

# EXHIBIT B

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

EOLAS TECHNOLOGIES, INC.,	)	Civil Action No. 6:09-cv-446
	)	
Plaintiff,	)	
	)	HIGHLY CONFIDENTIAL –
vs.	)	ATTORNEYS’ EYES ONLY
	)	
ADOBE SYSTEMS INC., et al.,	)	
	)	
Defendants.	)	
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**EXPERT REPORT OF ROY WEINSTEIN  
REGARDING DEFENDANT ADOBE SYSTEMS, INC.**

12. U.S. sales through Adobe.com for software total approximately \$1.1 billion for the period 2004 through 2010 (see Exhibit 3).

### **III. PRIOR LITIGATION INVOLVING THE PATENTS-IN-SUIT AND RELATED EVENTS**

#### **a. W3C Patent Advisory Group**

13. As set forth *supra* in the Core Report, in August 2003 a jury found that Microsoft Corporation (“Microsoft”) had infringed the Eolas ’906 patent and awarded damages of greater than \$520 million. Additionally, the court in that matter issued an injunction restraining and enjoining Microsoft from releasing new or revised products that would infringe the Eolas ’906 patent.<sup>19</sup>

14. On September 23, 2003, approximately one month after a jury found that Microsoft infringed the ’906 patent, World Wide Web Consortium (“W3C”), the global standard-setting body for the Web, launched a Patent Advisory Group to discuss issues arising from the ’906 patent.<sup>20</sup> W3C previously had invited its Members as well as other key commercial and open source software interests to attend an ad hoc meeting, hosted by Macromedia to begin to evaluate potential near-term changes that might be implemented in browsers, authoring tools, and Web sites as a result of the case involving Microsoft.<sup>21</sup>

15. The Patent Advisory Group published a Frequently Asked Questions (“FAQ”) document that set forth its reasoning for the Group’s creation and concerns. An entry discussing the impact and breath of the Eolas ’906 patent indicated:

[The ’906 Patent] may affect all Web pages involving dynamically loaded browser extensions that use external data and which feature

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19. The injunction was stayed and suspended pending resolution of any appeal filed in the action.

20. HTML Patent Advisory Group Charter, W3C.

21. HTML Patent Advisory Group Charter, W3C.

some kind of interactivity. Such browser extensions are widely used today e.g. for integrating audio, video and interactive media applications into Web pages. This could therefore affect a large number of Web pages.

16. Adobe was a participant in the Patent Advisory Group.<sup>22</sup>

17. Acting on the advice of the Patent Advisory Group, W3C urged the Director the U.S. Patent and Trademark Office (“USPTO”) to initiate a reexamination of the ’906 patent.<sup>23</sup> According to an October 28, 2003 letter from the Director of W3C to the Director of the USPTO,

The practical impact of withholding unrestricted access to the patented technology from use by the Web community will be to substantially impair the usability of the Web for hundreds of millions of individuals in the United States and around the world. The object embedding technology supposedly covered by the ’906 patent provides critical flexibility to Web browsers giving users seamless access to important features that extend the capabilities of Web browsers. Nearly every Web user relies on plug-in applications that add services such as streaming audio and video, advanced graphics and a variety of special purpose tools.<sup>24</sup>

18. The Director of W3C further noted that “changes forced by the ’906 patent will also have a **permanent impact on millions of Web pages that may have historical importance** [emphasis original]” and “[t]he ’906 patent will cause cascades of incompatibility to ripple through the Web.”<sup>25</sup>

19. In addition to actions taken by W3C, an October 15, 2003 letter to Director of the USPTO from Adobe itself urged the Director to exercise his authority to initiate a

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22. “HTML Patent Advisory Group (PAG) Public Home Page,” W3C website ([www.w3.org/2003/09/pag](http://www.w3.org/2003/09/pag)) viewed March 31, 2011.

23. “W3C Requests ’906 Patent Re-Examination,” W3C press release, October 29, 2003.

