

**GOOGLE'S MOTION TO COMPEL COMPLIANCE WITH PATENT RULE 3-1**

**Exhibit 2**

# KING & SPALDING

King & Spalding LLP  
1185 Avenue of the Americas  
New York, New York 10036-4003  
www.kslaw.com

Scott T. Weingaertner  
Direct Dial: (212) 556-2227  
Direct Fax: (212) 556-2222  
sweingaertner@kslaw.com

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## VIA ELECTRONIC MAIL

Danny L. Williams  
Williams, Morgan & Amerson, P.C.  
10333 Richmond, Suite 1100  
Houston, Texas 77042

**Re: Aloft Media, LLC v. Google Inc. (Case No. 6:08-cv-440-LED)**

Dear Danny:

I write on behalf of Google Inc. (“Google”) regarding *Plaintiff Aloft Media LLC’s Patent Rule 3-1 Disclosure of Asserted Claims and Infringement Contentions and Rule 3-2 Disclosure (“PICs”)*, served on May 22, 2009 in the above-referenced litigation.

After reviewing the infringement contentions (“PICs”) of Aloft Media LLC (“Aloft”) with respect to the accused Google instrumentalities, it is clear that Aloft has failed to comply with the Local Patent Rules of the Federal District Court for the Eastern District of Texas (“the Patent Rules”). The Patent Rules require more than the cursory investigation of the accused products that Aloft’s PICs reflect, and the Patent Rules further require a complete disclosure of all known allegedly infringing products and not simply representative examples of alleged infringement. *See generally Am. Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005); *ConnecTel, LLC v. Cisco Sys., Inc.*, 391 F. Supp. 2d 526, 528 (E.D. Tex. 2005). At a minimum, the Federal Rules of Civil Procedure require adequate pre-suit investigation including examination of publicly-available material. *See View Eng’g, Inc. v. Robotic Vision Sys.*, 208 F.3d 981, 986 (Fed. Cir. 2000). As explained in detail below, Aloft’s PICs and accompanying document production fail to fulfill Aloft’s obligations under P.R. 3-1 and P.R. 3-2.

As an initial matter, Aloft contends that “the asserted claims are directly infringed by the making, using and selling of the ‘Accused Instrumentalities.’” Aloft does not sufficiently identify the accused instrumentalities. *See* P.R. 3-1(b) (“Each product, device, and apparatus must be identified by name or model number, if known”). Based on the November 19, 2008 *Original Complaint* (at ¶ 7), the May 22, 2009 *First Amended Complaint* (at ¶ 8), and the PICs (at ¶ 6), Google understands that the Chrome Browser product running on Microsoft Windows

stands accused as an Accused Instrumentality. If this understanding is not correct based on Aloft's view of its infringement case, please notify Google immediately of the exact list of actual products.

P.R. 3-1(d) expressly requires Aloft to set forth "[w]hether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality." Aloft expressly admits that "Aloft has not incorporated any analysis with respect to possible infringement under the doctrine of equivalents" and, as such, Aloft has waived its right to pursue infringement allegations under the doctrine of equivalents in the present action, without the showing of good cause required to amend its PICs.

Aloft attempts to avoid meeting its burden and the Court's deadlines by making statements such as: it "reserves the right to assert that Google is liable for infringement under the doctrine of equivalents" and that Aloft preserves its "right to supplement or amend its disclosure as additional facts are ascertained, analyses are made, and claims are construed." Any attempt by Aloft to avoid its duty to provide complete PICs has no basis in P.R. 3-1. .

More specifically, Aloft falls short of meeting its obligations under P.R. 3-1(b), which requires a plaintiff to identify, "[s]eparately for each asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality ... of which the party is aware. This identification shall be as specific as possible." (Emphasis added.) The Patent Rules are intended to "provide structure to discovery and enable the parties to move efficiently toward claim construction and the eventual resolution of their dispute." *Am. Video Graphics*, 359 F. Supp. 2d at 560. Aloft's PICs circumvent that efficiency by failing to describe the alleged infringement with the level of specificity required by P.R. 3-1. For example, Aloft merely lists "Google Chrome Browser" without identifying whether there is a particular version or versions of the Chrome product for Microsoft Windows that it accuses of infringement. This is simply insufficient under the Patent Rules.

