by the applicant in the United States Patent and Trademark Office (also called the "Patent Office" or "PTO").

Claims - Claims are the numbered sentences appearing at the end of the patent that define the invention. The words of the claims define the scope of the patent owner's exclusive rights during the life of the patent.

Comprising - The beginning, or preamble, portion of each of the asserted independent claims uses the word "comprising." "Comprising" means "including" or "containing." A claim that uses the word "comprising" is not limited to products or methods having only the elements that are recited in the claim limitations, but also covers products or methods that have all of the elements and add additional elements without changing the required limitations.

Take as an example a claim that covers a table. If the claim recites a table "comprising"' a tabletop, legs and glue, the claim will cover any table that contains these structures, even if the table also contains other structures, such as a leaf or wheels on the legs. However, if a table contains a tabletop, legs, but no glue, then the claim does not cover the table.

File Wrapper - See prosecution history below.

License - Permission to use the patented invention, which may be granted by a patent owner (or a prior licensee) in exchange for a fee called a "royalty" or other consideration.

Office Action - Communication from the patent examiner regarding the specification of the patent application and/or the claims pending in the patent application.

Patent Examiners - Personnel employed by the United States Patent and Trademark Office ("PTO") who review (examine) patent applications, each in a specific technical area, to determine whether the claims of a patent application are patentable and whether the disclosure adequately describes the invention.

Patent Owner - The patent owner may be the original applicant inventor or any assignee who has acquired the patent by an assignment, which is similar to how a piece of real property would be conveyed by a deed.

Prior art - Prior art is not art as one might generally understand the word art. Rather, prior art is a technical term relating to patents. In general, it includes things that existed before the claimed invention and might typically be a patent or a printed publication. I will give you a more specific definition of prior art later.

Prosecution history - The written record of proceedings in the United States Patent and Trademark Office ("PTO") between the applicant and the PTO. It includes the original patent application and later communications between the PTO and the applicant. The prosecution history may also be referred to as the "File wrapper" of the patent during the course of this trial.

References - Any item of prior art used to determine patentability.

Specification - The specification is the information that appears in the patent and concludes with one or more claims. The specification includes the written text, the claims and the drawings. In the specification, the inventor sets forth a description telling what the invention is, how it works, and how to make and use it so as to enable others skilled in the art to do so.

Ordinary Skill in the Art – From time to time in these instructions I will refer to a hypothetical person of "ordinary skill in the art." This hypothetical person is presumed to be aware of all of the prior art and knowledge that existed in the field during the relevant time period. The skill of the actual inventor and experts is irrelevant because they may possess something that distinguishes them from workers of ordinary skill in the art. Factors to consider in determining the level of ordinary skill in the art include the educational level and experience of people working in the art, the types of problems faced by workers in the art and the solutions found to those problems, and the sophistication of the technology in the field.

A copy of these terms is included in your notebook for your reference.

I will now give you some general directions about your conduct as members of this jury. First, I instruct you that during the trial, you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the conclusion of the case to deliberate on your verdict, you are simply not to talk about the case. Second, do not read or listen to anything touching on this case in any way. If anyone should try to talk to you about it, bring it to the Court's attention promptly. Third, do not try to do research or make any investigation about the case on your own. This instruction to includes refraining from performing any type of research, such as on the Internet, that could relate in any way to this case, including the parties in this case, any of the companies or individuals you may hear mentioned during the case, or any of the witnesses in the case, regardless of whether the witness appears at trial to give live testimony or whether the witness's testimony is presented by reading from the witness's deposition or by a video showing that person's deposition.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the conclusion of the case. If you wish, you may take notes, but if you

do so, leave them in the jury room when you leave at night and remember that they are for your own personal use. I leave it to your discretion to determine much or how little note-taking you wish to do concerning a witness's testimony. It often occurs at the conclusion of the case, when the jury goes in the jury room, that the jurors request the transcribed testimony of a witness. You should know that this information is often not available. Therefore, your notes can be very important in refreshing your memory. The trial will begin very shortly, and this is what you can expect.

First, each side will make an opening statement. An opening statement is neither evidence nor argument. It is an outline of what the parties intend to prove, offered to help you follow the evidence. Next, the Plaintiff, Bright Response, will present its witnesses, and the Defendants may cross-examine those witnesses. Then Yahoo, Google, and AOL will present their witnesses, and the Plaintiff—Bright Response—may cross-examine those witnesses. The Plaintiff may then present witnesses to rebut Defendants' evidence, and Defendants may cross-examine those witnesses as well. During the course of the trial, the attorneys may take a few minutes to make interim statements. These statements are intended to explain or clarify previous or anticipated testimony. The ground rules for such statements is that a party planning to make an interim statement must inform the Court at the close of testimony the day before and also inform opposing party, so the opposing party can choose to respond or give a separate statement. After both the Plaintiff and the Defendants have presented all of their evidence, the attorneys will make their closing arguments to summarize and interpret the evidence for you, and the Court will give you instructions on the law. You will then retire to deliberate on your verdict.