24. Letter from Tim Berners-Lee to Hon. James E. Rogan, October 28, 2003.

25. Letter from Tim Berners-Lee to Hon. James E. Rogan, October 28, 2003.

reexamination of the ’906 patent. According to Adobe, the ’906 patent “has been the subject of widespread concern within the industry to which it pertains.”<sup>26</sup> Further, Adobe asserted that “significant concerns have been expressed within the broader community of owners and users of web sites on the Internet regarding changes that would have to be implemented in web browsers to avoid infringing the [’906] patent,” and that “...any such changes will affect an enormous segment of the Internet-using community.”<sup>27</sup>

20. Director initiated reexaminations are rare; they account for only two percent of all reexaminations according to the USPTO.<sup>28</sup> Nevertheless, on October 30, 2003, the Director of the USPTO ordered a reexamination of the ’906 patent, claiming “a substantial outcry from a widespread segment of the affected industry has essentially raised a question of patentability with respect to the ’906 patent claims.”<sup>29</sup>

21. The patentability of claims 1 through 10 of the ’906 patent ultimately was confirmed during the first reexamination.<sup>30</sup>

**b. Purported Design Around**

22. Microsoft released a software update to its Internet Explorer browser in 2006 that “change[d] how Internet Explorer handles some Web pages that use ActiveX controls and Java add-ins.”<sup>31</sup> Microsoft explained, “After you install this update, you cannot interact with ActiveX controls from certain Web pages until these controls are enabled. To enable an ActiveX

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26. Letter from MeMe Jacobs Rasmussen to Hon. Steven Kunin, October 15, 2003.

27. Letter from MeMe Jacobs Rasmussen to Hon. Steven Kunin, October 15, 2003.

28. Hicks, Matthew, “Eolas Remains Confident in Face of Patent Re-examination,” *ExtremeTech*, November 12, 2003.

29. Director Initiated Order for Reexamination, October 30, 2003.

30. Ex Parte Reexamination Certificate, U.S. Patent No. 5,838,906, June 6, 2006.

31. “Internet Explorer 6 Software Update and Its Effect on ActiveX Controls,” Microsoft website ([support.microsoft.com/kb/912945](http://support.microsoft.com/kb/912945)) viewed March 30, 2011.

control, manually click the control.”<sup>32</sup> This method of enablement became known as “click to activate.” The update to Internet Explorer was released after Microsoft was found to infringe the ‘906 patent, but before it entered into a license agreement with Eolas. It is my understanding that Microsoft introduced click to activate in an attempt to avoid infringement of the ‘906 patent.<sup>33</sup>

23. While the update to Internet Explorer purportedly restricted interaction with embedded objects prior to their activation, Microsoft provided developers with solutions designed to avoid this restriction. In particular, Microsoft provided techniques to “create Web pages that load interactive controls that respond immediately to user input.”<sup>34</sup> In other words, Microsoft provided developers with a workaround for its purported design around.

24. On its website, Adobe described the Internet Explorer update and the update’s impact on its Flash based products:

Microsoft has released updates to Internet Explorer that will change how it handles some active content such as that viewed in Adobe's Macromedia Flash Player, Authorware Player, Shockwave Player, and Adobe Reader, as well as Sun Java, Apple QuickTime, Real Networks Real Player and other ActiveX controls.

Microsoft has stated that when viewing an affected website using the updated Internet Explorer browser, visitors will be able to see, but not interact with, the content. When a user mouses over the content, a tool tip will appear telling the user to click to activate the

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32. “Internet Explorer 6 Software Update and Its Effect on ActiveX Controls,” Microsoft website (<http://support.microsoft.com/kb/912945>) viewed March 30, 2011.

33. See, for example:

“Microsoft patches IE after Eolas ruling,” *The Register*, April 3, 2006.

“Microsoft Announces Steps to Address Eolas Patent Ruling,” Microsoft press release, October 6, 2003.

