

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:)	
)	
ISYS TECHNOLOGIES, INC., a)	
Nevada Corporation,)	
)	
Plaintiff,)	
)	
v.)	Case No. 2:11-CV-507CW
)	
GOOGLE, INC., a Delaware)	
Corporation, et al.,)	REDACTED
)	
Defendants.)	

Transcript of Hearing on Motion for TRO and Preliminary Injunction

BEFORE THE HONORABLE CLARK WADDOUPS

June 14, 2011

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1 Salt Lake City, Utah, Tuesday, June 14, 2011

2 * * *

3 THE COURT: Good afternoon. We're here in
4 the matter of Isys Technologies v. Google and others,
5 case 2:11-cv-507. Will counsel please state their
6 appearance.

7 MR. ZENGER: Your Honor, Todd Zenger for
8 plaintiff, with me is co-counsel Dax Anderson, and also
9 we have here Jason Sullivan, the president of Isys
10 Technologies.

11 THE COURT: Thank you.

12 MR. STOLEBARGER: Good afternoon, Your
13 Honor, Robert Stolebarger, Holme, Roberts & Owen,
14 appearing for the defendants.

15 MR. BUSCHMANN: Craig Buschmann, Holme,
16 Roberts & Owen, appearing for the defendants.

17 MR. WILLSEY: Peter Willsey, with the law
18 firm of Cooley LLP, representing all defendants other
19 than Samsung.

20 THE COURT: Thank you. We're here on Isys'
21 motion for a temporary restraining order. The issue
22 that I would like to start with, Mr. Zenger, is what is
23 the standard, the burden of proof, that applies in terms
24 of the test to be applied, in that connection what is
25 the status quo, and what are you seeking to do, what --

1 in terms of -- specifically what the relief you are
2 seeking, and how that bears upon what the appropriate
3 standard to be applied by the court is.

4 MR. ZENGER: Thank you, Your Honor.

5 Your Honor, I think the standard under the
6 Tenth Circuit law, and is consistent throughout the
7 nation, is there have to be four elements proved,
8 irreparable harm, likelihood of success on the merits --

9 THE COURT: I'm questioning whether or not
10 this is the disfavored relief that requires a heightened
11 standard of proof.

12 MR. ZENGER: Thank you. I would be happy to
13 address that.

14 THE COURT: I know what the four standards
15 are for a temporary restraining order.

16 MR. ZENGER: I figured you did. I just
17 wanted to make sure I was covering all the standards.

18 We believe here, Your Honor, that the status
19 quo that needs to be maintained is the ability of Isys
20 to go forward, not only with its pending application, to
21 which it gave notice to the world, but with its product
22 development and launch, which it has given notice to the
23 world, and that the status quo is that Isys is able to
24 go forward to perfect its registration and to launch its
25 product in a world free from a wave of competition and a

1 wave of marketing might and a wave of distribution and
2 advertising power of Google that will totally obliterate
3 our intended effort to have the market recognize the
4 mark CHROMIUMPC to be exclusively with Isys, and that no
5 similar or confusingly similar marks are to be
6 attributed to Google before Isys has an opportunity to
7 finish what it told the world it was going to start. So
8 we believe the status quo is a market without the
9 pending introduction of a PC product bearing CHROMEBOOK.

10 THE COURT: It sounds to me like what you're
11 saying is that you're asking the court to order
12 something that doesn't yet exist.

13 MR. ZENGER: No. I'm asking the court to
14 order what does now exist, because right now the market
15 has not been flooded with CHROMEBOOK, and that is what
16 they intend to do. So the status quo is we have been
17 going forward, we gave the world notice we were going to
18 create this product and call it by a certain name.

19 THE COURT: How do you explain what -- you
20 started by saying we're asking the court to preserve the
21 status quo, which is our ability to go forward, so
22 you're looking for something in the future that doesn't
23 now exist.

24 MR. ZENGER: Let me restate that. I'm
25 asking for the privilege to continue to go forward in a

1 market that isn't flooded --

2 THE COURT: You've changed continue to take,
3 but it's still talking about something that hasn't
4 happened yet.

5 MR. ZENGER: Okay. We're asking for the
6 market, the current market, which is free from
7 CHROMEBOOK to stay free from CHROMEBOOK and for the
8 market not to change, but for it to stay the same.

9 THE COURT: Wouldn't that -- you're asking
10 me to freeze facts as they now are?

11 MR. ZENGER: I'm asking you -- yes.

12 THE COURT: That would mean that Isys would
13 also be frozen where it now is.

14 MR. ZENGER: No, because what Isys has been
15 doing is preparing to perfect its trademark
16 registration, its trademark uses, and launch its
17 product.

18 THE COURT: So under your interpretation of
19 what the status quo is, what's the standard that
20 applies, is it the heightened standard, or is it the
21 modified standard?

22 MR. ZENGER: It is not the heightened
23 standard because we're not asking the court to change
24 the status quo of the market, but to leave it the way it
25 is. And the way it is is Isys is seeking to register,

1 perfect its trademark, and launch a product without a
2 confusingly similar one being injected upon it.

3 THE COURT: As you understand that, the
4 modified likelihood of success standard, what is it in
5 this circuit?

6 MR. ZENGER: My understanding is that there
7 has to be -- for the likelihood of success on the
8 merits?

9 THE COURT: Yes.

10 MR. ZENGER: That we have to show that there
11 is sufficient evidence upon which the court can find in
12 favor of -- that a reasonable factfinder or the court
13 could find in favor of the plaintiff.

14 THE COURT: Okay. Let's hear from someone,
15 whoever is going to address this issue on behalf of the
16 defendant.

17 MR. WILLSEY: Your Honor, Peter Willsey,
18 thank you. Your Honor, of course we believe, and we
19 think it's clear, that what plaintiff wants to do is to
20 upset the status quo and, therefore, a heightened
21 standard should apply in this case. In order to obtain
22 the extraordinary relief of a TRO in this situation and
23 to stop a multimillion dollar product launch, which has
24 been under development for two years, the plaintiffs
25 would have to meet a clear and unequivocal showing as to

1 all the elements required to obtain a TRO.

2 They point as support for their basis --

3 THE COURT: What do you believe the status
4 quo is?

5 MR. WILLSEY: The status quo is a situation
6 where the plaintiff has yet to sell or ship any product
7 bearing the CHROMIUMPC mark.

8 THE COURT: Isn't that also true as to
9 Google, it has yet to ship any computers with the
10 CHROMIUMBOOK trademark on a computer.

11 MR. WILLSEY: Your Honor, actually, as
12 you'll hear today from one of Google's witnesses, if you
13 permit us to put on witnesses, Google has in fact
14 shipped over a thousand of its computers that are set to
15 be publicly launched tomorrow.

16 THE COURT: It has shipped computers under
17 the trademark CHROMIUMBOOK?

18 MR. WILLSEY: They have -- well, CHROMEBOOK.

19 THE COURT: I'm sorry, I've misspoken.

20 MR. WILLSEY: These are the products that
21 will be the CHROMEBOOK. They --

22 THE COURT: What name did they ship under?

23 MR. WILLSEY: Samsung Series 5 CHROMEBOOK.

24 THE COURT: So they did use the claim
25 trademark CHROMEBOOK in the thousand that have shipped?

1 MR. WILLSEY: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. WILLSEY: Now, plaintiffs point to this
4 supposed desire to perfect their trademark rights.
5 That's a red herring here, Your Honor, because they
6 don't need a trademark registration in order to use
7 CHROMIUMPC. They can go out and use CHROMIUMPC. Now,
8 our position is that to the extent they start using
9 CHROMIUMPC in commerce, that would infringe Google's
10 right to the CHROMIUM mark, for which it has a prior
11 pending trademark application, which was recently
12 allowed for registration by the PTO. All of this is in
13 the context of marketing materials that have been
14 disseminated by the plaintiff that foster the very
15 confusion that they complain about. They claim to be I
16 think concerned about reverse confusion --

17 THE COURT: I think you're getting beyond --

18 MR. WILLSEY: I understand --

19 THE COURT: -- which is the standard that's
20 going to be applied. We'll get to these other points.

21 MR. WILLSEY: So to bring it to a point,
22 they wish to alter the status quo. Google has developed
23 its product for years, sales have been made, they will
24 continue to be made on a larger basis tomorrow, and at
25 the same time plaintiff has not made any sale of the

1 CHROMIUMPC product, or at least they haven't supplied us
2 any evidence they have. For that reason, a heightened
3 standard should apply, they should be forced to make a
4 clear and unequivocal showing as to all the required
5 elements before issuance of a TRO.

6 THE COURT: Mr. Zenger, if I could go back
7 to you, I want you to proceed with your argument,
8 assuming that the heightened standard applies, finding
9 that this -- assuming that this is a disfavored
10 preliminary injunction type relief, if you believe you
11 can't meet that standard, or after -- if you want to
12 argue that it shouldn't apply and attempt to establish
13 how you could meet the requirements under the -- what
14 the Tenth Circuit calls a modified likelihood of success
15 standard, I'll allow you to argue that. But I think you
16 should argue initially, assuming that the heightened
17 standard applies. You may proceed.

18 MR. ZENGER: Just for the record then, Your
19 Honor, we would object to the heightened standard
20 applies, but we will argue heightened standard, and in
21 doing that, we still believe the evidence meets the
22 heightened standard, and if it meets heightened
23 standard, it certainly meets the lower standard. But we
24 object to the extent that we are required to put on the
25 heightened standard and our evidence only meets the

1 lower standard, we reserve that position.

2 Your Honor, in order to go forward I think
3 it's best for us to set some factual standards -- or
4 some factual context. I want to know if you want any
5 argument now or whether we can go right to the evidence.

6 THE COURT: Let me tell you where I am
7 because we have about an hour and-a-half to use and we
8 want to use it wisely. I have read all of the briefs, I
9 believe I understand the arguments in the brief, and I
10 prove that I don't really, but I think I do, and I have
11 looked at some of the supporting evidence, so in terms
12 of the factual context, I've got that well in mind. So
13 why don't you just go right to the facts that you think
14 are critical to support your motion.

15 MR. ZENGER: Well, Your Honor, from the
16 standpoint of a record in order to establish those
17 facts, we would like to call two witnesses.

18 THE COURT: Proceed.

19 MR. ZENGER: Okay. We would first call
20 Jason Sullivan.

21 MR. STOLEBARGER: Your Honor, may I invoke
22 Rule 16.

23 THE COURT: The rule will be applied, and
24 all witnesses who are not -- who may testify will now be
25 required to leave the courtroom, unless they're expert

1 witnesses. Experts may remain in the courtroom.

2 If you would come right up here in front of
3 Mr. Taylor to be placed under oath.

4 JASON SULLIVAN,
5 called as a witness at the request of the Plaintiff,
6 having been first duly sworn, was examined
7 and testified as follows:

8 THE CLERK: Please have a seat in the
9 witness stand. Sir, if I could have you move up close
10 to the microphone, please say your name and spell your
11 last name for our record.

12 THE DEFENDANT: My name is Jason Sullivan,
13 Sullivan, S-u-l-l-i-v-a-n.

14 THE CLERK: Thank you.

15 DIRECT EXAMINATION

16 BY MR. ZENGER:

17 Q. Mr. Sullivan, can you please tell us what your
18 relation is with Isys Technologies?

19 A. I'm a founder, president, CEO of Isys
20 Technologies.

21 Q. What's your relationship to any subsidiaries of
22 Isys that might be involved in this matter?

23 A. We have a subsidiary Xi3 which faces the
24 customer, I'm the president of that company.

25 MR. ZENGER: Your Honor, with your

1 permission, during the course of the testimony, I've put
2 a board up here in which we would like to put some items
3 on a timeline. May I proceed to do that as the
4 testimony is elicited?

5 THE COURT: Yes, you may.

6 MR. STOLEBARGER: Is that offered for
7 illustrative purposes?

8 THE COURT: We'll see when it's offered.

9 MR. ZENGER: Thank you.

10 Q. (By Mr. Zenger) Mr. Sullivan, are you an
11 inventor?

12 A. I am.

13 Q. Are there any of your inventions that are related
14 to this matter?

15 A. There are.

16 Q. When did those inventions -- development of your
17 inventions begin?

18 A. Started back in 1999 and subsequently turned into
19 some filings in 2002.

20 Q. What did you invent?

21 A. I invented a new standard for computers called
22 Modular Computing.

23 Q. And can you give us an example of that Modular
24 Computing?

25 A. Sitting right there on the desk.

1 MR. ZENGER: Your Honor, during the course
2 of this testimony may I present to him illustrative
3 items and other exhibits without asking permission?

4 THE COURT: Yes, permission is granted to
5 approach as you believe is appropriate.

6 Q. (By Mr. Zenger) What is that device that you have
7 there in front of you?

8 A. This is our product, the Modular Computer.
9 Small, it's basically a full-blown computer chunked down
10 into 40 square inches.

11 Q. What does modular mean, can you explain to the
12 court why -- what modular means.

13 A. We can change the application of the computer.
14 So most computers the day that they're built they're
15 designated to have one application or another. So this
16 computer can be a home computer one day, and you can
17 actually remove portions of it and change it to a
18 computer that would run an industrial machine tomorrow.

19 Q. Would you please show the court how this hardware
20 can be readily adapted to keep up with any changes in
21 software or any desired changes in software?

22 A. Basically we have several patents on how the box
23 is constructed. It's all robotically built, so it takes
24 very little human labor. You can actually build it on
25 the continent that you sell it on. So the inside just

1 kind of slides out. And the system is built out of
2 three boards. This is kind of the core processing,
3 which is a standard computer, pretty much everything you
4 see today, ATM machines, hydraulic control systems,
5 desktop computers, things of that nature. And what
6 changes it from an ATM machine to a personal computer is
7 basically the identity of the chips that are inside the
8 computer. So whether it runs USB or has some type of
9 specialty board on it is dependent upon what is inside
10 the computer. So what we've done is allowed for you to
11 change the nature of that computer from one day being a
12 personal computer to the next day making a custom card
13 and making a hydraulic control system or an ATM. You
14 just remove the old card and put a new one in. So you
15 can actually change everything from the operating
16 system, the low level software, all the way down to the
17 peripheral eye, which is a fancy word for like USB, the
18 little -- like the USB mouse.

19 Q. Is this a change that the consumer can readily
20 make?

21 A. Yes. It was designed specifically so that
22 computers wouldn't become outdated. So traditionally
23 when you see all of this technology and existing
24 technology sits on one board like a flat all-in-one, so
25 once you make it, you can't change its application from

1 one to the other. So what we did was invented this
2 technology that allows you to change the computer's
3 application from one to the other.

4 Q. Can you describe the appearance of the device?

5 A. A small 40 square inch computer, about the size
6 of a grapefruit, weighs about a pound and four ounces,
7 easily usable. It's a standard in computers called x86,
8 modus code runs on, so Windows, Linux, other -- every
9 x86, a little x, x86 is a standard in computers that
10 allows you to run -- it's the standard which Intel
11 adopted, so it's the architecture by which most code in
12 the world is written to.

13 Q. And what colors does it come in?

14 A. Comes in any color, red, blue, green, different
15 finishes. We set off to make basically a fashion PC.
16 We've been denoted in the marketplace to be very similar
17 to Apple, only in the PC world. So Apple doesn't --
18 they have their own software. We use any type of
19 software in our product, so Windows, Linux, Unix,
20 CHROMIUM OS.

21 Q. How are these products to be sold?

22 A. We actually sell in two different marketplaces.
23 We sell in the wholesale market through distribution.

24 Q. What brand do you use in the wholesale market?

25 A. We use -- Xi3 is the name of the company that

1 faces the customer, and so Xi3 sells it under the
2 Modular Computing mark. And the reason why -- Xi3
3 modular is what we sell it under, and the reason is is
4 because we allow our customers to put their names on the
5 product, so we actually went after some patent
6 protection that allows us to put our customers' names on
7 the product. So this is one of our customers, Intuit,
8 they make QuickBooks, Quicken, things like that.

9 Q. That's on the wholesale side?

10 A. On the wholesale side.

11 Q. What's the other market that you sell in?

12 A. The other side is going to be the retail side.

13 Q. What brand are you going to use on the retail
14 side?

15 A. We're going use CHROMIUMPC on the retail side.

16 Q. When was the CHROMIUMPC name chosen?

17 A. We started back in 2009 working with CHROMIUMPC.

18 We actually came up with it before. Modular Computer
19 was the first mark that we came out with, but as we went
20 forward in the marketplace we found that our wholesale
21 divisions took off faster than the retail side. The
22 retail side is a little bit different. Wholesale
23 customers come in an order 5,000 pieces, I fulfill the
24 5,000 pieces, I take the next order. Retail's a little
25 bit different. As you'll probably hear later on,

1 there's a lot more cost and expense in doing retail
2 because you have to build all the stuff upfront and put
3 it on the shelf for someone to buy it.

4 Q. Why did Isys choose the name CHROMIUMPC?

5 A. It's our fanciful mark, it's our -- you know, we
6 couldn't name it Fashion PC because it would be
7 descriptive.

8 MR. STOLEBARGER: I'm going to have to
9 impose an objection. The witness is now testifying as
10 to matters that require a foundation for expert
11 testimony as to the nature of the trademark. He just
12 referred to the mark as a fanciful mark. There's been
13 no foundation for that testimony.

14 THE COURT: Overruled. It's a legal issue.

15 MR. ZENGER: Your Honor --

16 Q. (By Mr. Zenger) And what colors would the
17 CHROMIUMPC come in?

18 A. It's designed to be in all colors, but we needed
19 one mark, so on our wholesale product where we put other
20 people's names on it, you can't put -- you know, in a
21 package at Best Buy or Amazon, you can't customize a
22 product like that, so it has to have a continual name
23 that can be used that they can identify the goods from.

24 Q. And the CHROMIUMPC, are they the same Modular
25 Computer that allows the --

1 A. Identical product.

2 Q. -- boards to be changed and swapped out readily?

3 A. It's the identical product. The only difference
4 is that there be -- that that bottom card that I pulled
5 out, this card here, would have software and the
6 firmware for CHROMIUM, CHROMIUM OS.

7 Q. If they chose to use such a software?

8 A. Uh-huh (affirmative). Or Microsoft or Linux or
9 whatever. But that's kind of the concept is to be able
10 to let consumers pick and choose the different -- the
11 different options available in the marketplace. Most
12 products kind of shoehorn a customer into one operating
13 system, and with this product what it was designed to do
14 is to give people the choice to go all the way from open
15 source operating systems, like Google's operating
16 system, all the way through Microsoft's Windows 8, which
17 is you pay to play, pay \$200 to buy a license.

18 Q. What about the appearance of the device, or the
19 hardware of the device Linux, anything that Google has
20 done?

21 A. What do you mean what --

22 Q. Does anything of the hardware or appearance mimic
23 anything that Google has done?

24 A. No. No. This is --

25 MR. STOLEBARGER: Your Honor, objection, as

1 to lack of foundation that this witness understands what
2 Google has done.

3 THE COURT: Sustained as to lack of
4 foundation.

5 Q. (By Mr. Zenger) Are you aware of the business
6 that's conducted by Google?

7 A. What you see in the -- everyday on the Internet
8 or in the press.

9 Q. Have you ever seen a hardware device that is
10 offered for sale by Google?

11 A. I have.

12 Q. And do they mimic either the design or the
13 hardware of the CHROMIUMPC?

14 A. No, not that I've seen.

15 Q. Okay. Was the CHROMIUMPC mark adopted in any way
16 to have association with any Google open source project?

17 MR. STOLEBARGER: Objection, Your Honor,
18 that's a legal question.

19 MR. ZENGER: Your Honor, it's a fact
20 question. I'm asking --

21 THE COURT: Overruled.

22 MR. ZENGER: Thank you.

23 THE WITNESS: It was our name for our retail
24 product. It was our fanciful name. We couldn't name it
25 Fashion PC. We had to come up with a name for it. So,

1 you know, chrome denotes something that is flashy and
2 fanciful, so that's what we wanted to portray to the
3 marketplace that you could have the big square computer
4 that's sitting under your desk, but you could also be
5 fashion conscious while you were doing that.