In addition, different Chrome products are available on different operating systems: Windows, OS X, and Linux. There are separate Chrome products for OS X and Linux which contain different implementations that are specific to each respective operating system. (*See, e.g.,* <http://blog.chromium.org/2009/06/google-chrome-sandboxing-and-mac-os-x.html> (discussing different security implementation architectures for each operating system).) Moreover, the Chrome products for OS X and Linux currently lack features found in the Chrome product for Windows. (*See* <http://blog.chromium.org/2009/06/danger-mac-and-linux-builds-available.html>.) Should Aloft allege infringement by these other Chrome products, Aloft must also disclose separate claim charts for each specific product. *See TPL v. Fujitsu*, 2:05-cv-494, Dkt. 162, Order (E.D. Tex. Nov. 7, 2006) (Ward, J.).

Google further questions Aloft's PICs to the extent that they do not make clear whether the alleged infringement is direct or indirect and what specific facts are the bases for the allegations. Given Aloft's failure to comply with P.R. 3-1(b), Google cannot know which specific product version(s) Aloft has asserted each claim against, nor can Google determine whether Aloft contends that an accused product or version allegedly infringes a particular claim

directly, contributorily, or by inducement. Aloft's disregard of P.R. 3-1(b) thus imposes an undue burden on Google in the development of its positions in this case, and frustrates Google's ability to efficiently proceed through discovery.

Further, Aloft ignores its obligations under P.R. 3-1(c), which requires that a plaintiff provide "[a] chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality . . . ." (Emphasis added.) The charts provided with Aloft's PICs fall short of this requirement and thus do not provide a sufficient basis for Google to ascertain the infringement theories that Aloft is pursuing with respect to the accused product.

A critical failure in Aloft's PICs is the complete lack of reference to source code from the accused product, which is, and has been, both publicly and freely available. A September 2, 2008 press release from Google regarding the launch of its Chrome Browser noted that "Google Chrome is being released as an open source project under the name Chromium" (*See* [http://www.google.com/intl/en/press/pressrel/20080902\\_chrome.html](http://www.google.com/intl/en/press/pressrel/20080902_chrome.html).) The press release also directed those interested in more information about the Chrome source code to the Chromium website at [www.chromium.org](http://www.chromium.org). (*See id.*)

According to the Chromium website, "Google Chrome is built with open source code from Chromium." (*See* <http://dev.chromium.org/getting-involved>.) Visitors can – at no cost – "get Chromium's source code." (*See* <http://code.google.com/chromium/>.) The Chromium website includes detailed instructions for downloading and accessing the source code and build files on Windows, Mac OS X, or Linux platforms. (*See* <http://dev.chromium.org/developers>.) The same website also provides a wealth of information and documentation about the source code as well as discussion groups and FAQs for issues relating to the Chromium code. The website makes technical presentation videos available for free and on-demand. The website even offers "Engineering design docs" and "User experience design docs." (*Id.*)

Asserted claim 21 of the '691 patent relates to "a computer program product" and all three claim elements require "computer code." Likewise, asserted claims 36 and 37 of the '443 patent relate to "a computer program product" and include a number of claim elements that require "computer code." These referenced elements claim computer code for achieving a specified functionality, and it is therefore the computer code itself that must be identified. As such, the Patent Rules require Aloft to identify with particularity the computer code alleged to infringe the asserted claims. Given that source code relating to the Chrome browser was freely and publicly available months before Aloft even filed suit, the recently-served PICs are defiantly deficient as PICs under the Patent Rules and should have included a detailed identification of the particular source code implementing the accused functionality. "Representative" screen shots alleged to demonstrate a particular functionality are insufficient and inaccurate, in part because that functionality may be partly – or even entirely – provided by the operating system or other third party software or hardware.

Plaintiff's PICs must therefore provide "[a] chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality" (P.R. 3-1(c) (emphasis added)), including, with respect to elements in the asserted claims that require

“computer code,” the identification of allegedly infringing computer code. “When information is publicly available, the Patent Rules require plaintiffs to set forth specific theories of infringement at the outset of the case.” *Orion IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006) (Davis, J.) (citing *Am. Video Graphics*, 359 F. Supp. 2d at 560). “[I]n software cases, the Court has recognized the pragmatic limitation on detailed Rule 3-1 Disclosures *when plaintiffs do not have the necessary access to non-public software*, which is needed to make detailed infringement contentions.” *Id.* (citing *Am. Video Graphics*, 359 F. Supp. 2d at 560) (emphasis added). Source code implementing the functionality of the Chrome Browser is, and has been, readily available to Aloft since before this suit was filed and there is no excuse for the lack of detailed PICs identifying the specific source code alleged to infringe the asserted claims of the ‘691 and ‘443 patents.