34. “Activating ActiveX Controls,” Microsoft website (<http://msdn.microsoft.com/en-us/library/ms537508%28v=vs.85%29.aspx>) viewed March 30, 2011.

content. After the visitor clicks the content, the content can receive user input and behave normally.<sup>35</sup>

Adobe advised Flash developers that “[t]here is a workaround for this behavior.”<sup>36</sup> Specifically, developers “can modify their existing websites so that their user experience is not impacted by the changes that Microsoft made to Internet Explorer.”<sup>37</sup> Adobe noted, “Developers can modify their HTML pages so that interactive controls can immediately respond to user input. We expect that many developers will want to make content ‘active’ without requiring the user to click.”<sup>38</sup>

25. Efforts by Adobe to mitigate the impact of the 2006 update to Internet Explorer by working around the purported design around demonstrate that click to activate is not an acceptable substitute for technology covered by the patents-in-suit. With respect to the Internet, small incremental changes to the user experience, such as eliminating a mouse click, can generate significant value.

#### **IV. INFRINGEMENT CONTENTIONS**

26. Eolas alleges that Adobe infringes at least Claims 1 and 6 of the ‘906 patent and at least Claims 1, 2, 3, 8, 10, 11, 16-18, 20-22, and 36-43 of the ‘985 patent.<sup>39</sup> I understand that independent Claims 1 and 6 of the ‘906 patent and independent Claims 1 and 16 of the ‘985 patent generally are directed at browsers on the client side of the network environment, and independent Claim 20 of the ‘985 patent generally is directed at the server side

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35. “Active Content FAQ,” Adobe website as of May 23, 2006 ([www.adobe.com/devnet/activecontent/faq.html](http://www.adobe.com/devnet/activecontent/faq.html) archived at [www.archive.org](http://www.archive.org)).

36. “Active Content Developer Center,” Adobe website as of May 22, 2006 ([www.adobe.com/devnet/activecontent/](http://www.adobe.com/devnet/activecontent/) archived at [www.archive.org](http://www.archive.org)).

37. “Active Content Developer Center,” Adobe website as of December 4, 2007 ([www.adobe.com/devnet/activecontent/](http://www.adobe.com/devnet/activecontent/) archived at [www.archive.org](http://www.archive.org)).

38. “Active Content Developer Center,” Adobe website as of May 22, 2006 ([www.adobe.com/devnet/activecontent/](http://www.adobe.com/devnet/activecontent/) archived at [www.archive.org](http://www.archive.org)).

39. Expert Report of Dr. David Martin.

and will be infringed without a license. Some *Georgia-Pacific* factors may suggest a starting point for the determination of a reasonable royalty, while others may suggest an upward or downward adjustment to the royalty.

54. The hypothetical negotiation occurs at the onset of alleged infringement; this is referred to as the hypothetical negotiation date. Accordingly the owner of the patents-in-suit would have entered into a hypothetical negotiation with Adobe at or about the time that infringement by Adobe commenced. The ‘906 patent issued on November 17, 1998. I understand that Eolas has held the exclusive right to grant sublicenses under the ‘906 patent since that time.<sup>81</sup> Eolas also has held the exclusive right to grant sublicenses to the ‘985 patent since its issuance on October 6, 2009. As discussed above, infringement by Adobe is alleged to have commenced in or about August 2006 when Adobe added Flash content to the adobe.com website.<sup>82</sup> Accordingly, the hypothetical negotiation date is in or around August 2006, and the parties to the negotiation are Eolas as the hypothetical licensor and Adobe and the hypothetical licensee.

55. It is my understanding, however, that Adobe is accused of indirect infringement of the ‘906 patent. Consequently, while the hypothetical negotiation date is in or around August 2006, the earliest date on which Eolas can begin to accrue damages is upon Adobe’s first knowledge of the ‘906 patent. I understand, however, that Adobe’s knowledge of the ‘906 patent predates August 2006.<sup>83</sup> Therefore, damages begin to accrue in August 2006.

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81. Exclusive License Agreement for Embedded Program Objects in Distributed Hypermedia Systems between the Regents of the University of California and Eolas Technologies Incorporated, August 1, 1995 (EOLASTX-0000010254-318).

82. Internet Archive Wayback Machine for Adobe.com, August 10, 2006. (<http://web.archive.org/web/20060810150243/http://www.adobe.com/>)

83. I understand that Adobe first became aware of the ‘906 patent during the proceedings of the W3C meetings hosted by Macromedia on August 19, 2003. I further understand that Adobe was involved in requesting a reexamination of the ‘906 patent in October, 2003. See deposition of Mimi Rasmussen, May 13, 2011 pp. 30,