6 Q. How long have you been working in the computer
7 industry, Mr. Sullivan?

8 A. For a while, since '94.

9 Q. Okay. And in the computer industry are there
10 distinctions between hardware and software?

11 A. Very much so.

12 Q. And what are they?

13 A. I like to look at it as like a basket. So
14 hardware is a basket that software sits in. So hardware
15 is a mechanical device. Software is zeros and ones,
16 binary code. You buy software on a CD or preload it on
17 a computer, but they're very, very different. As a
18 matter fact, there's very little confusion from my
19 standpoint of the difference between software and
20 hardware.

21 Q. Getting back to your product launches, has Isys
22 launched its wholesale product?

23 A. It has. It's actually presented both products to
24 the market.

25 Q. All right. And when was the wholesale product

1 launched?

2 A. The first one started shipping I think July. We
3 have been in the marketplace and talking before then,
4 but I would say July 2010.

5 Q. So they were promoted before July 2010?

6 A. Oh, yeah, absolutely.

7 Q. Shipments began --

8 A. Shipments began in July 2010 for Xi3 Modular PC.

9 Q. And what has Isys done to launch the retail side
10 under the CHROMIUMPC mark?

11 A. We actually -- so when we came up with the name,
12 sometime after we came up with the name, we went and
13 filed for all of the marks that go with it. So when you
14 buy -- when you go to get a mark, it's our belief that
15 you should try and own all of the pieces of it. So we
16 went out and got the Web site, we went out and got the
17 Twitter account, went out and got the YouTube account,
18 the Facebook account, all the collateral -- we call it
19 collateral properties that go around the mark, so that
20 no matter when somebody types something in, they type in
21 CHROMIUMPC in YouTube, they get to us, they type in
22 CHROMIUMPC in Facebook, they get to us. So we went out
23 and did all of that first.

24 And then after we acquired all of the
25 properties, because sometimes you run into problems

1 where you can get the mark, but you can't get the
2 properties, and this happens to be a situation where we
3 were able to get both, which makes the mark very strong
4 in our eyes because we may want to eventually make
5 CHROMIUMPC its own company. We don't know.

6 Q. What other channels did Isys use to launch the
7 retail CHROMIUMPC product?

8 A. We put up a Web site. We actually had pre-sales
9 in the product, we talked about it on e-mail, we talked
10 about it on the phone, we dragged that little chrome box
11 all around God's green earth showing people the product.

12 Q. Is this the box?

13 A. That is the box.

14 Q. Where did you take it?

15 A. Everywhere.

16 Q. Did you transport it to other states in the
17 United States?

18 A. Absolutely, Nevada, Arizona, California.

19 Q. For what purposes?

20 A. To sell it.

21 Q. To whom?

22 A. Anybody who wants to buy it.

23 Q. Did you take it to trade shows?

24 A. Absolutely.

25 Q. Transport it to trade shows in other states?

1 A. Absolutely.

2 Q. Did you show it to people at trade shows?

3 A. I did.

4 And so, just to be clear, our focus has been
5 on the wholesale side of the business, and that's why we
6 filed, we filed an intent to use application. And my
7 understanding of it is that cow walked into my rights.
8 I wasn't forced to go be ultra verbal about it, though I
9 was out and was actively soliciting the product, I was
10 kind of trying to wait for a big -- some big event to
11 launch the retail product, garner some capital from my
12 wholesale sales and get my feet wet and then make a big
13 retail slash. And now my mark is in jeopardy.

14 Q. Has this device generated interest at trade
15 shows?

16 A. Oh, a ton.

17 Q. Has it --

18 MR. STOLEBARGER: Your Honor, could we be
19 more specific as to the device, CHROMIUMPC or the Xi3
20 Modular.

21 MR. ZENGER: Both, that's why I said the
22 device.

23 Has the device gone --

24 THE COURT: Mr. Zenger, if you would let me
25 rule before you proceed. I'm going to overrule the

1 objection.

2 Q. (By Mr. Zenger) Has the device -- are there
3 expectant customers for either the device branded as Xi3
4 or CHROMIUMPC?

5 A. Both products.

6 Q. How do you know there are -- you have expectant
7 customers?

8 A. I've talked to them. We were at -- we won an
9 international award from the Consumer Electronics Show
10 for Hardware Design last year before the CES Show in
11 January. And though our initial push into the market
12 was Xi3 Modular Computer, primarily because we were
13 focusing business to business more so than business to
14 consumer, we did talk to people because people asked
15 us -- people are very interested in new operating
16 systems but they have a fear of new operating systems
17 because they -- if they buy a system with a new
18 operating system and they don't like it, they can't go
19 backwards. What our technology does is allow them to do
20 both. If you bought it with a new operating system and
21 you didn't like it, you could replace that card and go
22 back to Windows.

23 Q. And based upon the response that you've had at
24 trade shows, do you have an estimate as to how many
25 expectant customers you have?

1 A. Hundreds of thousands.

2 Q. Do you have that same expectation with respect to
3 CHROMIUMPC?

4 MR. STOLEBARGER: Was the number hundreds or
5 thousands or --

6 THE WITNESS: Hundreds of thousands.

7 Q. (By Mr. Zenger) Do you have that same expectation
8 with respect to the launch of CHROMIUMPC based on that
9 kind of market response to your device?

10 A. Absolutely.

11 Q. I would like to show you Exhibit Number 2. What
12 is Exhibit Number 2, do you recognize Exhibit Number 2?

13 A. I do.

14 Q. What is it?

15 A. It's a picture of my --

16 MR. STOLEBARGER: There's probably an easier
17 way to do this, I don't want to interrupt, but we filed
18 an objection to the exhibits on file with the court. I
19 can offer an objection as to each page as each exhibit
20 comes up, or I can allow Your Honor to just look at the
21 exhibits because this is a bench hearing, I don't want
22 to be disruptive, and I'm sure you can assign whatever
23 weight is appropriate, but --

24 THE COURT: When he offers it into evidence
25 you may -- you should object if you don't believe it

1 should be received.

2 MR. STOLEBARGER: Thank you, Your Honor.

3 Q. (By Mr. Zenger) Do you recognize Exhibit 2?

4 A. I do.

5 Q. What is it?

6 A. It's a printout of our CHROMIUMPC Web site
7 chromiumpc.com.

8 Q. Are there other papers associated in Exhibit 2
9 that relate to CHROMIUMPC?

10 A. Let's see, yeah, some of our setup stuff when we
11 set up our servers and our blogs that we blogged and
12 talked about our product in the marketplace, our
13 pre-sales orders from our -- we have a software program
14 that manages the orders when people go online and
15 preorder a product, so to manage taking their credit
16 card numbers and stuff, e-mails to --

17 Q. Are these true and correct copies?

18 A. Absolutely. There are some e-mails in here from
19 some of our sales guys to large companies like DHL and
20 CVS Pharmacy.

21 MR. ZENGER: Your Honor, do you want me to
22 move the entry of these exhibits as we go or at the end?

23 THE COURT: You should offer them as you
24 proceed.

25 MR. ZENGER: We offer Exhibit 2 into

1 evidence having been properly authenticated and
2 identified.

3 THE COURT: Any objection, Mr. Stolebarger?

4 MR. STOLEBARGER: No, Your Honor.

5 THE COURT: Exhibit 2 is received.

6 (Whereupon, Plaintiff's Exhibit 2 was
7 received into evidence.)

8 Q. (By Mr. Zenger) Did there come a point in time,
9 Mr. Sullivan, when you filed for a trademark application
10 for CHROMIUMPC?

11 A. We did. It was sometime after we filed the --
12 for the Web site and all of the collateral properties
13 that go with the Web site.

14 Q. I've given you Exhibit Number 3, can you tell me
15 whether you recognize Exhibit Number 3?

16 A. It looks to be our CHROMIUMPC registration with
17 the USPTO.

18 Q. Okay. And do you recall when the CHROMIUMPC
19 application was filed?

20 A. It says it was --

21 MR. STOLEBARGER: Your Honor, I believe the
22 witness just characterized this as the CHROMIUMPC
23 registration. The opinion as to whether or not this is
24 what constitutes a registration calls for expert
25 testimony.

1 THE COURT: He can characterize whatever it
2 is. It's not going to change the nature of the
3 document.

4 MR. ZENGER: Thank you, Your Honor.

5 Q. (By Mr. Zenger) Do you recall when the CHROMIUMPC
6 trademark application was filed?

7 A. It says here it was filed June 21st, 2010. You
8 might want to write that a little bigger.

9 Q. What goods and services were described for which
10 CHROMIUMPC -- which you sought protection for
11 CHROMIUMPC?

12 A. We filed under hardware obviously, and it covered
13 some other things, computer carrying cases, computer
14 chassis, computer expansion boards, computer hardware,
15 computer interface boards, computer peripherals, and
16 computers.

17 Q. At the time you filed this application, were you
18 aware of any similar products being offered by Google
19 under any brand name?

20 A. No.

21 Q. Were you aware at the time you filed this
22 application of any goods or services of Google --

23 A. Wait, wait, what date was it? Are you talking
24 from which date?

25 Q. June 2010.

1 A. No, I knew Google had a browser called Chrome.

2 Q. I asked you are you aware that Google had any of
3 these hardware products that you've just described that
4 they were selling?

5 A. No. They had software products.

6 Q. Thank you. And what kind of application was
7 this?

8 A. This was an intent to use application.

9 Q. What's your understanding, your understanding of
10 an intent to use application?

11 A. I've been told that an intent to -- when I went
12 to go file the mark, because I wasn't ready really to
13 run full steam into the market, I wanted to keep people
14 off the mark for a period of time while I decided when I
15 officially wanted to launch my retail product, and so we
16 filed an intent to use application to at a later date
17 peg when the first implementation of the -- when the
18 first time I used it in commerce was.

19 Q. What's your understanding of the effect of filing
20 an intent to use application?

21 A. I don't understand the question.

22 Q. When you filed the intent to use application,
23 what is your understanding of the effect of that filing
24 on others?

25 MR. STOLEBARGER: Your Honor, that's asking

1 for opinion testimony.

2 THE COURT: Sustained.

3 MR. ZENGER: Your Honor, I'm not asking for
4 opinion testimony, I'm just asking --

5 THE COURT: I understand, but why is his
6 understanding relevant?

7 MR. ZENGER: Okay. Thank you.

8 Q. (By Mr. Zenger) Was the trademark office given
9 any indication as to whether your CHROMIUMPC trademark
10 application should be allowed?

11 A. Yes.

12 MR. STOLEBARGER: Hearsay.

13 THE COURT: I'm sorry, Mr. Stolebarger.

14 MR. STOLEBARGER: That would be calling for
15 hearsay.

16 THE COURT: Sustained on lack of foundation.

17 MR. ZENGER: Okay.

18 Q. (By Mr. Zenger) Mr. Sullivan, did you receive
19 communication from the United States Trademark Office
20 regarding your application for CHROMIUMPC?

21 A. I did.

22 Q. Did you receive any correspondence from the
23 United States Trademark Office as to whether the
24 CHROMIUMPC application could be registrable?

25 A. Yes, it was approved for registration.

1 Q. Okay.

2 MR. STOLEBARGER: If there's a writing, that
3 would be the best evidence. The witness has been asked
4 to summarize a written communication. I would object on
5 that ground.

6 THE COURT: For purposes of a preliminary
7 injunction, is this fact really in dispute,
8 Mr. Stolebarger?

9 MR. WILLSEY: Your Honor, the fact that they
10 own a pending trademark application is not.

11 THE COURT: Let's not bother objecting to
12 facts not in dispute.

13 MR. ZENGER: Thank you.

14 THE COURT: We don't have time for that
15 elaborate of an evidentiary hearing.

16 Q. (By Mr. Zenger) What happens after a mark is
17 provisionally indicated as allowable?

18 A. My understanding is that it is published for
19 opposition to the rest of the world, but we put the
20 world on notice a year ago that we -- to stay off the
21 mark.

22 Q. Do you understand how long that opposition period
23 is?

24 A. My understanding is 30 days from the time that
25 it's set for approval.

1 Q. Okay. Was your company's CHROMIUMPC application
2 opposed?

3 A. It was.

4 Q. By whom?

5 A. Google.

6 Q. When?

7 A. Six months after it's approval.

8 Q. How is that it they opposed it six months after
9 approval when there's a 30-day opposition period?

10 MR. STOLEBARGER: Your Honor, I'm sorry, the
11 witness is testifying now that the application's been
12 approved. There's absolutely no evidence of that.

13 THE COURT: Sustained. I don't believe --

14 MR. ZENGER: Your Honor, I asked the witness
15 whether there was an interim approval of the mark, and
16 what that means is -- and I think this is a legal point
17 that also is not contested, that is, the trademark
18 office allowed an application. I asked the witness what
19 happens next. He said it's published for opposition,
20 and it was opposed. So it was an interim approval
21 pending opposition by someone else.

22 THE WITNESS: Your Honor, I received
23 notifications --

24 MR. WILLSEY: Your Honor, we're not
25 objecting to the existence of this application, but what

1 we take issue with though is his characterization of as
2 to what has happened through the application process.
3 He's asking the witness to testify about trademark
4 legal --

5 THE COURT: It seems like many of these
6 disputes are presented in the memoranda in the statement
7 of facts. They're really not in dispute. So if you
8 want to have him saying some particular insight or
9 perspective he has on these facts, that would be
10 helpful. It's not helpful to have him just restate
11 what's in the memorandum that's not disputed.

12 MR. ZENGER: Thank you. I'll move on.

13 Q. (By Mr. Zenger) So there was a period of time
14 between the -- when the mark was published for
15 opposition and when Google opposed the mark.

16 A. I got a phone call about Google's opposition.
17 They had called counsel and stated they may have issue
18 with my mark, they may want to oppose it. And they
19 waited, they kept going through these processes where
20 they kept extending the period of time, which until they
21 physically opposed it I didn't have any problem with it
22 because may have issues with it and actually have issues
23 with it are two different things.

24 Q. What has been the effect of these delays on the
25 registration of CHROMIUMPC?

1 A. Our mark has not been able to perfect. So we
2 have been delayed six months from the -- supposed to
3 have 30 days, and we played along not thinking that
4 there was going to be any issue, and here there were
5 other -- from my perspective, there were other reasons
6 why the filings were being delayed.

7 MR. STOLEBARGER: Your Honor, it's hard to
8 interpose an objection after the question and the
9 witness gave his answer, but now the witness is
10 testifying in a manner where he's now trying to explain
11 the intent of Google.

12 THE COURT: Well, he's headed in that
13 direction. I don't think he's got there yet.

14 MR. ZENGER: I think he stopped.

15 THE COURT: I'll overrule the objection at
16 this point.

17 MR. ZENGER: I present to you Exhibit 1, do
18 you recognize Exhibit 1?

19 THE WITNESS: I do.

20 MR. ZENGER: Oh, by the way, Your Honor, I
21 would like to go back and move the admission of
22 Exhibit 3, the papers related to the CHROMIUMPC
23 trademark application.

24 THE COURT: Any objection to 3?

25 MR. STOLEBARGER: Your Honor, with the

1 representation from the witness that this is the
2 complete file. I did not hear that question asked. If
3 the question is posed and the answer is in the
4 affirmative, we don't object.

5 MR. ZENGER: Are the papers represented in
6 Exhibit Number 3 true and correct copies as you -- as
7 papers related to the CHROMIUMPC trademark application?

8 THE WITNESS: May I look through them?

9 MR. ZENGER: Yes.

10 MR. STOLEBARGER: The question is whether or
11 not this constitutes the complete file.

12 MR. ZENGER: I didn't ask that question, and
13 I'm not presenting it and I'm offering it as the
14 complete prosecution file. I'm asking if it represents
15 true and correct copies --

16 THE COURT: I don't think there's a
17 challenge on that ground.

18 MR. ZENGER: Then I don't understand the
19 objection.

20 THE COURT: The objection was he doesn't --
21 he questions whether or not Exhibit 3 is the complete
22 application.

23 MR. ZENGER: And I'm not offering it as
24 that. I'm offering it as exemplary copies.

25 THE COURT: It's not being offered as the

1 complete application. Do you have an objection,
2 Mr. Stolebarger?

3 MR. STOLEBARGER: We have -- the best
4 evidence would be the complete application. This is
5 some collection. There's been no foundation what
6 portions were selected and what portions of the file
7 were not selected.

8 THE COURT: I'm going to overrule the
9 objection. I'll receive it for what it is. If there
10 are other relevant portions of the exhibit that should
11 be offered, I'll entertain those on cross-examination.

12 MR. ZENGER: Thank you.

13 (Whereupon, Plaintiff's Exhibit 3 was
14 received into evidence.)

15 Q. (By Mr. Zenger) I've given you Exhibit Number 9
16 and ask if you recognize the papers presented as
17 Exhibit 9.

18 A. Yes, I do.

19 Q. What are the papers represented by Exhibit 9?

20 A. These are papers relating to the opposition of
21 Google to CHROMIUMPC claiming one of their marks.

22 MR. ZENGER: I move the admission of
23 Exhibit 9, Your Honor.

24 THE COURT: Any objection to Exhibit 9?

25 MR. STOLEBARGER: No.

1 THE COURT: Exhibit 9 is received.

2 (Whereupon, Plaintiff's Exhibit 9 was
3 received into evidence.)

4 MR. ZENGER: Thank you.

5 Q. (By Mr. Zenger) I've presented to you,
6 Mr. Sullivan, Exhibit Number 1, would you look at
7 Exhibit Number 1 please. Do you recognize the papers
8 constituting Exhibit Number 1?

9 A. Yes, this is a copy of our Web site.

10 Q. Are they true and correct copies of depictions of
11 your Web site?

12 A. Yes.

13 MR. ZENGER: I offer the admission of
14 Exhibit Number 1, Your Honor.

15 THE COURT: Any objection to Exhibit Number
16 1?

17 MR. STOLEBARGER: Your Honor, could we have
18 some foundation as to when these documents were
19 presented and when these existed on the Web site.
20 There's no time period.

21 THE COURT: Sustained.

22 THE WITNESS: There's dates on these at the
23 bottom right-hand corner.

24 MR. ZENGER: There are dates on the bottom
25 right-hand corner when they were printed, Your Honor,

1 and that would --

2 THE COURT: Why don't you have the witness
3 testify to that.

4 Q. (By Mr. Zenger) Mr. Sullivan, were these
5 documents recently printed from the Web site?

6 A. Yes. When you print out a Web site it will put
7 the URL and the date that it was printed on it.

8 Q. And were these documents -- did you assist in
9 helping prepare these documents?

10 A. I'm sure I was at some point.

11 Q. Did you change any of the dates, or do they
12 accurately reflect the dates on which they were printed?

13 A. No. They're the date they were printed.

14 MR. ZENGER: Your Honor, I move the
15 admission of Exhibit 1.

16 MR. STOLEBARGER: There's no foundation as
17 to when these items went on the Web site. We have no
18 way of telling when they were generated.

19 THE COURT: As I understand it, it's simply
20 being offered as to what the Web site looked like on the
21 day it was printed.

22 MR. ZENGER: That's correct.

23 THE COURT: It's received for that purpose.

24 MR. ZENGER: That is correct.

25 (Whereupon, Plaintiff's Exhibit 1 was

1 received into evidence.)

2 Q. (By Mr. Zenger) All right. Can you tell me what
3 Exhibit 1 one shows, Mr. Sullivan.

4 A. It's a picture of our Xi3 CHROMIUMPC and the
5 ability to click for more details.

6 Q. How long has the CHROMIUMPC been depicted on that
7 Web site?

8 A. There's two Web sites, so there's chromiumpc.com,
9 and in the process, because we decided that we didn't
10 want to make a whole new company out of it, we were just
11 going to use Xi3 as the primary brand of the computer
12 and CHROMIUMPC was really going to be this specific
13 product, we ended up forwarding the CHROMIUMPC Web site
14 to Xi3.com. But until then CHROMIUMPC had its own site,
15 and I believe there's some printouts somewhere of what
16 that site looked like, and that's --

17 THE COURT: I don't have the exhibit in
18 front of me. What's the date we're talking of?

19 Q. (By Mr. Zenger) What's the date on that printout
20 of Exhibit 1 there?

21 A. This one is 6/6 2011, Exhibit 1.

22 Q. So is it your testimony, Mr. Sullivan, that the
23 CHROMIUMPC Web site, chromiumpc.com Web site, was
24 established in November of 2009?