Moreover, the complete lack of reference to source code prevents Google from analyzing the PICs to understand the actual basis for, and legitimacy of, Aloft’s allegations. As such, Google cannot yet identify other possible deficiencies in the PICs or begin preparing a defense. In other words, by disregarding and ignoring the very computer code that is necessary to meet the claim limitations, Aloft is in complete noncompliance with the Patent Rules and impermissibly leaves Google in the dark with respect to the alleged infringement.

To the extent that Aloft has any difficulty accessing the public source code (however unlikely that may be) or if Aloft simply prefers to have Chrome Browser code made available on a computer for its review, please contact me to schedule a visit.

Aside from Aloft’s failure to identify the allegedly infringing code, the ambiguous claim charts provided by Aloft fail to address the specific allegations with respect to many key claim elements. For example:

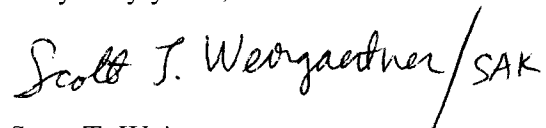
- The claim charts do not identify where or how the accused product is “utilizing a processor coupled to memory” – the processor needs to be specifically identified for each accused product;
- There is no explanation as to how the accused product is “displaying the content associated with at least one of the URLs utilizing the network browser,” whether software other than the accused product is required to meet this limitation, and where and in what component the content is physically displayed;
- The claim charts do not identify how the accused product is “storing” any content – please identify how and where and in what component the content is stored in the accused product (or if it is stored elsewhere); and
- The claim charts do not identify where there is any “automatic correlation” in the accused product, particularly because, even according to Aloft’s chart, the user must manually select “close” – the claimed correlation must be specifically identified within the accused product.

With respect to Aloft's purported Rule 3-2 Disclosures, Aloft has not produced any documents and only references documents produced in a co-pending litigation. (See PICs at 2 ("ALOFT 000001 – ALOFT 053487 have been previously produced in connection with *Aloft Media, LLC v. Microsoft Corporation, et al.* (Case No. 6:08-CV-50 JDL)”) (hereinafter “Aloft 50”).) As in the “Aloft 50” case, by failing to produce any responsive documents other than the file histories of the patents-in-suit, Aloft has not met its obligations under P.R. 3-2. In particular, Aloft has neither produced documents “sufficient to evidence each discussion with, disclosure to, or other manner of providing to a third party, or sale of or offer to sell, the claimed invention prior to the date of application for the patent in suit,” as required by P.R. 3-2(a), nor documents “evidencing the conception, reduction to practice, design, and development of each claimed invention, which were created on or before the date of application for the patent in suit or the priority date identified pursuant to P. R. 3-1(e), whichever is earlier,” as required by P.R. 3-2(b). Google therefore requests that Aloft either supplement its production with documents responsive to P.R. 3-2(a) and P.R. 3-2(b) or acknowledge that no such documents exist.

Finally, Google also notes that Aloft has no good faith basis for accusing Google of “selling” the accused instrumentalities (PICs at ¶ 2) when it is plainly evident that the Chrome Browser is distributed at no cost to a consumer. (See <http://www.google.com/chrome/> (“It’s free”).) Aloft should immediately seek to revise its allegations to correct this and any other factual inaccuracies. Google requests an immediate meet and confer to discuss Aloft’s failure to meet its obligations under the Patent Rules and will follow up with a date and time for that call.

Please feel free to contact me if you have any questions.

Very truly yours,

A handwritten signature in black ink that reads "Scott T. Weingaertner / SAK". The signature is written in a cursive style with a diagonal slash and the initials "SAK" at the end.

Scott T. Weingaertner

cc: Eric M. Albritton (via e-mail)  
Scott Stevens (via e-mail)  
Craig Tadlock (via e-mail)  
Robert F. Perry (via e-mail)  
Christopher C. Carnaval (via e-mail)  
Mike Jones (via e-mail)  
Allen Gardner (via e-mail)