EXHIBIT A

PROPOSED SUPPLEMENTAL BRIEF

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

SOFTWARE RIGHTS ARCHIVE, LLC,	§	
	§	
Plaintiff,	§	
	§	**Civil Action No. 2:07-cv-511-CE**
v.	§	
	§	
GOOGLE INC., YAHOO! INC.,	§	
IAC SEARCH & MEDIA, INC., AOL LLC,	§	
and LYCOS, INC.,	§	
	§	
Defendants.	§	

SOFTWARE RIGHTS ARCHIVE, LLC'S THIRD SUPPLEMENTAL BRIEF OPPOSING DEFENDANTS' MOTION TO TRANSFER

Since the parties' most recent briefing related to Defendants' motion to transfer, the Federal Circuit has released additional opinions confirming the central basis for rejecting Defendants' motion: Defendants failed to seek a transfer with reasonable promptness by inexcusably waiting fifteen months even to file their motion and then by permitting an additional seventeen months to lapse without resolution of the issue.

A few things have not changed in the almost three years since this case was filed. It remains literally hornbook law that "it is common sense that the party seeking a change of venue should act with reasonable promptness and that delay may induce the district court to refuse a transfer that otherwise would have been granted had it been sought earlier." 15 Fed. Prac. & Proc. Juris. § 3847 (3d ed. 2010). It likewise remains the rule in the Fifth Circuit that "[p]arties seeking a change of venue should act with reasonable promptness." *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) (internal quotation marks omitted). And the consistent Fifth Circuit practice remains that of denying belatedly-filed motions to transfer. *See id.* (affirming rejection of motion to transfer where transfer "would have caused yet another delay in

this protracted litigation" and the "motion to transfer venue was not filed until eighteen months after" suit was situated in the district court); *McKethan v. Tex. Farm Bureau*, 996 F.2d 734, 739 (5th Cir. 1993) (affirming rejection of motion to transfer where "McKethan's motion . . . was far too late in the day."); *cf. Elizondo v. Pilgrim's Group, Inc.*, 100 F.3d 952, no pag. (5th Cir. 1996) (affirming rejection of motion to transfer in part because of "the potential for delay").

Six months ago, however, the Federal Circuit released an opinion *confirming* that transfers should *not* be granted twenty-two months or more into a case.[1] In *In re VTech Communications, Inc.*, 2010 WL 46332 (Fed. Cir. Jan. 6, 2010), the plaintiff filed the case in November 2007. (*See* Docket Sheet (Ex. 1).) The defendant then filed a motion to transfer in January 2008—just two months later. In August 2009—twenty-two months into the case—this Court denied the defendant's motion. The defendant sought mandamus, and the Federal Circuit held that this Court had properly rejected the motion to transfer. *Id.* at *2. The Federal Circuit based its ruling principally on the fact that twenty-two months had elapsed between the filing of the case and the ruling on transfer. *See id.* It wrote, "[T]he advanced stage of discovery and the completion of claim construction are proper considerations that weigh against transfer in the

[1] The Federal Circuit issued six opinions regarding transfer since the parties last briefed Defendants' motion to transfer. Two of the opinions ordered a transfer; both involved no delay in the defendants' seeking transfer or in the court's resolving transfer. *See In re Zimmer Holdings, Inc.*, --- F.3d ----, 2010 WL 2553580 (Fed. Cir. June 24, 2010) (motion to transfer filed three months, and resolved seven months, into the case); *In re Nintendo Co., Ltd.*, 589 F.3d 1194 (Fed. Cir. 2009) (motion to transfer filed two months, and resolved seven months, into the case). Two affirmed the lower court's denial of transfer, but did not address the issue of promptness one way or the other. *See In re Affymetrix, Inc.*, 2010 WL 1525010 (Fed. Cir. Apr. 13, 2010); *In re Apple Inc.*, 2010 WL 1922942 (Fed. Cir. May 12, 2010) (affirming Eastern District of Texas ruling that was based in part on the fact that "it could likely hold a trial sooner than the Massachusetts district court."). A fifth denied the writ of mandamus as having been sought prematurely. *See In re Oracle Corp.*, 2010 WL 2076987 (Fed. Cir. May 19, 2010). The sixth is the *In re VTech Communications, Inc.*, 2010 WL 46332 (Fed. Cir. Jan. 6, 2010), case that is discussed in the body of brief, above.

circumstances of this case." *Id.* The Federal Circuit also held the defendant to a high standard of promptness in pursuing its motion, and held that the defendant had failed that standard—even though the defendant had filed its motion just two months into the case—because it had permitted twenty-two months to lapse without a ruling. *See id.* The Federal Circuit wrote, "It was incumbent upon VTech to actively and promptly pursue its motion to transfer before the district court invested considerable time and attention on discovery and completing claim construction." *Id.*

VTech confirms that this Court should reject Defendants' motion here. Both principles underlying the Federal Circuit's ruling in *VTech* apply here, and even more strongly here than in *VTech.* First, where the Federal Circuit in *VTech* found a twenty-two month lapse excessive for transfer, Defendants here seek a transfer *thirty-two* months into the case. As in *VTech*, this Court has "invested considerable time and attention" on discovery issues, procedural issues, and substantive issues in the case. *Id.* To cite some important examples, this Court has considered and resolved the following motions, learning critical information along the way:

- A motion to dismiss for lack of standing. In resolving this motion after reviewing over 100 pages of briefing and over 700 pages of exhibits, this Court has thoroughly learned the facts and arguments pertaining to Defendants' unclean hands argument, which remains to be finally adjudicated in this case.