25 A. It was.

1 Q. And that it was available on the Web continuously
2 until it was forwarded to the Xi3 Web site?

3 A. I have receipts from the building hoster that
4 hosted the Web site.

5 Q. Do you remember when the forwarding of
6 CHROMIUMPC -- the CHROMIUMPC Web site to the Xi3 Web
7 site began?

8 A. It was prior to the launch of our public
9 announcement. We had a public announcement announcing
10 our retail version coming available, and at that time --
11 I think prior to that we had some preparation up to
12 those weeks, but at some point, I don't remember the
13 exact date, but we had switched over somewhere in that,
14 you know, May timeframe.

15 Q. After this recent -- did you give a date for the
16 announcement about the CHROMIUMPC availability?

17 A. Our release date was the 20th of May, if I
18 remember.

19 Q. After that release, was there a recognition of
20 the CHROMIUMPC mark in connection with Isys?

21 A. Absolutely. Xi3 and CHROMIUMPC were paired
22 together, so when we wrote the press release, we
23 purposely paired together Xi3 and CHROMIUMPC because we
24 wanted to point back to Xi3 which is owned by Isys.

25 Q. And do you have an estimate of how many persons

1 came to identify CHROMIUMPC with Isys after that
2 additional announcement?

3 MR. STOLEBARGER: Objection, lacks
4 foundation.

5 THE COURT: Sustained.

6 Q. (By Mr. Zenger) Isys made an announcement on -- a
7 further announcement about CHROMIUMPC on May 20th,
8 correct?

9 A. Yes.

10 Q. And what was the reaction to that in the PC
11 industry?

12 A. We garnered hundreds of thousands of search
13 results based on it. If you would have searched it
14 prior to that application date -- or prior to the
15 announcement date, there were a couple of thousand.
16 After the announcement there were several hundred
17 thousand, probably about I think 500,000 at the height
18 of the rush, and we had had several -- or tens of
19 thousands of people visit the Web site for information.

20 Q. Okay. Now, let's go back in time. Did there
21 come a point in time when you became -- when Isys became
22 aware that Google had begun an open source -- open
23 source initiative?

24 A. Yeah, we were really excited about it.

25 Q. What is an open source initiative?

1 A. Open source is kind of -- open source is where
2 you have other people -- large groups of other people
3 come together for a common cause to write a mutually
4 beneficial to everyone type of software program, as far
5 as open source relates to software.

6 Q. And did you become aware that Google had an open
7 source initiative that they called CHROMIUM?

8 A. At the time, no. There has been some confusion
9 between CHROME and CHROMIUM. Apparently they have two
10 different projects we thought was one in the same, but
11 it's not. They call them both open source, but
12 apparently one requires a license and one doesn't. And
13 so at the time I knew about it, this was early on, this
14 was back in 2009, it was announced as an initiative,
15 nothing more, nothing less, to build a Web browser
16 driven operating system, basically, that was going to be
17 free for people to use, which we were totally excited
18 about.

19 Q. Was that hardware or software?

20 A. Software.

21 Q. Did you learn whether Google attempted to
22 associate a particular name with that initiative?

23 A. At the time I thought it was CHROME OS, but I've
24 learned since a couple of nastygrams that it's called
25 CHROMIUM OS.

1 Q. And did you -- have you had an opportunity to
2 review Google's literature regarding the CHROME OS and
3 the CHROMIUM OS open source initiatives?

4 A. In the last couple of weeks, yeah, I know a lot
5 about it now.

6 Q. Have you learned whether Google controlled the
7 quality of the software that was developed in that
8 initiative?

9 MR. STOLEBARGER: Objection, lacks
10 foundation.

11 THE COURT: Sustained.

12 Q. (By Mr. Zenger) Have you had an opportunity to
13 read Google literature regarding CHROME and CHROMIUM OS
14 initiatives?

15 A. Yes, I've perused their Web site many times now.

16 Q. I present to you Exhibit 7 and ask if you
17 recognize the documents in Exhibit 7.

18 A. This is the Chromium Blog from Google. I don't
19 know if it's the whole thing. The top couple of sheets
20 are.

21 Q. Are these true and correct copies of the
22 documents that you retrieved from the Google Web site?

23 A. Yes. This was printed out on 6/6 2010 again.
24 But, yeah, these are all correct.

25 Q. And does Google take a position as to whether

1 it's going to control the quality of the software
2 written under the open source initiative?

3 MR. STOLEBARGER: Your Honor, these
4 documents speak for themselves.

5 THE COURT: Sustained.

6 MR. ZENGER: Your Honor, I present for
7 admission Exhibit 7.

8 THE COURT: Any objection to Exhibit 7?

9 MR. STOLEBARGER: Your Honor, there's a
10 couple of what appear to be newspaper -- it is only one
11 or two pages long, and it's a New York Times article.
12 Was the testimony of the witness that this was on
13 Google's Web site, or is this a separate document?

14 MR. ZENGER: I see, Your Honor, just one
15 second please.

16 THE WITNESS: There's multiple things in
17 here. This was -- yeah, there's a couple of articles,
18 looks like one New York Times article and a couple of
19 different Web sites that Google controls, chromium.org
20 and dev.chromium.org.

21 MR. ZENGER: Your Honor, we're happy to take
22 off the last few pages of Exhibit 7 that have the New
23 York Times article and leave the remainder of the
24 exhibit and ask the same question, do you recognize --

25 THE COURT: I don't think you need to ask

1 the question. I will receive Exhibit 7 as modified.

2 MR. ZENGER: Thank you.

3 (Whereupon, Plaintiff's Exhibit 7 was
4 received into evidence as modified.)

5 MR. ZENGER: And from Exhibit 7 what was
6 your understanding as to the efforts that Google took to
7 control its software?

8 THE COURT: Why don't you just put -- the
9 document is in the record. His understandings is not
10 going to be very helpful to the court.

11 MR. ZENGER: Thank you.

12 Q. (By Mr. Zenger) I've given you Exhibits 8A and 8B
13 and ask you if you recognize those documents.

14 A. These are trademark filings for -- oh, these are
15 Google's trademark filings for CHROMIUM.

16 Q. Do you recognize them as true and correct copies
17 of documents from the files of the United States
18 Trademark Office Web site?

19 A. Yes, this is a print-off of the Web site.

20 MR. ZENGER: Your Honor, I move the
21 admission of Exhibits 8A and 8B.

22 MR. STOLEBARGER: Your Honor, at this point
23 it lacks foundation. If the witness would let me know
24 is he the one that printed this off.

25 THE WITNESS: I didn't print this.

1 THE COURT: Have you had a chance to look at
2 them, Mr. Stolebarger?

3 MR. STOLEBARGER: Your Honor, I haven't had
4 a chance to look at them and compare them to actually
5 what's on the Web site. I don't believe the witness can
6 authenticate these documents as being in the file if
7 he's not the one that accessed the Web site.

8 THE COURT: If you've not had an opportunity
9 to compare them with the actual Web site, I'm going to
10 need to require more foundation as to whether these are
11 in fact the documents --

12 MR. ZENGER: Your Honor, let me ask that.

13 Q. (By Mr. Zenger) Have you reviewed the United
14 States Trademark Office Web site files and documents
15 related to Google's CHROMIUM trademark applications?

16 A. I have.

17 Q. And are the documents represented in Exhibits 8A
18 and 8B, do they appear to be true and correct copies of
19 those documents which you viewed?

20 A. Yes.

21 MR. ZENGER: Your Honor, I would move the
22 admission of Exhibits 8A and 8B.

23 THE COURT: Received.

24 (Whereupon, Plaintiff's Exhibits 8A and 8B
25 were received into evidence.)

1 Q. (By Mr. Zenger) When did Google file -- do you
2 know when Google filed its trademark application for
3 CHROMIUM?

4 A. Which one? There's two. The software one?

5 Q. Yes.

6 A. Um, filing date, September 2nd, 2008. Was
7 published for opposition June 30, 2009.

8 Q. Thank you. Was there any request in that
9 trademark application for hardware, to protect hardware?

10 A. 8B is for educational services.

11 Q. And 8A for International Class 9.

12 A. 8A for computer software.

13 Q. Is there any claim for computer hardware?

14 MR. STOLEBARGER: Your Honor, these
15 documents speak for themselves. This witness doesn't
16 have the foundation to testify as an expert what is in
17 and what is --

18 MR. ZENGER: I'm done with my questions on
19 that.

20 Q. (By Mr. Zenger) Mr. Sullivan, would you please
21 read for us the description of goods and services in 8A
22 for International Class 9.

23 A. Computer software for accessing, browsing,
24 sharing, and communicating information over computer
25 networks and secure private networks; computer software

1 for use in connecting to and searching the contents of
2 remote computers, computer networks, and secure private
3 networks; computer software for assisting users in
4 navigation through computer networks and secure private
5 networks; computer software for running Web
6 applications.

7 Q. Based upon your experience in the industry over
8 these last 17 years and based upon your understanding of
9 Google's CHROMIUM open source initiative and CHROME OS,
10 CHROME open source initiative, are they describing the
11 same software?

12 A. Yes.

13 MR. STOLEBARGER: Your Honor, objection,
14 lacks foundation.

15 THE COURT: Sustained. The answer is
16 stricken.

17 MR. ZENGER: Mr. Sullivan, based upon your
18 experience in the computer industry, is the description
19 of goods in Google's trademark application for software
20 for Internet operating systems and browsers --

21 MR. STOLEBARGER: Objection, the document
22 speaks for itself. The witness lacks foundation.

23 THE COURT: Sustained.

24 MR. ZENGER: Mr. Sullivan, based upon your
25 17 years in the computer industry, do you have an

1 understanding of terms of art that users apply -- do you
2 have an understanding of descriptive terms used to
3 describe software for Internet browsers and Internet
4 operating systems?

5 MR. STOLEBARGER: That doesn't go to
6 foundation that --

7 MR. ZENGER: I'm laying a foundation.

8 THE COURT: He can answer yes or no.

9 THE WITNESS: Yes. I've been party to many
10 trademark applications, many patent applications.

11 MR. ZENGER: And based upon your experience
12 and your knowledge of terms used to describe Internet
13 browsers and Internet operating systems, are those words
14 similar to the words used in the description for the
15 CHROMIUM application?

16 MR. STOLEBARGER: Again, lacks foundation.
17 The mere fact that the witness has filed applications
18 doesn't make him a lay witness or expert and --

19 THE REPORTER: Mr. Stolebarger, can you
20 speak up please.

21 MR. STOLEBARGER: No foundation for opinion
22 testimony as to what is or is not a term of art.

23 MR. ZENGER: I've asked him from his
24 experience in 17 years in the computer industry if he
25 knows what descriptive terms are used to describe

1 Internet browsers and operating systems, and he answered
2 yes. Now the next --

3 THE COURT: Tell me why that's relevant.

4 MR. ZENGER: Because the next question is
5 relevant, are the terms used to describe the software in
6 the CHROMIUM trademark application descriptive terms
7 used for operating systems.

8 THE COURT: Isn't that a legal issue for the
9 court to decide?

10 MR. ZENGER: No, it's a factual issue as to
11 the descriptive terms that Google is using in its
12 application and what it's describing in its application
13 because what their -- all their --

14 THE COURT: There's not a dispute as to what
15 they say in their application. Whether or not that
16 describes the product that is being challenged here is a
17 legal question, is it not?

18 MR. ZENGER: No. I believe it's a factual
19 question because the question is are those descriptive
20 terms used in CHROMIUM -- in the CHROMIUM application
21 descriptive terms that are typically used in the
22 industry to describe Internet browser or an Internet
23 operating system, I believe that's a question of fact.

24 THE COURT: I'm not sure it's a question of
25 fact, but I'll allow him to answer that question.

1 MR. ZENGER: Thank you.

2 THE WITNESS: Yes. It's not hardware. It's
3 definitely software. I don't even know if the operating
4 system -- it's definitely -- but there are some
5 distinctions even inside the software mark, different
6 types of software.

7 Q. (By Mr. Zenger) Thank you very much.

8 I'll show you what's been marked as
9 Exhibit 11, do you recognize Exhibit 11?

10 A. I do.

11 Q. What is Exhibit 11?

12 A. Some more printouts of Web sites printed on
13 various dates, 6 -- well, 6/6 of 2011 through looks to
14 be 6/2 2011.

15 Q. Are these Web sites that you've reviewed over the
16 last weeks or months?

17 A. It is, recently.

18 Q. And are these true and correct copies of those
19 Web sites that you reviewed?

20 A. Yes, amazon.com and Google Blog.

21 MR. ZENGER: Your Honor, I move the
22 admission of Exhibit 11.

23 THE COURT: Any objection, Mr. Stolebarger?

24 MR. STOLEBARGER: No objection, Your Honor.

25 THE COURT: Exhibit 11 is received.

1 (Whereupon, Plaintiff's Exhibit 11 was
2 received into evidence.)

3 Q. (By Mr. Zenger) Mr. Sullivan, do you have
4 knowledge of a recent announcement by Google about a
5 product called CHROMEBOOK?

6 A. I do.

7 Q. When was that? Do you recall when that
8 announcement occurred?

9 A. It was about a week ahead of our announcement,
10 May 11th.

11 Q. Okay. What is the -- what was announced by
12 Google on May 11th?

13 A. They announced their entrance into the hardware
14 world.

15 Q. And did that come as a surprise to you and Isys?

16 A. Yes, because traditionally Google has been a
17 software search company, and this was -- this is the --
18 as far as my understanding, their first entry into the
19 hardware market. Even when they got into phones and
20 stuff, they really don't -- they don't really meddle
21 around with hardware because they run on everybody's
22 hardware.

23 Q. And did this announcement cause concern to Isys?

24 A. Absolutely.

25 Q. Why?

1 A. We have a mark that's extremely similar and we
2 think that there will be extremely a lot of confusion in
3 the marketplace as to who owns our mark because of who
4 Google is.

5 Q. What is it about the marks that causes that
6 concern?

7 A. They're chrome-based hardware marks that denote a
8 physical hardware device.

9 Q. And how do they denote that hardware device?

10 A. Book and PC are very common denoters of a
11 computer, so we have CHROMIUMPC, which is a fanciful
12 computer, and they came out with CHROMEBOOK, which would
13 be a fanciful PC. Book isn't just another term, just
14 like netbook, I'm sure everybody's heard of those,
15 they're terms used in the computer industry to describe
16 a hardware device.

17 Q. And are you aware of any actual confusion between
18 the marks?

19 A. I am.

20 MR. STOLEBARGER: Can we have the witness'
21 understanding as to that terminology, otherwise there's
22 no foundation.

23 THE COURT: Sustained.

24 MR. ZENGER: Which, which terminology?

25 MR. STOLEBARGER: Actual confusion.

1 Q. (By Mr. Zenger) Do you understand -- what's your
2 understanding of actual confusion?

3 A. My understanding is something I've seen myself
4 that would evidence a proof that there is confusion in
5 the marketplace.

6 Q. Thank you.

7 I've presented to you a document, Your
8 Honor, that we would label as Exhibit 16, and I ask you,
9 Mr. Sullivan, whether you recognize this document.

10 A. I do.

11 Q. Was is it?

12 A. It's a news article that came out last Thursday.

13 Q. Where did you see this news article?

14 A. On the Internet.

15 Q. Is this a true and correct copy of what you saw
16 on the Internet?

17 A. Yes.

18 Q. Is this troubling to Isys?

19 A. It's extremely troubling.

20 Q. Why?

21 A. Because Google CHROMEBOOKS and Xi3 CHROMIUMPC are
22 used in the same line, and there's no denotation that
23 they're giving Google credit for Xi3, my other trademark
24 that I've owned for a period of time now and my new
25 filing CHROMIUMPC.

1 Q. Can you read the heading on this article?

2 A. New Laptop Form Google, Google CHROMEBOOKS, and
3 then in brackets, quotes, "Xi3 CHROMIUMPC", Android
4 Application, Android Forum, Android Help On Tablet And
5 Phone -- well, there's a bunch of things in the
6 headline.

7 Q. To whom is the CHROMIUMPC mark being attributed?

8 A. It says that Xi3 CHROMIUMPC is Google's when in
9 fact it is not.

10 Q. Thank you.

11 A. Even as -- we feel that Xi3 adds to the
12 specificness of our mark when used in conjunction
13 together with CHROMIUMPC, and even then, because of the
14 size and scale of Google, people are still confused.

15 Q. And after Google's May 11th CHROMEBOOK
16 announcement, what was the reaction in the industry to
17 that announcement?

18 A. I garnered probably about 5,000 -- or 5 million
19 search results.

20 Q. In what space of time?

21 A. I would say a week, two weeks, very, very --
22 within -- I think we checked it a week after we
23 launched, and they had 5 million search results, and we
24 had 500,000, about ten to one on our launch.

25 Q. And do you believe that this can cause confusion?

1 A. Absolutely.

2 Q. Why?

3 A. Because it's giving them rights. I mean I filed
4 and told everybody stay off this mark. I never got a
5 letter, I never got a care package in the mail, nothing,
6 telling me, hey, we have a problem with this early on.
7 You know, before we started rolling down the road with
8 it, we basically started working, you know, towards the
9 CHROMIUMPC -- I'm just very upset over the whole thing.
10 Sorry.

11 MR. ZENGER: Your Honor, I move for the
12 admission of Exhibit 16.

13 THE COURT: Received.

14 (Whereupon, Plaintiff's Exhibit 16 was
15 received into evidence.)

16 Q. (By Mr. Zenger) I present to you Exhibit 12,
17 Mr. Sullivan, do you recognize Exhibit 12?

18 A. Yes.

19 Q. What is it?

20 A. It's my nastygram from Google.

21 Q. Is there a date -- it's a letter from Google?

22 A. It is.

23 Q. What's the date on it?

24 A. It's May 27, 2011.

25 Q. And what demand -- or what claim does Google make

1 regarding the CHROMIUM mark?

2 A. They say that --

3 MR. STOLEBARGER: Your Honor, this document
4 speaks for itself. I object.

5 THE COURT: Are you offering Exhibit 12?

6 MR. ZENGER: Yes, sir.

7 THE COURT: Exhibit 12 is received. If he
8 wants to read from the letter, it's now in evidence.

9 MR. ZENGER: Thank you.

10 (Whereupon, Plaintiff's Exhibit 12 was
11 received into evidence.)

12 Q. (By Mr. Zenger) Would you please read the portion
13 in which Google states its position with respect to the
14 CHROMIUM mark and any rights they have in it and believe
15 it?

16 A. As we hope Isys can appreciate, Google's
17 ownership of trademark rights in the CHROMIUM mark
18 affords it the exclusive right to use and authorize
19 others to use the mark. It also obligates Google to
20 prevent use of the same or a similar mark by others in
21 circumstances that are likely to lead to consumer
22 confusion as to the source of goods and services.
23 Google --

24 Q. Thank you. That's the portion I wanted.

25 Now, based upon this conduct of Google, with

1 respect to its opposition of the trademark application,
2 with respect to its May 11th announcement of a
3 CHROMEBOOK product, and this demand letter, has this
4 caused harm -- has this conduct of Google caused harm to
5 Isys?

6 MR. STOLEBARGER: Objection, lacks
7 foundation.

8 THE COURT: Sustained. You need to be more
9 specific in terms of what you believe or what the
10 witness believes the effect of this has been upon Isys?

11 Q. (By Mr. Zenger) Has the conduct of Google been --
12 opposing the CHROMIUMPC trademark application,
13 announcing the CHROMEBOOK on May 11th, and sending this
14 May 27th cease and desist letter, in effect, has that
15 had a harmful effect on Isys?

16 A. Absolutely.

17 Q. What kind of harm has been caused?

18 A. They have prevented my registration of CHROMIUMPC
19 by extending the amount of time that they had -- we
20 actually gave them -- we got called and we gave them an
21 extension, and they launched this product during the
22 extension. So a little troubled by the fact that they
23 launched a product that is right on top of our mark when
24 we were -- you know, they were talking about disputing
25 it, but they didn't officially dispute it, so the

1 question for me is why did they do that.

2 Q. Does it have an adverse effect on Isys'
3 relationship with its partners with whom its working to
4 further develop and manufacture its products?

5 MR. STOLEBARGER: Objection, lacks
6 foundation.

7 THE COURT: Sustained.

8 MR. ZENGER: Does Google have partners with
9 which it is working to further develop and manufacture
10 the product, the CHROMIUMPC product?

11 THE COURT: The question was as to Google;
12 is that what you intended to ask?

13 MR. ZENGER: I'm sorry.

14 Q. (By Mr. Zenger) Does this conduct of Google
15 affect Isys' relationship with partners with whom it
16 would work to further develop and manufacture Isys'
17 CHROMIUMPC product?

18 A. Yes.

19 Q. And does Isys have partners and suppliers who
20 have devoted substantial resources to creating and
21 improving the components of the CHROMIUMPC?

22 A. Yes.

23 Q. Has Isys devoted resources to the promotion and
24 marketing of the CHROMIUMPC product?

25 A. Millions of dollars.

1 Q. And has there been significant financial and
2 personal investment in the CHROMIUMPC mark by you and
3 others related with Isys?

4 A. Yes.

5 Q. And are these resources and relationships going
6 to suffer irreparable harm?

7 A. Yes.

8 MR. STOLEBARGER: Your Honor, I'll object to
9 that last question. There's no foundation as to the
10 witness' understanding of the terminology of irreparable
11 harm.

12 THE COURT: I'm going to allow the answer.
13 I will also note that it is a meaningless answer in the
14 context of this dispute. For him to say it's having
15 irreparable harm doesn't mean anything. It's a
16 conclusory statement that adds no facts to the record.

17 MR. ZENGER: Thank you. I'll ask it a
18 different way. Okay.

19 Q. (By Mr. Zenger) When you describe it as
20 irreparable, what does that mean to you, what kind of
21 harm is that?

22 A. What does irreparable harm mean?

23 Q. Yes, when you use that term.

24 A. Irreparable harm means that you cannot be -- it
25 cannot be fixed, it cannot be solved with money.

1 Q. Okay. Thank you. And did you --

2 THE COURT: Let me ask a question. I
3 understand what irreparable harm is, I also understand
4 the legal meaning of it. What I don't understand from
5 your answer is how has it affected your company in some
6 significant way that you believe can't be fixed?

7 THE WITNESS: Well, if everybody thinks that
8 my mark is Google's, every time that I go out to the
9 marketplace I will not be able to market my product
10 effectively because every time I talk about it, they're
11 going to go to their Web site to go buy a product. So
12 every marketing dollar that I spend will go in the wrong
13 direction. They're steamrolling over the top of my mark
14 and I won't have a mark if they launch this product.

15 THE COURT: Okay.

16 Q. (By Mr. Zenger) Will this conduct of Google's
17 have an adverse effect on your ability to sell product?

18 A. Absolutely.

19 Q. And followup products?

20 A. It will ruin the mark.

21 Q. And related products?

22 MR. STOLEBARGER: Lacks foundation, calling
23 for speculation.

24 THE COURT: I'm going to sustain it as
25 speculation as to the effect it will have in the future.

1 MR. ZENGER: Does Google's conduct have an
2 adverse effect on Isys' reputation and the reputation of
3 the CHROMIUMPC product?

4 MR. STOLEBARGER: Your Honor, again that
5 asks for a conclusory statement.

6 THE COURT: I'm going to sustain for lack of
7 foundation. You've got to show some basis for him to
8 make this statement.

9 MR. ZENGER: Okay.

10 Q. (By Mr. Zenger) Mr. Sullivan, based upon the
11 market response that Isys has had, does the CHROMIUMPC
12 product have a reputation in the market?

13 A. It does. We -- this is a patent protected
14 product. You can't buy this product anywhere else. You
15 can only buy it from us. That's why we trademarked the
16 name to tie the patented product specifically to the
17 name. So no one else can build this product except me.
18 Size, shape, the dimensions, even the unique curves in
19 the box is actually a trademark of ours, like a Coke
20 bottle. So this is a serious problem for us with
21 regards to them trying to create confusion in the market
22 by launching another product on top of ours, because if
23 they get that mark, no matter what we do in the
24 industry, no matter what we say, people will always
25 attribute CHROMIUMPC to Google instead of to Isys. And

1 so any time someone says something about it, they want
2 to get information, they'll go to Google's Web site
3 instead of Xi3 to get information and to buy products.
4 It will ruin our ability to market in the space.

5 Q. Does it have an adverse -- sorry.

6 MR. STOLEBARGER: I would move to strike the
7 witness' last response, it was not responsive, it was
8 speculative, and attributed to the intent of Google,
9 which this witness has no basis to --

10 THE COURT: The last portion is stricken.

11 Q. (By Mr. Zenger) Has this -- does this conduct
12 have an adverse effect on the reputation of Isys?

13 A. Yes. People could think that we thieved the
14 mark, or we did something wrong, could damage my
15 reputation in the marketplace because they're saying
16 that it's their mark, and I have a registration for my
17 mark in hardware and they have a mark for registration
18 in software, so they're saying that their registration
19 in software is my registration in hardware, and that's
20 not true.

21 MR. STOLEBARGER: Your Honor, again, sorry
22 to --

23 MR. ZENGER: I think you misspoke when you
24 said registration. Did you mean application?

25 THE WITNESS: Yeah. I mean I look at it as

1 my registration because if Google wasn't stopping me
2 from -- if they weren't filing a -- if they didn't file
3 this thing five months late, I would have -- my mark
4 would have issued in January of last year -- or this
5 year.

6 MR. STOLEBARGER: Your Honor --

7 THE WITNESS: Not June. We would be here
8 for different reasons right now.

9 MR. STOLEBARGER: I have two separate
10 objections, two separate motions to strike as to the
11 answer previous to this. The question did not call for
12 speculation, but the witness speculated as to what would
13 happen in the future. The question asked what harm has
14 there been, and he testified as to what might happen in
15 the future.

16 But, with respect to this second line of
17 questioning, the witness is arguing about what the
18 Trademark Trial and Appeals Board might do with respect
19 to the pending application and pending opposition, which
20 this witness has no foundation to testify about.

21 THE COURT: I'm going to strike both answers
22 as being speculative and without foundation.

23 MR. ZENGER: The -- you've described -- I'm
24 not sure what I can say he said. Has the -- when this
25 conduct -- can this conduct of Google that's happened so

1 far with respect to its CHROMEBOOK announcement can it
2 be undone?

3 MR. STOLEBARGER: Again, calls for
4 speculation, what --

5 MR. ZENGER: Can it be reversed?

6 MR. STOLEBARGER: Same objection, there is
7 no foundation as to how this witness --

8 THE COURT: I'm going to sustain for lack of
9 foundation. You've laid no basis for him to give any of
10 these answers. We know what he thinks.

11 MR. ZENGER: I know, Your Honor, and I know
12 what I want him to say. I'm sorry that I haven't
13 articulated a good question.

14 THE COURT: The question is whether or not
15 he has any factual basis to give any of this testimony.

16 MR. ZENGER: I understand. Okay.

17 Is there a harm to Isys when its CHROMIUMPC
18 mark is attributed to Google?

19 MR. STOLEBARGER: Your Honor, assumes facts
20 not in evidence.

21 THE COURT: Sustained.

22 Q. (By Mr. Zenger) Do you understand what goodwill
23 is, Mr. Sullivan?

24 A. Yes.

25 Q. What is goodwill?

1 A. Goodwill is when you create something there's a
2 certain inherent value that goes with it, which is, I
3 created this product, that goodwill in CHROMIUMPC and
4 Xi3 Modular Computers, I created it.

5 Q. And is there a harm to that goodwill if that
6 CHROMIUMPC product is attributed to another?

7 A. Yes, because it could be the wrong device.
8 Someone could mistake my goodwill for someone else's
9 that may not be so good, they might not have done as
10 good a job as I did with my product.

11 MR. STOLEBARGER: Your Honor, once again,
12 it's speculative as to what someone might do, that
13 someone else might do. There's no foundation how this
14 witness might know what someone might do in the future.
15 These products aren't in the marketplace.

16 THE WITNESS: These products are in the
17 marketplace.

18 THE COURT: Mr. Sullivan, you need to wait
19 until I rule and wait until you're asked a question.

20 MR. ZENGER: Thank you, Your Honor.

21 THE WITNESS: Sorry.

22 THE COURT: I'm going to again sustain the
23 objection. I don't think there's any foundation that
24 he's given to establish that factual basis for any of
25 these opinions. They are his opinions, but he's not

1 here as an expert.

2 MR. ZENGER: Your Honor, I think that he is
3 clearly a 701 percipient witness who has since the year
4 2000 has been inventing, marketing, promoting, going to
5 trade shows, and I think where he's been the one who has
6 been promoting these at trade shows and talking with
7 customers that there is nobody better than him to be
8 able to testify based upon his product as to whether
9 that --

10 THE COURT: I'm still waiting for some
11 evidence that somebody in the public associates any
12 goodwill with the alleged trademark CHROMIUMPC. I've
13 not heard any evidence to support that so far.

14 MR. ZENGER: Okay.

15 Q. (By Mr. Zenger) Mr. Sullivan, you indicated that
16 after Isys' May 20th and further announcement of its
17 CHROMIUMPC product that there were proximately 500,000
18 Internet results based upon that announcement; is that
19 correct?

20 A. That's correct.

21 Q. Did you read those results and responses?

22 A. A few.

23 Q. And did you read several dozen? How many did you
24 read?

25 A. Hundreds of them.

1 Q. And what did they say about the quality or nature
2 of the goods that were going to be offered under the
3 CHROMIUMPC mark?

4 MR. STOLEBARGER: Your Honor, the witness is
5 being asked to summarize writings. His testimony is not
6 the best evidence, the writings are. He's admitted to
7 having read a relatively small percentage of the
8 responses. There's no foundation for the witness to
9 answer the question.

10 THE COURT: Sustained.

11 Q. (By Mr. Zenger) Mr. Sullivan, do you have
12 customers that have purchased your device?

13 A. Yes. Which device?

14 Q. The Modular Computer.

15 A. Yes.

16 MR. STOLEBARGER: Which --

17 MR. ZENGER: The device, the Modular
18 Computer.

19 MR. STOLEBARGER: With all due respect, all
20 periods of time --

21 THE COURT: I'm going to overrule the
22 objection at this point. It may or may not be relevant.

23 MR. ZENGER: Okay. Thank you.

24 MR. STOLEBARGER: It's a compound question.
25 We don't know which of these two devices.

1 MR. ZENGER: I'll come back.

2 THE COURT: I'm going to allow him to
3 complete his examination.

4 THE WITNESS: Both devices.

5 Q. (By Mr. Zenger) And based upon your interaction
6 with your own customers to whom you have presented or
7 sold your Modular Computer, what have you defined as the
8 goodwill that's been associated with the product?

9 MR. STOLEBARGER: Objection, no foundation
10 as to what these communications are.

11 MR. ZENGER: Well, I'm asking him, Your
12 Honor, what goodwill has been associated that is of
13 value to the company based upon his selling this device.
14 Nobody can answer that except for him, no customer
15 can --

16 THE COURT: The foundation question I'm
17 going to ask. Have you sold any of your computer
18 devices that have had the trademark CHROMIUMPC on the
19 computer, on the packaging, or on any materials
20 associated with the device?

21 THE WITNESS: Yes.

22 THE COURT: How many have you sold?

23 THE WITNESS: I would have to go look.

24 THE COURT: With the CHROMIUMPC.

25 THE WITNESS: On the device?

1 THE COURT: Yes.

2 THE WITNESS: I would have to go look. I
3 don't know offhand. But the only thing that I'm aware
4 of is the two that I've seen here that were pre-sales.

5 THE COURT: As to those two devices, do you
6 have any direct communications with any of those
7 purchasers?

8 THE WITNESS: I'm not sure. I don't think
9 so.

10 MR. ZENGER: Your Honor, let me go at this a
11 different way.

12 THE COURT: Let me interrupt you for a
13 moment. We're at 2:30. I've got a hearing that I need
14 to take right now. I am willing to continue this and
15 proceed as soon as my hearings are over. I've got three
16 criminal matters that will be relatively brief, but it
17 will be sometime between 3:30 and 4:00. If counsel can
18 indulge me to hear those three criminal matters, we'll
19 resume at -- I'm prepared to go late if we need to. And
20 so you can make plans, I'll be prepared to hear
21 additional argument and testimony tomorrow morning at
22 8:30 until about 10:00, if you need additional time.
23 That maybe will help you plan. We'll be in recess until
24 we finish the other hearings.

25 MR. ZENGER: Okay.

1 THE WITNESS: Thank you.

2 (Recess.)

3 THE COURT: We are back in session in Isys
4 v. Google, counsel and the parties are present.

5 Mr. Zenger, you may proceed.

6 MR. ZENGER: Thank you, Your Honor.

7 Mr. Sullivan, will you resume the stand
8 please.

9 Q. (By Mr. Zenger) Mr. Sullivan, does Isys' business
10 operations include project schedules related to the
11 CHROMIUMPC product?

12 A. Yes.

13 Q. Does Isys' business operations include budgets
14 related to the CHROMIUMPC product?

15 A. Yes.

16 Q. Does Isys' business operations include the
17 allocation of manufacturing resources for the CHROMIUMPC
18 product?

19 A. Yes.

20 Q. Will these business operations be affected if
21 Isys is required to change its trademark from CHROMIUMPC
22 to another mark?

23 MR. STOLEBARGER: I object, Your Honor,
24 there's no foundation, and it calls for speculation.

25 THE COURT: Overruled.

1 THE WITNESS: Yes, most certainly.

2 Q. (By Mr. Zenger) Why?

3 A. Because we've spent a lot of money developing the
4 product and the trademark and all of its surrounding
5 properties. So getting the Facebook and the -- getting
6 all of the tools that go with the product, you know,
7 it's not just the Web site, it's not just the mark, it's
8 the suite of things that go with it. It's very hard to
9 get something that is -- you know, means, you know,
10 fashion PC that you can get everything for, it's very
11 difficult today to get all of the things that you need
12 to market the product effectively.

13 Q. Does Isys have business operations which include
14 planned advertising for the CHROMIUMPC mark?

15 A. Yes.

16 Q. And product bearing the CHROMIUMPC mark?

17 A. Yes.

18 Q. Does Isys have business operations that include
19 promotional efforts for products bearing the CHROMIUMPC
20 mark?

21 A. Yes.

22 Q. And has Isys made investments in advertising and
23 promotion with respect to business operations relating
24 to the CHROMIUMPC mark?

25 A. Most definitely.

1 Q. And will those business operations be adversely
2 affected by having to switch to another mark?

3 A. Absolutely.

4 Q. And will those business operations be adversely
5 affected by a presence of Google in the market with
6 CHROMEBOOK?

7 MR. STOLEBARGER: Your Honor, the presence
8 of goodwill in the market of CHROMEBOOK is beyond the
9 scope of this witness' --

10 MR. ZENGER: I didn't say goodwill. I'll
11 ask the question again. Perhaps I was speaking so
12 softly he couldn't hear.

13 Will those business operations also be
14 adversely affected by a Google product in the market
15 bearing CHROMEBOOK for a PC product on hardware?

16 MR. STOLEBARGER: Your Honor, there's no
17 foundation, and that question calls for speculation.

18 THE COURT: Sustained.

19 MR. ZENGER: Has Isys invested heavily and
20 incurred substantial costs in preparing for the launch
21 of its CHROMIUMPC product?

22 MR. STOLEBARGER: Your Honor, that calls for
23 a conclusionary statement, and there's no foundation.

24 Q. (By Mr. Zenger) I'll ask a foundational question.
25 Mr. Sullivan, has Isys invested money and personal

1 resources in preparing for its CHROMIUMPC market?

2 A. Yes.

3 Q. And has Isys incurred substantial costs in
4 preparing for its CHROMIUMPC market?

5 A. Yes.

6 Q. And will those business efforts be adversely
7 affected if Isys needs to move to another mark?

8 A. We would have to start all over again because
9 there's a -- there's a timeline. You just don't pick up
10 art and go. You have to -- again, you have to keep --
11 you have to acquire all of the things that go with the
12 mark in order to effectively market that particular
13 mark. So it takes time to do that, resources to that,
14 money to do it. If you -- I can give you a for
15 instance. On our Xi3 name, we can't get the Xi3 at
16 YouTube, it -- we have Xi3 port. So if people type in
17 Xi3 at YouTube and they find some guy from Japan because
18 there's already somebody on that mark, so, you know, you
19 would have to either go in and offer that guy money to
20 get off of that mark, which could be from thousands to
21 hundreds of thousands to millions of dollars, depending
22 on who is sitting on the mark because they have -- the
23 right's are fully there. So it's very difficult to get
24 all of the assets. So from a cost perspective and a
25 resources perspective, I don't know that my company

1 could do it again.

2 MR. STOLEBARGER: Your Honor, as to the
3 portion of his testimony dealing with how much it might
4 cost to obtain the rights to YouTube, that's
5 speculation. I move to strike.

6 THE COURT: I'm going to overrule the
7 objection. You can cross-examine him as to the value of
8 that testimony.

9 Q. (By Mr. Zenger) Mr. Sullivan, I present to you
10 what's been marked as Exhibit 17, do you recognize
11 Exhibit 17?

12 A. Yes.

13 Q. Did you take an occasion this morning to review
14 some further publications of Google?

15 A. I did.

16 Q. Did you read them on the -- from its Web site
17 listings?

18 A. I did.

19 Q. Is Exhibit 17 a true and correct copy of a
20 listing that you received from Google's Web site this
21 morning?

22 A. This is an announcement, first quarter results
23 for Google.

24 Q. Is this a true and correct copy of what you saw
25 on Google's Web site this morning?

1 A. Yes.

2 MR. ZENGER: Your Honor, I move the
3 admission of Exhibit 17.

4 THE COURT: Do you have a copy of Exhibit 17
5 for the court?

6 MR. ZENGER: Yes, sir, I do.

7 THE COURT: I assume you want me to look at
8 it.

9 Mr. Stolebarger, any objection to
10 Exhibit 17?

11 MR. STOLEBARGER: Only with respect to the
12 yellow highlighting, whether that was added or that
13 appeared on the original of the Web site.

14 MR. ZENGER: It was added.

15 THE COURT: Noting that that's been emphasis
16 added by the plaintiff, it will be received.

17 (Whereupon, Plaintiff's Exhibit 17 was
18 received into evidence.)

19 MR. ZENGER: Thank you. No further
20 questions for Mr. Sullivan.

21 THE COURT: Cross-examination,
22 Mr. Stolebarger.

23 MR. STOLEBARGER: Thank you, Your Honor.

24 //

25 //

1 CROSS-EXAMINATION

2 BY MR. STOLEBARGER:

3 Q. Mr. Sullivan, I'm Bob Stolebarger, I represent
4 the defendant in this matter, I'll just ask you a few
5 questions.

6 A. Nice to meet you.

7 Q. Who came up with the name CHROMIUMPC?

8 A. I did.

9 Q. When?

10 A. CHROMIUMPC 2009 sometime of -- it was before the
11 filing of the Web site we registered chromiumpc.com.

12 Q. Didn't you attempt to register the domain name
13 immediately upon your conceiving of the name CHROMIUMPC?

14 A. No.

15 Q. You didn't do it the very next day?

16 A. We came up with a couple of different names, and
17 we tossed them around for a little bit, thinking about
18 the different names or different ways. We actually
19 filed for two different names, we filed for another one
20 called chromepecu.com that we decided not to use. But
21 those were kind of the two finalists, if you will,
22 CHROMIUMPC and --

23 Q. Any way of helping us and the court to pin down
24 when in 2009?

25 A. Months, you know, weeks, months before the filing

1 of the -- I couldn't tell you the exact date, I didn't
2 exactly write it down. It was more of a fluid -- you
3 know, when you come up with an idea you kind of just
4 chew on it for a little bit, think about it. We went
5 through several different naming nomenclatures before
6 settling on that. We had -- we had originally thought
7 about using a three digit character called PCU, and that
8 was one of the original development names for the
9 product, and so that's why we did CHROMEPCU, and, you
10 know, we wanted something that was a little bit better,
11 so CHROMIUMPCU was the one that kind of stuck out to
12 everybody as a better mark.