- A motion to compel Yahoo! to produce materials related to the Bing search engine. In resolving this motion after reviewing over 50 pages of submissions, this Court has become familiar with some of SRA's anticipated damages and willful infringement theories, as well as facts related to Yahoo!'s recent business activities.

- A motion to compel Defendants to provide non-infringement contentions.

And this Court has pending before it the following motions, among others:

- A motion to compel Google to provide various forms of discovery. In reviewing over 80 pages of briefing and over 900 pages of exhibits, and in holding a hearing regarding this motion, this Court has gained abundant

knowledge of the scope of SRA's infringement theories, the accused instrumentalities, the parties' course of conduct, the methods of discovery being employed by the parties, and other ongoing issues.

- A motion to compel Google to produce discovery related to damages. In considering this motion, this Court has become and will further become familiar with SRA's anticipated damages theories.

- A motion to compel Google to produce materials related to the *Function Media v. Google* case. In considering this motion, which has not even been fully briefed but already comprises over 20 pages of briefing and over 400 pages of exhibits, this Court has been and will further be made aware of the nature of the patents-in-suit, the accused instrumentalities, and SRA's anticipated damages, infringement, and other theories. During the thirty-two months of this case, this Court also developed expertise concerning Google's technologies and business through its adjudication of the *Function Media v. Google* case. That expertise relates to multiple core issues in this case, including both infringement by products accused in both *Function Media* and this case, and damages.

- A motion to protect Google from disclosure of allegedly sensitive discovery materials. In considering over 50 pages of briefing and over 500 pages of exhibits, this Court has learned and will learn critical information related to the asserted claims, the accused instrumentalities, and SRA's anticipated infringement and damages theories. For example, in briefing this motion, SRA educated this Court in detail about the meaning of Claims 27 and 41 of the '352 patent, Claims 7, 15, and 17 of the '571 patent, and the 1994 IDS in the '352 prosecution history. All this information is critical to resolving claim construction.

- A motion for leave to amend and supplement invalidity contentions and a cross- motion to strike Defendants' invalidity contentions. In considering over 75 pages of briefing and over 600 pages of exhibits, this Court has gained and will gain familiarity with SRA's infringement contentions and Defendants' invalidity contentions.

In other words, this Court has reviewed or has before it dozens of submissions totaling hundreds of pages of briefing and thousands of pages of exhibits. In adjudicating these submissions, this Court has "invested considerable time and attention" in studying the patents-in-suit, the parties' infringement and invalidity contentions, the parties' proposed positions regarding a variety of issues, portions of the prosecution histories of the patents-in-suit, facts related to the infringing technologies, facts related to Defendants' unclean hands allegations, the meaning of claim terms

and other substantive issues. The Court has also grown to understand the parties' conduct in litigation, as it has now seen the parties through the bulk of discovery and has considered multiple discovery motions. As of three months ago, claim construction is now underway, with the parties' having filed multiple claim construction disclosures in accordance with this Court's local rules and scheduling deadlines. Per this Court's scheduling order, the parties are expected to provide their "Joint Claim Construction and Prehearing Statement" in one week, with claim construction briefing to commence next month.

The second *VTech* principle also applies here with even more force than in *VTech*. In *VTech*, the Federal Circuit found that the defendant had failed the promptness requirement by permitting twenty-two months to lapse between the filing of the case and the ruling on transfer. *Id.* The Federal Circuit held this even though the defendant in that case had filed the motion to transfer just two months into the case. *Id.* Here, Defendants have permitted *thirty-two* months to lapse between the filing of the case and the present day. And Defendants alone are to blame for *fifteen* of those months. Rather than promptly filing their motion to transfer in 2007 when the case was filed, or even in 2008 when merits discovery was well underway, Defendants waited until early 2009 to file their motion to transfer. SRA eventually learned that at least one defendant had committed discovery abuse related to the motion by improperly failing to disclose material witnesses, necessitating supplemental briefing in November and December 2009—such that Defendants' motion was not fully and properly briefed to the Court until *twenty-five* months after the case was filed. Defendants thus have failed the Fifth Circuit's promptness requirement, as reaffirmed in *VTech*. Defendants' motion to transfer should be denied.

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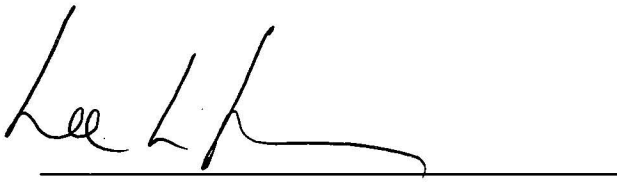
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record pursuant to Federal Rules of Civil Procedure on this the 12th day of July, 2010.



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