13 Q. You have no business records on which you can
14 rely as a source of material that would help you pin
15 down the date.

16 A. I can go look, I can see if I have something.

17 Q. Okay. You've not undertaken any investigation to
18 see if you can determine that date?

19 A. It was prior to the filing of the mark, which is
20 publically available.

21 Q. Your declaration says it was the fall of 2009.
22 How did you know it was the fall of 2009?

23 A. Because it wasn't a year difference, it wasn't --
24 I don't remember doing it in 2008 or 2007. It was
25 definitely in or around that time. That exact date I

1 would have to go try and see if I can look at notes or
2 something and remember.

3 Q. It's true, isn't it, that Google publically
4 announced its CHROMIUM OS project in 2008?

5 A. Yes.

6 Q. And you knew that was out there before you came
7 up with the CHROMIUM name that you just referenced; is
8 that correct?

9 A. No, not necessarily. I knew that there was --

10 Q. You just got -- if I could just try to pin you
11 down on this. You just got through saying you knew it
12 wasn't a full year before, and now I'm reminding you
13 that you knew in 2008 that Google launched the CHROMIUM
14 OS project. I'm asking you whether or not you knew
15 that, and you said, yes, correct?

16 A. Well, let me explain. So --

17 MR. STOLEBARGER: Your Honor, the question
18 calls for a yes or no answer.

19 MR. ZENGER: Your Honor, compound question.

20 THE COURT: I'm going to let you rephrase
21 the question, and I'm going to remind you, Mr. Sullivan,
22 that you need to answer his question. Given the amount
23 of time that we have for this hearing, it would be
24 useful if you would limit your answers specifically to
25 answer his questions.

1 Q. (By Mr. Stolebarger) The first question is it's
2 true, isn't it, that you know, you recall that Google
3 launched its CHROMIUM OS project in 2008, correct?

4 A. Yes.

5 Q. And it's true, isn't it, that you did not
6 conceive of the name CHROMIUMPC until after Google's
7 announcement, correct?

8 A. At the time, I didn't know. I would like to
9 explain to you, CHROMIUM to me was an initiative --

10 THE COURT: Mr. Sullivan, no explanation is
11 required. Your counsel can come back and follow up if
12 he thinks there's something important.

13 THE WITNESS: Okay.

14 Q. (By Mr. Stolebarger) Does Isys' adoption of the
15 name CHROMIUMPC have anything to do whatsoever with
16 Google's CHROMIUM OS initiative?

17 A. No.

18 Q. Just an absolute total coincidence.

19 A. It's not coincidence. I mean we actually went
20 through this process where we changed our end caps from
21 a standard aluminum finish and we ended up started
22 dipping them in chrome, and that's what started that
23 process, to run parallel tracks.

24 Q. Do you recall when Google launched the CHROME
25 browser?

1 A. Yes.

2 Q. When?

3 A. Probably around the same time.

4 Q. 2008?

5 A. I'm assuming.

6 Q. And the other name you were considering, in
7 addition to CHROMIUMPC, was CHROME; is that correct?

8 A. Correct.

9 Q. And so your testimony today under oath is that
10 the two names you conceived of for your product,
11 CHROMIUMPC and CHROME, had nothing whatsoever to do with
12 Google launching a CHROME browser in 2008 and announcing
13 its CHROMIUM OS project in 2008; is that your testimony?

14 A. The mark is not CHROME. The mark is CHROMEPCU is
15 what I filed for.

16 Q. Let me rephrase the question using the correct
17 mark. My question to you is whether or not you are
18 testifying here today under oath that when you conceived
19 of the two alternative names, CHROMIUMPC and CHROMEPCU,
20 sometime in the fall of 2009, it had absolutely nothing
21 to do with the fact that Google announced its CHROME
22 browser in 2008 and Google announced its CHROMIUM OS
23 project in 2008.

24 A. That's correct.

25 Q. Just a total coincidence.

1 A. We built a chrome box, it's dipped in chrome,
2 it's -- we needed something that -- we couldn't call it
3 Fashion PC, we had to come up with a name for it. We
4 had run parallel paths, mine's hardware, theirs is
5 software. There's a difference.

6 Q. When did Isys obtain the domain name
7 chromiumpm.com?

8 A. chromiumpc.com was --

9 Q. Sorry, pc.com.

10 A. I'm not sure. I would have to look at the --

11 Q. If you want to take a look at Plaintiff's Exhibit
12 Number 2, it should be in front of you, unless they were
13 removed. It's at page 25, which should be the last
14 page. If I call your attention to the information on
15 the far left column.

16 A. Created on 20th November '09.

17 Q. November 20, 2009?

18 A. Yep.

19 Q. That was one day after Google announced the
20 release of CHROMIUM OS, correct?

21 A. I'm not sure.

22 Q. Take a look at Plaintiff's Exhibit 2, page 13 of
23 25.

24 A. Page -- Exhibit 2?

25 Q. Exhibit 2, this is off of your CHROMIUMPC Blog;

1 is that correct?

2 A. Yeah.

3 Q. Does it not state --

4 A. Wait.

5 Q. -- Chrome OS Source Code released November 19,
6 2009, one day before you attempted to register the
7 domain name CHROMIUMPC?

8 A. I'm not seeing --

9 MR. STOLEBARGER: If I can approach, Your
10 Honor.

11 THE COURT: You may.

12 THE WITNESS: Is it this one?

13 MR. STOLEBARGER: Yes.

14 Q. (By Mr. Stolebarger) That's in evidence. If you
15 would read at the top where it says Chrome OS Source
16 Code released, what date does it say?

17 A. The date is November 24th, 2009.

18 Q. That's the date this went on your Web site,
19 correct? What does the headline say?

20 A. Chrome OS Source Code released November 19, 2009.

21 Q. At the time that Isys adopted the CHROMIUMPC
22 domain name, it was aware of Google's prior claim to
23 rights in CHROMIUM in connection with the operating
24 system and the browser software, correct?

25 A. No, we don't think that CHROMIUM has any rights

1 as a trademark.

2 Q. Let me focus you on the timeframe. We're talking
3 about November 20, 2009, when you registered the domain
4 name chromiumpc.com, my question to you is as of that
5 time Isys was aware of the fact that Google had a prior
6 claim to rights in CHROMIUM in connection with the
7 operating system and browser software, correct, you knew
8 that?

9 A. We knew that there was an initiative. We didn't
10 know that there was an OS -- we didn't know anything.
11 We knew that they were going to go do something, but
12 there was nothing specific in hardware.

13 Q. You knew those names were already out in the
14 marketplace, correct?

15 A. I knew CHROME was out in the marketplace as a
16 browser on an operating system.

17 Q. You knew CHROMIUM was on the marketplace in
18 September of --

19 A. CHROMIUM was an initiative, not a product.

20 Q. It was out, the name was out in the marketplace;
21 is that a fair statement?

22 A. Sure.

23 Q. Before filing your application to register
24 CHROMIUMPC with the Patent and Trademark Office, you
25 were -- you conducted a search, did you not, to

1 determine if there were prior conflicting rights?

2 A. I believe we did.

3 Q. That search revealed to you that Google CHROMIUM
4 had already filed an application by that time, correct?

5 A. I'm not sure. I would have to go back and look
6 at the records, I'm not sure.

7 Q. But you do recall having a search done and you do
8 recall reviewing the results?

9 A. We usually do a search. I'm not quite sure. I
10 may have just had them file it, I don't know, but I
11 would have to go back and look at my records.

12 Q. Mr. Sullivan, isn't it a fair statement that your
13 small company has a very nice product, which I like by
14 the way --

15 A. Thank you.

16 Q. -- was trying to gain a little buzz in the
17 industry by associating your product with Google's
18 CHROMIUM OS initiative and Google's CHROME browser;
19 isn't that a fair statement?

20 A. Not necessarily, because it really wasn't a
21 product yet. What good would tying new hardware to
22 software that doesn't exist do for us? It's very
23 presumptuous to say that a software program that doesn't
24 exist yet that hasn't been tested or fire tested in the
25 marketplace would give us an advantage. This product,

1 CHROMIUMPC, was not designed just to run on Google
2 CHROME, though we think it's a very cool place to start
3 with our product because it was supposed to be free in
4 open source.

5 Q. You recall, don't you, putting on your Web site
6 when you were first talking about your CHROMIUMPC
7 product --

8 A. Uh-huh (affirmative).

9 Q. -- how much you appreciated Google, do you recall
10 doing that?

11 A. I do.

12 Q. And so were you not trying to gain some
13 association even in the very beginning between your
14 CHROMIUMPC product, or the product you wanted to make,
15 and Google?

16 A. It's very customary to be polite in the industry.
17 When you see somebody out in the world trying to do
18 something cool, it's very customary in our industry to
19 put up logos or say, you know, special tanks to
20 Microsoft, or, wow, you guys are really doing something
21 cool, keep up the great work. And at the time, we
22 thought CHROMIUM, we -- our perception -- we -- first of
23 all, we thought it was CHROME OS not CHROMIUM at the
24 time. This is something that we learned after all of
25 this that there was two different names.

1 Q. Just so we're clear now, at what time?

2 A. Well, after we had gotten a letter from Google.

3 We --

4 Q. Which letter do you refer to?

5 A. The letter that we received --

6 Q. The May 27, 2011 letter?

7 A. May 27, where it was laid out pretty clearly to
8 us there are two very specific different products, that
9 they had basically called us out for allegedly
10 intentionally deceive -- intentionally trying to deceive
11 customers, which we would never do. If we weren't
12 licensed for the OS, we wouldn't do that. We're
13 licensed to sell Microsoft software. We go through a
14 process to do that. We honestly thought that it was an
15 open source initiative and weren't aware of the
16 differences between CHROME and CHROMIUM. And only after
17 this litigation have we learned the totality of what it
18 is that Google's trying to do.

19 Q. You did know, did you not, that the names Google
20 CHROMIUM and Google CHROME were out in the marketplace,
21 you knew that, right?

22 A. I thought Google CHROMIUM was an initiative, not
23 a product or a mark, and I thought Google CHROME was the
24 actual product that came out of the initiative -- or not
25 Google, but CHROME OS was the version that came out of

1 the CHROMIUM initiative. And then our --

2 Q. When did you learn that?

3 A. Through this litigation.

4 Q. You didn't know that --

5 A. No.

6 Q. -- until very, very recently.

7 A. No. The letter is what straightened it all out
8 for me.

9 Q. When you were telling the public that your
10 CHROMIUMPC would run Google's CHROME OS, you didn't know
11 what Google's CHROME OS was, is that your testimony?

12 A. My testimony is that I thought CHROME OS was
13 CHROMIUM OS, so the names are very close to each other,
14 and they mean -- they're two separate products as far as
15 Google's concerned, but they are both based on the same
16 source code. And the only difference between CHROME OS
17 and CHROMIUM OS, because they're both open source
18 initiatives built by other people, is, one, Google
19 manages it, which we thought was going to happen on the
20 CHROMIUM side, but that wasn't the case.

21 MR. STOLEBARGER: Your Honor, the last
22 portion should be stricken, nonresponsive.

23 THE COURT: That portion will be stricken.

24 Q. (By Mr. Stolebarger) Sitting here today, does
25 Isys claim to own a registration for CHROMIUMPC?

1 A. Yes.

2 Q. Do you know what a registration is?

3 A. Yes.

4 Q. What is it?

5 A. Registration is a mark that's given to you by the
6 U.S. Government, or whatever the governing body is.

7 Q. So sitting here today, you tell this court that
8 you own a registration?

9 A. I haven't been given approval. I'm a hop, skip,
10 and a jump from a full-blown registration, but I'm
11 only -- Google's the only thing standing in my way of
12 that registration.

13 Q. My question to you, sir, is sitting here today,
14 do you claim that your company Isys owns a registration
15 of CHROMIUMPC?

16 A. We have an approval.

17 Q. Please answer my question, it's a yes or no
18 answer, do you claim today that Isys owns a registration
19 for CHROMIUMPC?

20 A. No, we have -- no. We have an approval.

21 Q. You testified earlier in direct and just a minute
22 ago something to the effect that you don't have your
23 registration because of something Google has done; is
24 that correct?

25 A. Correct.

1 Q. Isn't it true, sir, that you've never filed a
2 statement of use with the Trademark Trial and Appeal
3 Board?

4 A. We actually filed a -- we haven't filed that yet,
5 as far as my knowledge. We -- the original application
6 that we filed was an intent to use application, which
7 was supposed to keep people off the mark while we
8 decided what we were going to do and make our plans for
9 a commercial launch of CHROMIUMPC, that's what it was
10 supposed to do. It's not doing it.

11 Q. My question, sir, is that you, your company, or
12 your counsel have not filed a statement of use to date;
13 is that correct?

14 A. I believe that's correct.

15 Q. If you look at your Exhibit Number 3, which you
16 earlier testified is a copy of the file, do you have
17 Exhibit 3 in front of you?

18 A. I'm sure I do.

19 Q. If you'll turn to Page 21 of 28.

20 A. What was the page?

21 Q. Page 21 of 28.

22 A. This one.

23 Q. Let me direct your attention to the middle of the
24 page under the heading Goods and Services
25 classification, do you see in the third column over,

1 first use date, and just to the right of that the word
2 none.

3 A. First use date, yes.

4 Q. It says none, right?

5 A. It does.

6 Q. That's the official file that you pulled off the
7 Web site yourself, right?

8 A. Yes.

9 Q. Take a look at the next column, first use in
10 commerce date, do you see that?

11 A. Yes.

12 Q. Next to that is the column that says none, right?

13 A. Yes.

14 Q. So you have no statement of use on file as of
15 today, correct?

16 A. That I know of, yeah.

17 Q. You testified earlier that there have been two
18 pre-sales of CHROMIUMPC, let's start with the first.

19 Before we get there, what is your definition of a
20 pre-sale?

21 A. Somebody who has given you money and you've
22 deposited it into your checking account for the transfer
23 of goods, for compensation.

24 Q. How is that different than a sale?

25 A. You don't -- a pre-sale is you haven't shipped

1 them the product yet.

2 Q. So you have two such transactions?

3 A. Yes.

4 Q. What's the first one?

5 A. I'm not sure. It's in one of these

6 declarations -- or one of these exhibits.

7 Q. There is an exhibit that references a sale of

8 CHROMIUMPC by Isys to a buyer.

9 A. Uh-huh (affirmative).

10 Q. I'm not familiar with that exhibit. Can you tell

11 me where I might find it?

12 A. It's in one of the exhibits, number 2, Exhibit 2.

13 Q. Let's take a look at Exhibit 2.

14 A. Page 18.

15 Q. Page 18.

16 A. So we had set up a shopping cart on

17 chromiumpc.com, and you can see that we have -- if you

18 look down you'll see CHROMIUMPC, then it will say

19 sales@chromiumpc.com, it was hosted by Go Daddy in

20 Arizona, and it has our address on it. Then you'll see

21 underneath here, order, and there's two order numbers,

22 210006739 and 207855046. They were for 299 apiece on

23 December 16, 2009, and December 6th of 2009.

24 Q. And who were the buyers?

25 A. What's that?

1 Q. Who were the buyers?

2 A. I don't know, it doesn't say.

3 Q. You don't know who your own -- you don't --

4 A. I have lots of customers, this was just the first
5 one.

6 Q. You testified that there have only been two
7 pre-sales.

8 A. Oh, no. We've had sales -- CHROMIUMPC was -- the
9 first market we came out with, we sold boxes under
10 CHROMIUMPC, and then shortly thereafter we -- we still
11 promote CHROMIUMPC, but we really shipped it ourselves
12 to the wholesale market to control our volume to get --
13 shipping -- selling retail product is all about product
14 ramp, so you have to be able to build enough product
15 each week or each month to support the channel or
16 support the market. So we were building to that over a
17 period of time. We anticipate that CHROMIUMPC will
18 be -- by the time our ramp is where it needs to be, it
19 will be sometime later this year that we'll be selling
20 retail product for CHROMIUMPC because of that ramp. But
21 we've been selling these boxes -- we don't only have two
22 customers. We have lots of customers.

23 MR. STOLEBARGER: Your Honor, I would move
24 to strike the answer in its totality as nonresponsive
25 and would ask for the admonition that he try to answer

1 my question.

2 THE COURT: I'll strike the answer. You
3 need to listen carefully to the question and respond
4 just to the question.

5 Q. (By Mr. Stolebarger) I want to know everything
6 you can tell me about the sales or pre-sales of the box
7 bearing the mark CHROMIUMPC. Earlier you testified
8 there were two pre-sales.

9 A. Uh-huh (affirmative). These two.

10 Q. Are there any others?

11 A. I would have to go look. Not in this particular
12 shopping cart, but there may be -- somebody may have
13 sold something. I would have to go look and see inside
14 my documents if there's any other CHROMIUMPC branded
15 sales. I'm assuming from the Web site these are the
16 only two because those are the only two listed on this
17 piece of paper. And I know that this shopping cart was
18 the only thing that we had running for CHROMIUMPC to
19 provide a credit card source.

20 Q. Was product shipped to these two purchasers?

21 A. I'm not aware. I would have to look in my -- I
22 would have to go look.

23 Q. What product could possibly have been shipped,
24 would it have been just the box, or would it have been a
25 box without operating software?

1 A. It was most likely -- it was probably a box with
2 either a version of openSUSE on it, or -- the problem
3 was at this time that what we really wanted to ship with
4 from a free software standpoint wasn't ready yet because
5 their CHROMIUM initiative had just started, and though
6 we had sales, it wasn't ready for market yet.

7 Q. Whose CHROMIUM initiative had just started?

8 A. The CHROMIUM initiative in 2008.

9 Q. Started by Google.

10 A. Started by Google.

11 Q. So you were waiting to launch your project when
12 Google CHROMIUM OS is available; is that your testimony?

13 A. No. We started selling boxes prior to that being
14 done. We just would provide a Linux OS, some other
15 source of -- you know, like openSUSE or something. All
16 CHROME, all CHROMIUM -- just so we're clear, CHROMIUM is
17 just a derivative of Linux, not a new operating system,
18 it's an old operating system. It's been around for
19 awhile.

20 Q. Again, if you could just stick with my question.

21 A. Sorry, I apologize.

22 Q. When your product Xi3 was shown at the CES, the
23 consumer electronics event, and garnered some attention,
24 as I understand your declaration, it seems that all the
25 attention was directed to Xi3 and none of it directed to

1 CHROMIUMPC; is that correct?

2 A. No. We had -- we would tell people verbally when
3 we were talking to people at the show that we were -- we
4 had this product that really wasn't ready yet for retail
5 delivery, and that the CHROMIUMPC would be available in
6 due time, so -- but we would tell them the features of
7 the wire-bound OS and....

8 Q. But certainly in the attention that was given to
9 Xi3, the BusinessWire report that you include the
10 reference on your Web site, it says nothing about
11 CHROMIUMPC, it's all Xi3, correct?

12 A. On our Web site? No, we have stuff about
13 CHROMIUMPC on our Web site.

14 Q. In reference to the attention at the CES event,
15 that was directed entirely to the Xi3 product and not at
16 all to the CHROMIUMPC product.

17 A. I don't think that's true.

18 Q. You don't think that's true?

19 A. No.

20 Q. Take a look at your Exhibit 4, do you have that?

21 A. I think I do. I'm missing Exhibit 4. I don't
22 have it.

23 Q. Let me show you what's identified in your papers
24 as Exhibit 4.

25 A. Okay.

1 Q. It talks about at the headline Cube-like Xi3
2 Modular Computer debuts as an award winner, do you see
3 that?

4 A. That's correct, that's what we entered an award
5 for and won an award at the CES.

6 Q. Do you see any mention at all in this document
7 CHROMIUMPC?

8 A. There's no mention of CHROMIUMPC in this
9 document.

10 Q. Turn to Exhibit 5, if you would, it's in the
11 book, it's the next -- do you see the little red
12 sticker. There you go. Turn to the second page of
13 Exhibit 5, you'll see an ad placed buy your law firm
14 Kirton & McConkie.

15 A. That's correct.

16 Q. This was for the CES event in 2011, right?

17 A. Yes.

18 Q. It mentions visit the Xi3 Corporation booth; do
19 you see that?

20 A. Uh-huh (affirmative).

21 Q. Is there any mention at all in this ad that is
22 showing its appreciation for you and you in turn
23 showing your appreciation for your counsel that says
24 anything about CHROMIUMPC?

25 A. No, sir.

1 Q. Turn to Exhibit 6, do you see the BusinessWire
2 article?

3 A. Yes. This was after the show.

4 Q. Leads with the headline Xi3 Corporation Rocks CES
5 2011?

6 A. Uh-huh (affirmative).

7 Q. Any mention at all to CHROMIUMPC?

8 A. No. We weren't publically promoting the product
9 at that time.

10 Q. You mentioned that you had a budget for the
11 promotion of CHROMIUMPC?

12 A. Uh-huh (affirmative).

13 Q. What is it?

14 A. For what period of time?

15 Q. Very beginning, 2009. What was your budget for
16 the year end 2009 for the promotion of just CHROMIUMPC,
17 I don't want to hear about Xi3, but just the CHROMIUMPC
18 product?

19 A. They're somewhat tied together because of the
20 nature of -- if I had to put a number on it, in early
21 2009, I would say probably around a million dollars.

22 Q. To promote CHROMIUMPC.

23 A. Correct.

24 Q. I thought you just said you didn't want to go
25 public in 2009.

1 A. A lot of preparation and preparation of going
2 public.

3 Q. I'm asking for a budget for promotional activity,
4 by that I thought I understood you're promoting to the
5 public.

6 A. Well, yeah, but you may do Web development in the
7 background, you may spend time and resources on
8 developing things for use in that, like shopping cart or
9 something like that.

10 Q. Let's see if we can separate research and
11 development from actually promotional activities. Why
12 don't you describe for the court what you mean when you
13 use the word promotion or promote, as you did in your
14 declaration.

15 A. Promote is to -- well, as I did in my
16 declaration, which declaration?

17 Q. Your declaration, it's Exhibit 13. Do you not --
18 do you recall offering the court your sworn testimony in
19 the form of a declaration?

20 A. I do.

21 Q. Let me read to you, it's at page 2 of your
22 declaration, which is also Exhibit 13 to your papers.
23 At paragraph 7 you say that Since 2009, Isys has
24 continuously promoted its new computers under the
25 CHROMIUMPC brand in discussions with customers in

1 different parts of the United States. Do you recall
2 giving that sworn testimony?

3 A. I do.

4 Q. What did you mean when you said promote?

5 A. Offer for sale or use.

6 Q. Did you procure any advertising for the
7 CHROMIUMPC product?

8 A. Yeah. We have a marketing department, we have
9 marketers, we pay people to develop concepts for retail
10 product, we pay for Web development, we built a shopping
11 cart.

12 Q. So paid advertising, do you recall whether there
13 was any form of paid advertising for the CHROMIUMPC
14 product?

15 A. What, like ABC, NBC, like TV advertising?

16 Q. Television, radio, magazine, trade journals,
17 anything of the sort.

18 A. Most of the stuff we do is through PR. We don't
19 place ads or -- like I said, we've been more kind of
20 business to business.

21 Q. Separating the research and development side from
22 the actual promotional activities, as you just said,
23 what was the budget for promotional activities for
24 CHROMIUMPC?

25 A. Tens of thousands of dollars. A lot of it's on

1 the PR side. So we do a lot of -- we feel that PR is
2 our best way to reach our customers, the type of
3 customers that we want to sell to, trade shows, that
4 sort of thing.

5 Q. Let me focus on the word customers. When you
6 testified in your declaration that you were promoting to
7 customers, what did you mean by the word customers?

8 A. Customers, people that are willing to buy
9 product or have bought product.

10 Q. So we're talking about the two pre-sales that
11 you've testified about?

12 A. No. We're talking about people that I talked to
13 at the show. We had tens of thousands of people at the
14 show come to us and say, we would like to buy this
15 product, what different formulations does it come in.
16 And then we would explain to them, listen, this is the
17 Modular Computer, but we also have CHROMIUMPC, which
18 will be kind of our retail product, so we would explain
19 the differences between the products and how we wanted
20 to position the products.

21 Q. Would you agree with me that those are
22 prospective customers, potential customers, but not
23 actually customers, they are not buying anything at the
24 time?

25 A. A lot of them bought -- became customers. Maybe

1 at the time they were prospective customers.

2 Q. And the lot of them that you referred to, they
3 all bought Xi3, did they not?

4 A. It depends on the -- some of the companies
5 decided to wait to see what our offering was going to be
6 with CHROMIUMPC and some of the customers bought Xi3.

7 Q. But my point is that either the customers or
8 potential or prospective customers decided to wait in
9 the case of CHROMIUMPC, or to buy Xi3, correct?

10 A. Oh, yeah, fair statement.

11 Q. It's true, isn't it, with the exception of the
12 two pre-sales, that no CHROMIUMPC branded computer has
13 been sold to anyone?

14 A. I would have to look. I'm not sure.

15 Q. Your best testimony sitting here today is that
16 you recall two pre-sales and that's it.

17 A. That's what I have in front of me. I don't know
18 if someone else tried to sell, pre-sell one. We have
19 sales guys that -- I just don't know. But we actively
20 promoted CHROMIUMPC with Modular Computer. This was the
21 first product we ever sold, there's actually an e-mail
22 sent out from my guys when we sold our first one, we
23 sold CHROMIUMPC before we sold Modular Computer.

24 Q. It's true, isn't it, sir, that the development of
25 CHROMIUMPC hasn't even been completed yet?

1 A. CHROMIUMPC -- well, what we wanted to launch with
2 is we wanted to launch with Google CHROME, which we
3 found out that we can't launch with, so we'll either
4 be -- mostly likely be moving on. Probably won't launch
5 with -- probably change our course after this
6 litigation. We kind of considered Google's open source
7 operating system as a cool way to launch into the retail
8 space. And now finding out that it's not open source,
9 it's not free, and has to be under license and that
10 there's some red-headed stepchild version of that you
11 could load if you'd like, we'll most likely change our
12 direction. We don't need CHROMIUM or CHROME OS to sell
13 this product.

14 Q. You don't need CHROMIUMPC either, do you?

15 A. I do. I registered that.

16 Q. Isn't it true that your Xi3 product has been
17 acclaimed at the CES and you've had sales of your Xi3
18 product, correct?

19 A. Yes.

20 Q. Isn't your Xi3 product identical to CHROMIUMPC?

21 A. No. It has different software on it. We put a
22 different --

23 Q. Didn't you just say you were going to have to put
24 different software than the software you intended for
25 the CHROMIUMPC product?

1 A. Um --

2 Q. You intended to operate Google CHROME OS on your
3 CHROMIUMPC product, correct?

4 A. Yes.

5 Q. You just testified that now you realize you
6 cannot do that, correct?

7 A. Well, we can load CHROMIUM OS, which is the
8 red-headed stepchild to CHROME OS. CHROME OS is a
9 licensed version of firm Google, which we don't have a
10 license. So if we don't have a license to it, it won't
11 ship, which will change our marketing stance on -- we
12 may decide not to ship even with CHROMIUM OS because we
13 can load openSUSE on this with Firefox and get the same
14 exact thing as we're going to get with CHROME OS or
15 CHROMIUM.

16 Q. Isys has not disclosed any pricing for the
17 CHROMIUMPC product; is that correct?

18 A. That's correct.

19 Q. As of the moment you've had no product bearing
20 the brand CHROMIUMPC available in the marketplace today;
21 is that correct?

22 A. We have talked about it, we've discussed it with
23 our customers, but it is yet for something for us to --
24 that's why we filed an intent to use application.

25 Q. Were you made aware of a contact from Google's

1 counsel to your counsel on May 18, 2011?

2 A. Not specifically.

3 Q. You don't recall being informed by your counsel
4 as to what the Google lawyer said on May 18, two days
5 before your May 20th press release?

6 A. Not offhand. But I know that we were granting an
7 extension or talking about an extension for Google's
8 right -- or Google's opposition of CHROMIUMPC.

9 Q. Do you have Exhibit 12 in front of you?

10 A. Is it in this?

11 Q. It's a letter from Cooley LLP to Mr. Zenger.

12 A. Yes, I remember this. This was after -- this was
13 after our announcement on the 20th.

14 Q. Yeah, but you saw this letter, right? You
15 testified about it earlier?

16 A. I did.

17 Q. Do you see in the second paragraph where it says
18 Google contacted you directly several months ago to
19 express its concern over Isys' use of the CHROMIUMPC
20 mark; do you see that?

21 A. Uh-huh (affirmative).

22 Q. It's true, isn't it?

23 A. No.

24 Q. That's not true?

25 A. Google never got that to me.

1 Q. The letter's not addressed to you, sir, it's
2 addressed to Mr. Zenger.

3 MR. ZENGER: Objection, no foundation, Your
4 Honor.

5 THE COURT: Overruled. Cross-examination.

6 Q. (Mr. Stolebarger) The letter is from counsel for
7 Google to your counsel, correct?

8 A. This was after our -- this was after our
9 announcement.

10 Q. I understand that.

11 The second paragraph says, Google contacted
12 you, meaning Mr. Zenger, directly several months ago to
13 express its concerns over Isys' use of CHROMIUMPC mark;
14 do you see that?

15 A. All that I heard was that there was a --

16 Q. Just a second.

17 MR. ZENGER: And the document speaks for
18 itself.

19 MR. STOLEBARGER: I don't want you to
20 divulge --

21 THE COURT: Answer the question. The
22 question simply is do you see that statement in the
23 letter.

24 THE WITNESS: Do I see it? Yes, I see the
25 statement in the letter.

1 THE COURT: Okay. Now you can follow up.

2 Q. (By Mr. Stolebarger) You did have an
3 understanding, did you not, that several months before
4 your May 20 press release you had been put on notice
5 that Google had concerns about Isys' use of the
6 CHROMIUMPC mark, correct?

7 A. Google had told counsel that it may oppose our
8 CHROMIUMPC mark, but it did not give any specifics to
9 what it would use to -- that I knew of, it didn't say it
10 was going to use a specific mark or -- it just said they
11 had concerns and they may -- they may challenge it,
12 which at the time there was no imminent launch of a
13 product, you know, okay, you may have a problem with it,
14 we'll let them figure out if they do have a problem. If
15 they do, then we'll talk about it then. But there was
16 no communication with the company, it was with counsel,
17 and as far as I knew, I don't know what conversations
18 went on between counsel, the counsel between Google and
19 to my counsel. But as far as my knowledge, it was
20 merely a -- we may have a problem with your mark, not of
21 these specific concerns.

22 Q. But you knew -- sorry, Your Honor -- you knew
23 months before your May 20th press release that Google
24 had concerns about Isys' use of the CHROMIUMPC mark,
25 correct?

1 A. Yes.

2 Q. Do you have Exhibit 16 in front of you?

3 A. 16. I should put these in order.

4 THE COURT: 16 is one of the exhibits I
5 don't have a copy of. Do one of you have a copy you can
6 hand to the court?

7 THE WITNESS: I don't have it. I don't
8 think I have it either.

9 MR. ZENGER: Here's one, Your Honor.

10 MR. STOLEBARGER: May I approach, Your
11 Honor?

12 THE COURT: You may.

13 THE WITNESS: I don't have that copy.

14 MR. STOLEBARGER: You don't have 16 on it?

15 THE WITNESS: No. Is it in this book?

16 MR. STOLEBARGER: No. I do not have that.

17 MR. ZENGER: It doesn't have a cover sheet
18 on it. New Laptop from Google, printout from the Web
19 page.

20 THE WITNESS: This one is what, 16.

21 Q. (By Mr. Stolebarger) Earlier you testified that
22 when you saw Exhibit 16 you were concerned, do you
23 recall that testimony?

24 A. Yes.

25 Q. You said this was something that came out just

1 very recently?

2 A. Last Thursday.

3 Q. And that you were concerned because it had both
4 Google CHROMEBOOKS and your Xi3 CHROMIUMPC in the same
5 headline?

6 A. Yes.

7 Q. Isn't that, sir, a function of your own press
8 release on May 20, 2011, when you announced that the Xi3
9 CHROMIUMPC would come loaded with Google CHROME OS?

10 A. No, because I never said Google CHROMEBOOKS.

11 Q. But you said it would come loaded with Google
12 CHROME OS, did you not?

13 A. I did. That's what was in the release.

14 Q. Can you tell us why from 2009 to 2010 into 2011
15 that Isys repeatedly refers to Google when its talking
16 about its CHROMIUMPC product? It refers to Google
17 CHROMIUM and Google CHROME, it refers to thank you to
18 Google for all they have done, it refers to your soon to
19 be the first desktop running on Google CHROME OS. Why,
20 sir, was it Isys' plan to associate its CHROMIUMPC
21 product with Google?

22 A. We have a modular architecture which allows us to
23 change operating systems very quickly. We thought, wow,
24 what a great way to show off modularity of our product
25 and to be the first out with something that's brand new

1 coming out that's open source so that everybody could
2 use it. We thought that was cool.

3 Q. So you thought it was cool to be associated with
4 Google, with CHROME.

5 A. No, not Google, with a new operating system. It
6 didn't matter if it was Google or SUSE or -- there's not
7 a lot of change in the operating system --

8 Q. It's true, isn't it, that that particular
9 operating system that you latched onto was Google CHROME
10 and Google CHROMIUM?

11 A. Yeah, sure, it's true.

12 Q. You testified earlier and again a few moments ago
13 that today you realized that your May 20th press release
14 was wrong in that you didn't have permission to run
15 Google CHROME OS on your CHROMIUMPC product, correct?

16 A. We did.

17 Q. Have you publically retracted that press release?

18 A. We have. We sent out another press release.

19 Q. When?

20 A. I'm not sure of the date, but it was very soon
21 thereafter.

22 Q. Would it surprise you, sir, that that press
23 release is still on your Web site, the May 20th press
24 release is still on your Web site?

25 A. May 20th? It may be in the historical records.

1 I don't know that that's something we can take off.

2 Q. But you have a new press release in which you
3 retract that statement.

4 A. Yes.

5 Q. Do you recall what it says?

6 A. It's pretty much to the effect of we made a
7 mistake, that the product will not ship with CHROME OS,
8 that it will ship with CHROMIUM OS. And at the time,
9 you know, we're still considering whether we will ship
10 at all with CHROME or CHROMIUM. I mean we basically
11 said that if we ship at all we would never ship without
12 a license or say that we're shipping a licensed product.
13 We didn't know it was a licensed product. If you go
14 back to my Web site, chromiumpc.com originally, I
15 actually use CHROME OS and open source right next to it
16 because that's what I thought. It's true.

17 Q. Okay. All right.

18 A. I apologize for it, it's not -- we -- it wasn't
19 intentional.

20 Q. Who's Paul Lilly?

21 A. What's that?

22 Q. Paul Lilly, do you know Paul Lilly? Did you give
23 Paul Lilly an interview yesterday or the day before,
24 writes for HotHardware?

25 A. No, I don't think so.

1 Q. You might want to check his site because he's
2 quoting you from an interview.

3 A. He is?

4 Q. Yes.

5 A. Nice.

6 Q. I won't ask you if you can't authenticate it.

7 A. No, I didn't give an interview, sir.

8 Q. You testified on direct that millions of dollars
9 have been invested in the promotion of CHROMIUMPC.

10 A. True.

11 Q. A moment ago you testified after we drew the
12 distinction between research and development on the one
13 hand and actual promotional activities on the other,
14 that the number was closer to tens of thousands of
15 dollars, correct?

16 A. Sure.

17 THE COURT: Let me ask a question because
18 I'm the one who has to decide this issue. Have you made
19 any effort to go back to your financial department or
20 your accounts to identify the amount of money that you
21 have spent promoting specifically the name CHROMIUMPC
22 associated with your Modular Computer?

23 THE WITNESS: We can. We haven't done that
24 to date.

25 THE COURT: You have not done that to date.

1 THE WITNESS: No. We found out about this
2 like 16 days ago.

3 THE COURT: That's 16 days more than the
4 rest of us.

5 THE WITNESS: That's true. You have a tough
6 job.

7 THE COURT: Now, so as you sit here today
8 you're assuming that you have some records that would
9 show that you've actually spent money promoting your use
10 of the words CHROMIUMPC.

11 THE WITNESS: I'm assuming that, that
12 something -- I mean a lot of it's research and
13 development.

14 THE COURT: As you sit here today, you've
15 made no effort to verify how much you've spent or
16 whether you've got any records that would demonstrate
17 that you in fact have spent that specifically to promote
18 that trade name.

19 THE WITNESS: We have show records and stuff
20 like that, we've paid for our trade booth shows and
21 spent a quarter of a million dollars at CES, that type
22 of stuff I have.

23 THE COURT: Did you have the tradename
24 CHROMIUMPC at your CES trade booth?

25 THE WITNESS: We discussed it with all of

1 our customers.

2 THE COURT: My question, did you have a
3 signage up of any kind that used the name CHROMIUMPC at
4 your trade booth at the CES?

5 THE WITNESS: We had products like this at
6 the trade booth.

7 THE COURT: That's all you had.

8 THE WITNESS: This is all we had. We didn't
9 put any signs, we didn't put up any trade -- big trade
10 dress because that's not what we won the award for. We
11 were promoting the thing that we won the award for,
12 which was Modular Computer.

13 THE COURT: Okay. Other than the amount
14 that you may have spent to have the name put on the
15 demonstration model, can you identify any other specific
16 expenditure that you've made to promote CHROMIUMPC?

17 THE WITNESS: Our web developers when we did
18 the Web site for chromiumpc.com.

19 THE COURT: Back in 2009?

20 THE WITNESS: Uh-huh (affirmative). We
21 actually built a new one, so we have one on the Xi3 site
22 now where you go on and you can select the different
23 colors. We have the Modular Computer one on there
24 because that's all we're shipping today, but it was
25 built for CHROMIUMPC because that's the retail product.

1 THE COURT: The issue here is whether you've
2 used the name in commerce.

3 THE WITNESS: I have used the name in
4 commerce.

5 THE COURT: That's what I'm trying to figure
6 out. Tell me some specific examples that you can give
7 me where you've spent money promoting or using the name
8 in commerce, other than the two PC sales that you've
9 identified from the --

10 THE WITNESS: The only other thing that I
11 have is the show in January where I spent hundreds of
12 thousands of dollars promoting it, but I don't have a
13 banner or sign --

14 THE COURT: What is it, what is it,
15 promoting it?

16 THE WITNESS: Promoting CHROMIUMPC.

17 THE COURT: How did you spend hundreds of
18 thousands of dollars promoting it, what did you do to
19 promote it?

20 THE WITNESS: I had to be at the show, you
21 have to buy a booth.

22 THE COURT: I thought you just told me you
23 were promoting Xi3.

24 THE WITNESS: Promote both.

25 THE COURT: Now, that's important. I want

1 you to distinguish your use of specifically the
2 trademark that is at issue here.

3 THE WITNESS: So the biggest place where we
4 promoted the product was at the show in January. We had
5 tens of thousands of people come to the booth, there
6 were 200,000 people in town for the event. It was a big
7 event.

8 THE COURT: Other than the demonstration
9 models that have the CHROMIUMPC name on it, that's the
10 only visual signage that you had was using that name; is
11 that correct?

12 THE WITNESS: That was only attached to the
13 product. We didn't have any product slicks yet. We are
14 in the process of doing some marketing materials. We
15 weren't ready for the show for that, so we didn't have
16 any product slicks or anything. With that said though,
17 we didn't have any product slicks for this one either.
18 Sold out. So it's been more of a process.

19 THE COURT: Sorry, Mr. Stolebarger, for
20 interrupting you. You may proceed.

21 MR. STOLEBARGER: That's fine, Your Honor.
22 I have nothing further.

23 THE COURT: Any redirect, Mr. Zenger?

24 MR. ZENGER: Just a question or two.

25 //

1 REDIRECT EXAMINATION

2 BY MR. ZENGER:

3 Q. So Isys spent money beginning in 2009
4 specifically to promote the CHROMIUMPC product via the
5 chromiumpc.com Web site.

6 A. Yes.

7 Q. And if that Web site needed to be updated or
8 refreshed or whatever has to be done with the Web site,
9 additional money was spent to keep that Web site
10 current, correct?

11 A. You have to pay somebody to have a server, you
12 have to pay somebody to -- they don't do it for free.

13 Q. And that Web site continued up until it was
14 merged into the Xi3 Web site, correct?

15 A. That's correct.

16 Q. And since the time that it's been merged into the
17 Xi3 Web site the CHROMIUMPC mark is now shown on the
18 home page of the Xi3 Web site, correct?

19 A. When we decided that CHROMIUMPC was going to be a
20 product underneath Xi3, then we forwarded the
21 chromiumpc.com Web site to Xi3.com.

22 Q. So Isys spent money promoting the CHROMIUMPC mark
23 by changing the Xi3 Web site, correct?

24 A. Correct. We had new splash images done, we had
25 new marketing material, we had photos shot of the

1 product, so not an exorbitant amount.

2 Q. You testified earlier that you visited with
3 customers about purchasing the CHROMIUMPC product,
4 correct?

5 A. I did.

6 Q. And when you went to see those customers in
7 various states you took this promotional piece.

8 A. We always have this with us.

9 Q. And when you went there you had to pay for
10 airline travel, correct?

11 A. That's correct.

12 Q. And you had to pay for hotel accommodations and
13 you had to do whatever you have to do to be able to be
14 present to promote the CHROMIUMPC product with this
15 CHROMEBOX in front of you, correct?

16 A. That's correct. We travel like three or four
17 guys at a time.

18 Q. And the same is true with respect to going to
19 trade shows?

20 A. Correct, it was a real big expense.

21 Q. And while you can't say this much was spent on
22 CHROMIUMPC and this much was spent on Xi3, a portion of
23 your promotional efforts at the trade show and the CES
24 show was directed to CHROMIUMPC.

25 A. Correct.

1 Q. And how much money -- did you say there was a
2 quarter of a million dollars spent to go to the CES
3 show?

4 A. That was just for the booth, that wasn't for any
5 of the travel or the people, that was just spin cubes
6 and space.

7 Q. How much was spent to attend the CES trade show?

8 A. It was probably closer to 325, all tolled with
9 employees maybe closer to 350. I don't know. I'll have
10 to go look.

11 Q. And a portion of those efforts --

12 A. Between a quarter million to 500,000.

13 Q. And a portion of those efforts were directed to
14 promoting the CHROMIUMPC product that you have there in
15 front of you?

16 A. Absolutely.

17 Q. At the show?

18 A. We would offer it as an option. When people
19 would say, well, you know, what else do you have, we
20 would always go through the process. Even when they
21 didn't do that, if they were specifically in education
22 or things like that, we would always offer the
23 CHROMIUMPC.

24 THE COURT: Mr. Zenger, is Exhibit 2 the
25 2009 Web page?

1 MR. ZENGER: Yes, sir.

2 THE COURT: Thank you.

3 Q. (By Mr. Zenger) There was an initial question
4 asked of you about when you knew about the CHROMIUM OS
5 initiative under the name CHROMIUM, and the wording from
6 Mr. Stolebarger concerned me a little bit. As you sit
7 here today, you know and you have learned that that
8 CHROMIUM OS initiative began in 2008, correct?

9 A. Correct.

10 Q. But you didn't know about it in 2008, did you?

11 A. No. I thought --

12 MR. STOLEBARGER: I realize it's very late
13 in the day, but this whole series of questions are very
14 leading.

15 THE COURT: Sustained. It's really not very
16 helpful to the court to have you lead him.

17 MR. ZENGER: Sorry, I was just trying to
18 move it along. I'll do it the other way. Thank you,
19 Your Honor.

20 Q. (By Mr. Zenger) When did you know -- when did you
21 first become aware that there was an open source
22 initiative that was -- Google was attempting to forward
23 under a name CHROMIUM OS?

24 A. So the CHROMIUM OS thing, that didn't come until
25 later. I knew about CHROMIUM, the initiative, not a

1 product, but a plan of people getting together and
2 saying we're going to build this. People get together
3 all the time and say we're going to build stuff. It
4 doesn't mean anything. No product was announced, no
5 hardware was announced. It was, hey, we're going to get
6 together to do some cool stuff, well, that I knew about.
7 A specific OS with licensing, I mean to this day I'm
8 confused about the structure of the licensing.

9 Q. When did you learn that Google had launched or
10 published or made available a software that they called
11 the CHROMIUM OS open source initiative?

12 A. Now I know it was back in 2008.

13 Q. But when did you learn about -- when did you
14 first learn about that, when did you become aware of it?

15 A. When they sent me the letter -- when they sent me
16 this letter explaining the differences in the OSes. I
17 thought it was CHROMIUM, the initiative, and then -- I
18 mean I would imagine sometime -- I mean it's been pretty
19 public that CHROME OS launch.

20 Q. That's what I'm asking you, when did you know?

21 A. When they launched it. What was it, July or --
22 of '09 or something like that.

23 MR. ZENGER: Thank you. No further
24 questions.

25 THE COURT: Mr. Stolebarger, anything

1 further under what has been covered?

2 MR. STOLEBARGER: Just one question.

3 RE-CROSS-EXAMINATION

4 BY MR. STOLEBARGER:

5 Q. Did you say you took a CHROMIUMPC box like the
6 one in front of you to the CES in 2011?

7 A. Uh-huh (affirmative).

8 Q. Was it a complete product ready to sell?

9 A. Yes.

10 Q. What operating system did it run?

11 A. SUSE, open source SUSE.

12 MR. STOLEBARGER: Thank you.

13 THE COURT: Thank you. You may step down.

14 Mr. Zenger, any additional witnesses you
15 wish to call?

16 MR. ZENGER: Your Honor, we would call

17 Mr. Lin from Google.

18 THE COURT: Mr. Lin.

19 MR. WILLSEY: Your Honor, he's outside the
20 courtroom.

21 THE COURT: Someone is going to get him.

22 If you would come right up here in front of
23 the deputy to be placed under oath.

24 FELIX LIN,

25 called as a witness at the request of the Plaintiff,

1 having been first duly sworn, was examined
2 and testified as follows:

3 THE CLERK: Please have a seat in the
4 witness stand. Sir, if you could please speak into the
5 microphone and say your name and spell your last name
6 for our record.

7 THE WITNESS: Felix Lin, last name is L-i-n.

8 THE CLERK: Thank you.

9 DIRECT EXAMINATION

10 BY MR. ZENGER:

11 Q. Mr. Lin, it's true that you're the director and
12 product of -- the director of product management for
13 the -- for Google for the CHROME OS project at Google?

14 A. I am.

15 Q. And you have been at Google how long?

16 A. A little over two years.

17 Q. So when did you start your employment at Google?

18 A. End of March 2009.

19 Q. You have filed a declaration in this matter, have
20 you not?

21 A. I did.

22 Q. It's true, isn't it, Mr. Lin, that Google in 2008
23 announced an open source initiative under the name
24 CHROMIUM, correct?

25 A. That's correct.

1 Q. And it's true, isn't it, that in doing so a
2 software was made available to independent developers
3 and they could make changes to that software, correct?

4 A. The software was made available to the open
5 source community, that's correct.

6 Q. And all you had to do was go to the Google Web
7 site and click through what's called a BSD agreement and
8 then they were permitted to obtain copies of the
9 software, correct?

10 A. It didn't work exactly that way, but it was
11 fairly easy to see the software.

12 Q. Tell me the process by which someone who wanted
13 to participate in the open source initiative obtained a
14 copy of the CHROMIUM open source software.

15 A. Developers could go to the chromium.org Web site
16 and simply get access to the software.

17 Q. And then after they had access to the software,
18 other than place certain type of copyright notice on it,
19 the open source developers could make whatever changes
20 they wanted, correct?

21 A. So there's a sort of a license agreement --

22 Q. Answer -- the question is a yes or no question,
23 Mr. Lin.

24 A. Would you repeat the question.

25 Q. After receiving a copy of the software, the

1 software developers could do whatever they wanted with
2 that software so long as they put in a certain type of
3 copyright notice on it, correct?

4 A. Incorrect.

5 Q. Correct or incorrect?

6 A. Incorrect.

7 Q. Okay. Tell me why that's an incorrect statement.

8 A. There are a number of other conditions required
9 as well.

10 Q. When you say they are required, what are they
11 required under?

12 A. Under the terms of the license.

13 Q. The BSD agreement, the BSD license.

14 A. Right.

15 Q. Let's turn to that, shall we? I present to you
16 your declaration, and I believe the BSD agreement is
17 Exhibit B, correct?

18 A. Correct.

19 Q. Exhibit B is two pages. Tell me what was
20 required of an open source developer when it received a
21 copy of the CHROMIUM OS software, open source software.

22 A. The software is provided by the copyright holder
23 on an as is basis.

24 Q. And that's Google?

25 A. Pardon me?

1 Q. Which Google is claiming themselves to be the
2 copyright holder?

3 A. Not for all of the components of the software.

4 Q. And that's because other people had already
5 contributed to the software, correct?

6 A. That's correct.

7 Q. So it wasn't the right of Google, exclusive right
8 of Google, there was no exclusive right of Google in the
9 software, correct?

10 A. Google had compiled all of the software that was
11 part of the CHROMIUM project, and together that makes up
12 the entire CHROMIUM project.

13 Q. But the point is, there were many authors, not
14 just Google, correct?

15 A. That's correct.

16 Q. So Google had no exclusive right to control the
17 CHROMIUM open source software by claiming to be the
18 exclusive author, correct?

19 A. It didn't have the exclusive right to the
20 individual components, that's correct.

21 Q. Thank you. So carry on, what was required for a
22 recipient of this open source software?

23 A. There's no requirement of the recipients of the
24 software. They can have access to it, they can use it,
25 they can make modifications to it.

1 Q. Thank you. In fact, Google -- the BSD agreement
2 says that the software is provided as it is.

3 A. Correct.

4 Q. And it also states that there are no implied
5 warranties with respect to the software, correct?

6 A. Correct.

7 Q. And that there are no implied warranties,
8 correct?

9 A. Correct.

10 Q. And, in fact, Google says that it will not be
11 responsible for any harm arising to anyone in any way
12 out of the use of the software, correct?

13 A. Correct.

14 Q. So, in effect, Google exercised no control over
15 the changes, modifications, or functionality of the open
16 source software that was provided to open source
17 developers, correct?

18 A. Incorrect.

19 Q. What control -- you said the controls were under
20 the BSD agreement, right?

21 A. The software is controlled by the BSD agreement.

22 Q. So what is -- show me in the language in the BSD
23 agreement that shows that Google exercised any control
24 over the quality or the content of the open source
25 software.

1 A. The BSD agreement --

2 Q. I'm asking show me in the agreement, read me the
3 words please.

4 MR. WILLSEY: Objection. This is
5 mischaracterizing his previous testimony. He was
6 talking about the BSD agreement in one context, he's now
7 shifting to a new area to ask what Google did to enforce
8 CHROMIUM and the open source software.

9 MR. ZENGER: That's not my question. If
10 that's how you understood it, let me restate it then.

11 Q. (By Mr. Zenger) This is the question, in Exhibit
12 B to your declaration, which you have stated is the BSD
13 agreement, point to me the language in Exhibit B that
14 shows that Google in any way controlled the content of
15 the open source CHROMIUM software.

16 A. Controls are not specifically in the BSD license.

17 Q. Okay. But the only thing someone had to do to
18 get the CHROMIUM software was to agree to the BSD
19 agreement, right?

20 A. People can have access to the software, but that
21 does not mean that they have the ability to change the
22 CHROMIUM project.

23 Q. I'm not talking about the CHROMIUM project. I'm
24 talking about if someone -- if an open source developer
25 in order to get -- I believe your testimony was in order

1 to obtain a copy of the CHROMIUM open source software,
2 all they had to do was enter into the BSD agreement;
3 isn't that what you testified?

4 A. Yes.

5 Q. Show me in the BSD agreement where there is any
6 attempt of Google to control the content of that open
7 source software, of that CHROMIUM software given to an
8 open source developer, point to the language.

9 A. It is not in that agreement.

10 Q. Thank you. Would you please turn to Exhibit 7.

11 A. Where is Exhibit 7?

12 MR. ZENGER: Yes. Not of your -- I'm sorry,
13 sir, not of your declaration. There is a previously --
14 Exhibit 7 previously there on the stand.

15 Your Honor, can I help him find it quicker?
16 I know which one it is.

17 THE COURT: You may.

18 Q. (By Mr. Zenger) Do you have the exhibit there in
19 front of you?

20 A. (Witness indicates by nodding head up and down.)

21 Q. Turn to page 3 in the bottom, in the center just
22 above the indication of the Web site, there's a small
23 number, do you see number 3, page 3?

24 A. Yes.

25 Q. In the middle of page 3 the following statement

1 is made: CHROMIUM OS is an open source project; do you
2 see that?

3 A. Yes.

4 Q. Used by -- used primarily by developers with a
5 code that is available for anyone to check out, modify,
6 and build. That's a correct statement, isn't it?

7 A. That's correct.

8 Q. Go to the next page please. There's a heading in
9 the second paragraph under the second bolded sentence
10 that states the following: We don't plan to support
11 auto update on CHROMIUM OS as we did not build the
12 binaries and we don't know what modifications were made
13 to the system. So we don't want to blow away any
14 changes you made -- you may have made to the codes. So
15 Google did not build binaries for -- the required
16 binaries for the CHROMIUM OS software, did it?

17 A. That's correct.

18 Q. Someone else did?

19 A. That's right.

20 Q. And Google did not control that, that building of
21 those binaries, did it?

22 A. That's correct.

23 Q. And the building of binaries significantly
24 impacts the function and operation of that software,
25 doesn't it?

1 A. We don't allow those to be called CHROMIUM OS
2 either.

3 Q. That's not my question, sir. My question is the
4 building and construction of binaries has a material
5 impact on the open source software, doesn't it?

6 A. That's correct.

7 Q. In fact, it can render the software inoperable,
8 can't it?

9 A. Potentially.

10 Q. In fact, it could -- if the code in the software
11 is abused it could actually even harm the hardware,
12 couldn't it?

13 A. I'm not sure how that could be possible.

14 Q. But the point is the CHROMIUM OS software could
15 be modified by anyone to do anything, right?

16 A. It would not be known as CHROMIUM OS at that
17 point.

18 Q. That's not my question. Please answer my
19 question. The CHROMIUM OS software could be modified to
20 do anything, correct?

21 A. Theoretically.

22 Q. And Google exercised no control over the change
23 in that function, right?

24 A. That's correct.

25 Q. Okay. Now, there are frequently asked questions

1 here -- by the way, Exhibit 7 is Google's own Web site
2 that answers questions about the CHROMIUM project, isn't
3 it?

4 A. That's correct.

5 Q. On page 4 when a builder used -- there was a
6 frequently asked question by builders, and they said,
7 should I call -- and a build, let me go back to what a
8 build is, a build is any modification that an open
9 source developer makes, right?

10 A. That's correct.

11 Q. Google was exercising no control over what those
12 builds were, correct?

13 A. We control what the end user started with, what
14 the developer started with, which is what is known as --

15 Q. I'm not asking you whether you control what they
16 started with. Google did not control the build for the
17 open source developers, correct?

18 A. That's correct.

19 Q. And, therefore, whatever quality there was
20 associated with the CHROMIUM open source software, it
21 would vary from one developer's build to another
22 developer's build, correct?

23 A. That could be.

24 Q. And all that was done without the control of
25 Google, correct?

1 A. That's correct.

2 Q. And so there was a frequently asked question by
3 the builders, and on page 3 this question was asked,
4 should I call my build -- do you have page 3 there?

5 A. Yes.

6 Q. A frequently asked question was, Should I call my
7 build CHROMIUM OS or Google CHROME OS, do you see that?

8 A. I don't see that question.

9 Q. On page 3 -- top of page 4, excuse me, sir. The
10 builder -- this was a frequently asked question by
11 builders, Should I call my build CHROMIUM OS or Google
12 CHROME OS, correct?

13 A. Right.

14 Q. And the answer from Google was, You should call
15 it CHROMIUM OS, correct?

16 A. That's right.

17 Q. Thank you.

18 If you would please go to page 6 of
19 Exhibit 7, this continues to be the statements of
20 CHROMIUM -- or the statements of Google with respect to
21 the CHROMIUM open source software, correct?

22 A. Uh-huh (affirmative).

23 Q. Let's go on here, the last paragraph, you see
24 this statement, of course -- excuse me. Mr. Lin, did
25 you participate in preparing these frequently asked

1 questions -- the answers to these frequently asked
2 questions?

3 A. I did not write these.

4 Q. But you are willing to state that the statements
5 and representations made by Google in its own
6 publications are true and correct, right?

7 A. That's correct.

8 Q. Okay. So this last statement here on page 6 of
9 the -- Google states, quote, Of course, CHROMIUM OS is
10 an open source and it's Linux. This means that as a
11 developer you can pretty much -- you can do pretty much
12 anything you want, including installing any Linux
13 application.

14 A. Uh-huh (affirmative).

15 Q. That's a true statement, isn't it?

16 A. Yes.

17 Q. I present to you what we've marked as Exhibit 18,
18 do you recognize Exhibit 18?

19 A. Yes.

20 Q. This is also a Google publication, correct?

21 A. Yes.

22 Q. And would you please -- and are the statements --

23 THE COURT: I don't have a copy of 18.

24 MR. ZENGER: Yes, sir.

25 Q. (By Mr. Zenger) Would you please read the

1 highlighted portion of Exhibit 18.

2 A. A number of sites have also posted pre-built
3 binaries of CHROMIUM OS. However, these downloads are
4 not verified by Google, therefore please ensure you
5 trust the site you are downloading these from.

6 Q. In other words, Google is not guaranteeing the
7 quality or operability of those binaries written by
8 others, correct?

9 A. Not for developers.

10 Q. Thank you. How long did CHROMIUM OS -- how long
11 did the CHROMIUM open source initiative continue -- when
12 did it begin?

13 A. We started developing the CHROMIUM project in
14 2006.

15 Q. When was the open source initiative published or
16 made available?

17 A. For CHROMIUM?

18 Q. Yes.

19 A. It was in 2008.

20 Q. How long did it continue?

21 A. It's still continuing, it's ongoing.

22 Q. And from 2008 to the present the ability of an
23 open source developer to obtain the CHROMIUM OS -- or
24 the CHROMIUM open initiative software has stayed
25 basically the same by any -- let me start all over

1 again. The ability of developers to obtain the CHROMIUM
2 open source software has remained the same from 2008 to
3 the present, hasn't it?

4 A. Yes.

5 Q. So there have been no additional requirements to
6 obtain a copy of the CHROMIUM open source, correct?

7 A. Correct.

8 Q. And there hasn't -- and to this date the
9 instructions set forth in Exhibit 7 are still posted on
10 Google's Web site, correct?

11 A. Correct.

12 Q. And there hasn't been any time from 2008 to the
13 present where Google's answers have been different than
14 they are -- than they are as shown in Exhibit 7,
15 correct?

16 A. Correct.

17 MR. ZENGER: Thank you.

18 Your Honor, we move the admission of
19 Exhibit 18.

20 THE COURT: Any objection?

21 MR. WILLSEY: No objection to Exhibit 18.

22 THE COURT: Exhibit 18 is received.

23 (Whereupon, Plaintiff's Exhibit 18 was
24 received into evidence.)

25 Q. (By Mr. Zenger) Mr. Lin, I present to you

1 Exhibit 19, do you recognize Exhibit 19?

2 A. Yes.

3 Q. What is Exhibit 19?

4 A. It's the Google Blog post announcing CHROME OS.

5 Q. What's the date -- what was -- when was the
6 CHROMIUM OS -- when was the release of the CHROMIUM OS
7 open source project?

8 A. CHROME OS was announced on July 7, 2009.

9 Q. Okay. And can you please read for me the portion
10 that I've highlighted on Exhibit 19.

11 A. Google CHROME OS is an open source, lightweight
12 operating system that will initially be targeted at
13 netbooks. Later this year we will open source its code.

14 Q. Okay. And it's Google's position that when you
15 open source something you make it available to
16 developers for independent development without the
17 control of Google, correct?

18 A. That's correct.

19 Q. And that was -- that's what Google did with
20 respect to this project shown in Exhibit 19, correct?

21 A. Correct.

22 Q. And it was treated the same way as the CHROMIUM
23 OS open source initiative, wasn't it? With respect to
24 access, one could readily gain access to it and make the
25 modifications it wanted, correct?

1 A. CHROMIUM OS is an open source project. CHROME OS
2 was based on that open source project, but distributed
3 differently.

4 Q. Can you read me the quote again please.

5 A. Google CHROME OS is an open source, lightweight
6 operating system.

7 Q. Stop. Is that a true statement, that Google
8 CHROME OS is an open source software?

9 A. It is based on open source.

10 Q. That's not what it says. It doesn't say based on
11 open source. It says it is an open source software,
12 doesn't it?

13 A. That's what it says.

14 Q. It's a true statement, isn't it?

15 A. The fact that it was written does not make it
16 true.

17 Q. Are you telling me that Google's publication here
18 is misleading and false?

19 A. This particular statement is not exactly correct.

20 Q. Did you participate in the preparation of this
21 press release?

22 A. I believe I saw it at one time.

23 Q. You reviewed it, in fact, didn't you, before it
24 was published.

25 A. I may have reviewed different copies of it.

1 Q. And it passed your inspection, didn't it?

2 A. It did.

3 MR. ZENGER: Thank you.

4 Your Honor, I move the admission of
5 Exhibit 19.

6 THE COURT: Any objection?

7 MR. WILLSEY: No objection, Your Honor.

8 THE COURT: Exhibit 19 is received.

9 (Whereupon, Plaintiff's Exhibit 19 was
10 received into evidence.)

11 Q. (By Mr. Zenger) Mr. Lin, I've presented to you
12 what's been marked as Exhibit 20, do you recognize
13 Exhibit 20?

14 A. I do.

15 Q. What is it?

16 A. This is a blog post describing releasing of the
17 CHROMIUM open source project.

18 Q. What's the date on that?

19 A. November 19, 2009.

20 MR. ZENGER: Your Honor, I move the
21 admission of Exhibit 20.

22 THE COURT: Any objection to Exhibit 20?

23 MR. WILLSEY: No objection.

24 THE COURT: Exhibit 20 is received.

25 (Whereupon, Plaintiff's Exhibit 20 was

1 received into evidence.)

2 Q. (By Mr. Zenger) Did you assist in the preparation
3 of Exhibit 20, Mr. Lin?

4 A. I believe I probably saw it.

5 Q. Does that mean that part of your job as the
6 project manager was to review these press releases
7 before they went out, wasn't it?

8 A. I don't read every -- I don't read in detail
9 everything that comes across.

10 Q. But this one you did.

11 MR. WILLSEY: Objection, mischaracterizes
12 his previous testimony and lacks foundation.

13 THE COURT: Overruled.

14 THE WITNESS: I likely saw this, yes.

15 Q. (By Mr. Zenger) And when you review documents
16 before they go out you review them for accuracy and
17 correctness, don't you?

18 A. Yes.

19 Q. It's your belief that the statements made in
20 Exhibit 20 are accurate and true, correct?

21 A. Yes.

22 Q. Would you please read for me the highlighted
23 portion of Exhibit 20.

24 A. In July we announced that we were working on
25 Google CHROME OS, an open source operating system for

1 people who spend most of their time on the web. Google
2 CHROME OS will be ready for consumers this time next
3 year.

4 Q. Would you read that first statement for me again.

5 A. In July we announced that we were working on
6 Google CHROME OS, an open source operating system for
7 people who spend most of their time on the web.

8 Q. It's a true statement, correct?

9 A. Uh-huh (affirmative).

10 Q. Thank you.

11 You're aware, aren't you, Mr. Lin, that
12 there has been confusion in the market as to what is and
13 is not open source and what -- and whether CHROME OS or
14 CHROMIUM OS are open source, hasn't there been?

15 A. There can be.

16 Q. I didn't ask if there can be. I asked do you
17 know that there has been, correct?

18 A. There has been.

19 Q. And as we sit here today these press releases of
20 both Exhibit 19 and 20 remain on Google's Web site,
21 don't they?

22 A. Yes.

23 Q. I've presented to you Exhibit 21, do you
24 recognize Exhibit 21?

25 A. Yes.

1 Q. That is a Google publication, correct?

2 A. Yes.

3 MR. ZENGER: Would you please turn to page 3
4 of Exhibit 21. Excuse me.

5 Your Honor, I move the admission of
6 Exhibit 21.

7 THE COURT: Any objection to Exhibit 21?

8 MR. WILLSEY: No objection, Your Honor.

9 MR. ZENGER: Would you please turn to page 3
10 of Exhibit 21.

11 THE COURT: Do you want me to receive it?

12 MR. ZENGER: I'm sorry.

13 THE COURT: It is received.

14 MR. ZENGER: I apologize, sir.

15 (Whereupon, Plaintiff's Exhibit 21 was
16 received into evidence.)

17 Q. (By Mr. Zenger) Would you please turn to page 3.

18 A. Okay, there.

19 Q. There's a highlighted portion that talks about
20 CHROME OS product, would you please read that first of
21 all?

22 A. CHROME OS Linux.

23 Q. Yes.

24 A. It just says CHROME OS Linux.

25 Q. Keep reading.

1 A. CHROME OS Linux is a brand new free operating
2 system built around the revolutionary Google Chrome
3 browser.

4 Q. Is that a true statement? That is a true
5 statement, isn't it?

6 A. I've never seen this, so I don't know.

7 Q. I thought you just told me that Exhibit 21 was a
8 Google publication.

9 A. So this came off of the CHROMIUM site. I have
10 not seen the third page.

11 Q. Is there an indication on the bottom where it was
12 printed from, sir?

13 A. No.

14 Q. But --

15 A. There's no URL here as well.

16 Q. But it's true, isn't it, that Google has told its
17 customers and its developers that CHROME OS is a free
18 software, correct?

19 A. CHROME OS is made free? Made available for free
20 to licensees.

21 Q. That's not what that -- but that's not what --
22 okay. Thank you.

23 As project manager at Google you're also aware of
24 efforts by Google to seek trademark protection by
25 federal registration for Google products, correct?

1 A. I'm aware of some of these, yes.

2 Q. And, in fact, part of your job is to either
3 approve or ensure that applications are filed for marks
4 that are important to Google and its new products,
5 correct?

6 A. That's not part of my job, no.

7 Q. Whose job is that?

8 A. We have attorneys for that.

9 Q. So is it your testimony that attorneys decide
10 whether brand names are important to -- important enough
11 to Google to file trademark applications?

12 A. Product managers are involved in identifying
13 brands and product names.

14 Q. And that's you.

15 A. Yes.

16 Q. And so when, for example, the CHROMIUM open
17 source initiative went out, part of your consideration
18 was whether to file a trademark application on it,
19 correct?

20 A. That predated my time at Google.

21 Q. But it's your understanding that the project
22 manager at the time -- or someone in project management
23 would have been in on that decision, correct?

24 A. Correct.

25 Q. Okay. And it's true, isn't it, that on September

1 2nd, 2008, an application was filed with the United
2 States Trademark Office for Google CHROMIUM?

3 A. That may be.

4 Q. Would you please get in front of you, sir,
5 Exhibit 8-A. Do you have Exhibit 8-A there?

6 A. Okay.

7 Q. Now, as project manager and as part of your
8 duties being trademarks, you're familiar with the type
9 of documents that are shown here in Exhibit 8-A, aren't
10 you?

11 A. Yes.

12 Q. In fact, you look them up and refer to them as
13 part of your job responsibility, don't you?

14 A. I don't.

15 Q. But you've seen them and reviewed them and you're
16 familiar with these type of documents.

17 A. I've seen them in the past.

18 Q. Okay. Thank you.

19 You don't have any evidence to contradict
20 any of the information that's set forth in the official
21 record of the United States Trademark Office, do you?

22 A. I don't have any reason to, no.

23 Q. And you can confirm for me that this application,
24 by looking simply at the cover page, that it was filed
25 on September 2nd, 2008, correct?

1 MR. WILLSEY: Objection, Your Honor. The
2 record speaks for itself. This application is what it
3 is. He hasn't --

4 MR. ZENGER: I'll skip, skip, skip.

5 THE COURT: The question is withdrawn.

6 MR. ZENGER: Thank you.

7 Q. (By Mr. Zenger) Were you involved in the
8 identification -- or in the preparation of a statement
9 of use in support of this trademark application?

10 A. I was not involved in this.

11 Q. Were you aware that a statement of use for this
12 application which was -- wasn't filed for two years?

13 A. I was not aware.

14 Q. You don't know. Okay. Thank you.

15 On September 2nd, 2008, Google also filed
16 another trademark application, didn't it?

17 A. I have no idea.

18 Q. Okay. But this much is true, you do know that
19 Google never filed a trademark application for the
20 CHROME mark, correct?

21 A. I don't know.

22 Q. You don't have any evidence that Google ever did
23 file a trademark application for the CHROME mark, do
24 you?

25 A. No, I don't know.

1 Q. Would you please turn to your declaration,

2 Exhibit C. What is Exhibit C?

3 A. Guidelines for Third-Party Use of the Google
4 Brand.

5 Q. True and correct copy?

6 A. Yes.

7 Q. As is Exhibit B is a true and correct copy, the
8 BSD agreement, correct?

9 A. Uh-huh (affirmative).

10 MR. ZENGER: Your Honor, I move the
11 admission of Exhibits B and C of the declaration into
12 evidence.

13 THE COURT: They will be received.

14 (Whereupon, Exhibits B and C to Mr. Lin's
15 Declaration were received into evidence.)

16 Q. (By Mr. Zenger) Did you prepare these guidelines?

17 A. I did not.

18 Q. But it's your understanding it's true and correct
19 statements, correct?

20 A. Yes.

21 Q. And that Google relies for its business on this
22 Exhibit C, which is called Guidelines for Third-Party
23 Uses of Google Brand Features, correct?

24 A. Yes.

25 Q. And to your information, knowledge, and belief,

1 these statements are true and correct, right?

2 A. Uh-huh (affirmative).

3 Q. Down at the bottom on the first page, the
4 following statement is made: A trademark assures
5 consumers of consistent quality with respect to those
6 goods and services and aids in their promotion. It's a
7 true statement, correct?

8 MR. WILLSEY: Objection to the extent --

9 THE COURT: Mr. Zenger, this is not helpful
10 to the court.

11 MR. ZENGER: Okay. I'll skip it.

12 THE COURT: It says what it says, and
13 whatever it says --

14 MR. ZENGER: I'll argue --

15 THE COURT: -- trademark in any event.

16 MR. ZENGER: Okay. Thank you.

17 Q. (By Mr. Zenger) Would you please go with me,
18 Mr. Lin, to page 4, beginning at the bottom of page 3
19 and continuing on page 4, 5, 6, 7, 8, 9, 10, 11 are
20 marks that Google is telling people that they have and
21 how they should be used, correct?

22 A. Yes.

23 Q. Turn with me to page 4.

24 A. Okay.

25 Q. The marks are listed in alphabetical order,

1 correct?

2 A. Correct.

3 Q. And there is a listing on page 4 for CHROMIUM
4 operating system, correct?

5 A. Yes.

6 Q. Why is CHROME not listed in this alphabetical
7 listing?

8 A. I'm not sure why.

9 Q. Thank you.

10 A. This is not proposed to be a complete list. It
11 just says these are -- some of these are marks known by
12 Google.

13 Q. Okay.

14 MR. STOLEBARGER: Your Honor, just for the
15 record, Google CHROME is on the next page starting --

16 MR. ZENGER: Your Honor, he can ask his own
17 questions.

18 THE COURT: It would be helpful to get that
19 information before the court so we don't have to go back
20 and forth.

21 Q. (By Mr. Zenger) Go ahead, turn to page -- the
22 next page, do you see a number of marks that start with
23 Google?

24 A. Yes.

25 Q. Down below there are some that say Google CHROME,

1 right?

2 A. Yes.

3 MR. ZENGER: Thank you.

4 I'm going to profusely apologize, I'm a copy
5 short, Your Honor, I'll have to get you one.

6 THE COURT: All right.

7 Q. (By Mr. Zenger) I show you what's been marked as
8 Exhibit 22, do you recognize the documents comprising
9 Exhibit 22, Mr. Lin?

10 A. I think so, these pages before, yeah.

11 Q. Some of these pages are just copies from the
12 Google Web site, correct?

13 A. Yes.

14 Q. It's true, isn't it, Mr. Lin, that when Google
15 uses the word CHROME they use a logo with it that has a
16 spiral shape that's green, yellow, and red, correct?

17 A. Yes.

18 Q. Or Google says -- or the CHROME name is labeled
19 as Google CHROME, correct?

20 A. Correct.

21 Q. Would you please look at each page of Exhibit 22
22 and confirm for me that these are representations or
23 printouts made from Google's own Web site?

24 A. Yes.

25 Q. And they contain true and accurate

1 representations, correct?

2 A. Uh-huh (affirmative).

3 Q. Thank you.

4 Would you please turn to your declaration
5 please, page 2 paragraph 4.

6 A. Okay.

7 Q. It states as follows, just try -- first of all,
8 the statements made in this declaration are true and
9 correct, right?

10 A. Yeah.

11 Q. Paragraph 4 reads, The CHROME and CHROMIUM
12 browser software is derived from the same source code.
13 True statement, correct?

14 A. Correct.

15 Q. Then it goes on to say, with the primary
16 differences between the two products being that CHROME
17 includes certain additional features not found in
18 CHROMIUM, such as automated software updates and
19 built-in license to third-party software, such as Adobe
20 Flash player, correct?

21 A. Correct.

22 Q. So really the only differences between the
23 CHROMIUM OS open source software and anything sold under
24 the CHROME name is there were a couple of -- two
25 software -- there was a software updating feature and

1 third-party software included, correct?

2 A. Incorrect.

3 MR. WILLSEY: Objection, Your Honor, he
4 didn't read the entire sentence of the declaration.

5 MR. ZENGER: Okay. I'll get there.

6 Q. (By Mr. Zenger) With respect to the two features,
7 though, you said there were additional features. The
8 additional features are automated software updates and a
9 third-party licensed software such as Adobe Flash
10 player.

11 A. This was not intended to be an exhaustive list.
12 These are just examples of the many features that are in
13 CHROME that are not in CHROMIUM. Other things include
14 fonts that are licensed, codex that are licensed.

15 Q. Thank you. Anything else?

16 A. Those are the first things that come to mind, but
17 I'm sure there are others as well.

18 Q. You're the project manager for CHROME, right?

19 A. Sure.

20 Q. Tell me what else is in it?

21 THE COURT: Mr. Zenger, you can -- in the
22 interest of time, this is really not helping the court.
23 The fact that there are differences and how many
24 differences there are, unless you think this is critical
25 to your final argument, it really doesn't seem to me to

1 be very helpful.

2 MR. ZENGER: It is critical, and I will
3 argue that point, but I think I have enough from him,
4 other than to say -- let me ask this one more question
5 on this subject, if I may.

6 Q. (By Mr. Zenger) List for me the other differences
7 between CHROME and CHROMIUM OS -- or CHROMIUM open
8 source.

9 A. There's branding differences.

10 Q. Anything else?

11 A. There are differences in video encoding, there
12 are proprietary extensions for video conferencing, for
13 chat, similar features.

14 Q. Okay. Thank you.

15 When did the CHROMEBOOK project begin?

16 A. So we started the initial thinking about CHROME
17 OS back in late --

18 Q. That's not responsive. I want to try keep us on
19 track here. Google has announced the CHROMEBOOK
20 hardware product, correct?

21 A. That's correct.

22 Q. When did that project product development begin?

23 A. That began in early 2009.

24 Q. And what happened was Google started developing
25 hardware -- or wanted to develop hardware in 2009,

1 correct?

2 A. We started developing an operating system that
3 would be optimized for notebook computers.

4 Q. But Google also has taken the position that they
5 have also attempted to build hardware that will
6 optimize the running of that.

7 A. Google did not announce that Google is building
8 hardware. In fact, we specifically said we were working
9 with PC manufacturers to bring their products to market.

10 Q. Let me restate my question, I'm sorry. What I
11 meant to say was Google has announced that it is working
12 with hardware manufacturers on hardware products that
13 are going to be able to run this CHROME, or whatever
14 software is going to run on it, correct?

15 A. Correct.

16 Q. XX

17 A. XX

18 XXXX

19 Q. XX?

20 A. XXXXXXXXXXXX.

21 Q. XX

22 XX

23 XXXXXXXXXXXXXXXXXXXX?

24 A. XX. XXXXXXXXXXXX

25 XX.

1 Q. What product name did you use internally?

2 A. We had a number of code names which are
3 confidential.

4 MR. WILLSEY: I'm going to object, Your
5 Honor. He's delving into very confidential, proprietary
6 information, negotiations --

7 THE COURT: I'll allow you to ask him
8 whether or not CHROME or CHROMIUM is any of the code
9 names. Beyond that, I'm not going to allow you to ask
10 the question.

11 MR. ZENGER: Okay.

12 Q. (By Mr. Zenger) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
13 XX
14 XXXXXXXXXXXXXXXXXXXXX?

15 A. XX
16 XX
17 XXXXXXXXXXXXXXXXXXXXX.

18 Q. XXXX?

19 A. XX.

20 Q. XX
21 XXXXXXXXXXXXXXXXXXXXX?

22 A. XXXXXXXXXXXXXXXXXXXXX.

23 Q. In fact, there was a time when Google considered
24 using the name SpeedBook, right?

25 A. That is incorrect.

1 Q. That is incorrect.

2 A. SpeedBook has never been associated with this
3 project.

4 Q. What project was SpeedBook associated with?

5 A. From my understanding, SpeedBook was associated
6 with the Android team, which has been working on phones
7 and tablets.

8 Q. XXX
9 XXX
10 XXX
11 XXX
12 XXXXXXXXX?

13 A. XXX
14 XXXX.

15 Q. Why didn't Google file an intent to use
16 application for CHROMEBOOK?

17 A. I have no idea. I leave that to the trademark
18 attorneys.

19 Q. The trademark attorneys decide whether to file
20 trademarks on Google's brand names?

21 A. There's a discussion that happens and, you know,
22 decisions are made about timing. I was not part of
23 that.

24 Q. No input was sought from you, the project
25 manager, as to CHROME, the name for this product?

1 A. I was indifferent at the time. CHROMEBOOK was
2 one of the names that we looked at. We looked at many
3 others as well.

4 Q. And at that time when CHROME -- when Google began
5 deciding to use the name CHROMEBOOK, Google knew about
6 Isys had filed a trademark application for CHROMIUMPC
7 for hardware, didn't it?

8 A. I personally did not.

9 Q. I'm not asking whether you personally did not,
10 but Google did know, didn't it?

11 A. I can't say, I can't speak for all of Google.

12 Q. But in discussions in which you participated, the
13 CHROMIUMPC mark was mentioned, wasn't it?

14 A. The first time I became aware of CHROMIUMPC was
15 when I saw the press release that Isys issued.

16 Q. When you are involved in discussions with respect
17 to brand names, it's common for Google to conduct a
18 trademark search, right?

19 A. Sure, I imagine so.

20 Q. And a trademark search was conducted with respect
21 to the CHROMEBOOK mark, right?

22 A. I believe so.

23 Q. And that trademark search included results
24 indicating Isys' CHROMIUMPC registration -- or
25 application in June of 2010?

1 A. I can't say yes or no. I didn't see the report.

2 I never saw the trademark search results.

3 Q. Thank you.

4 It is your testimony that Google did not

5 adopt the CHROMEBOOK name until XXXXXXXXXXXXXXXXXXXX

6 correct, or thereabouts?

7 A. That's correct.

8 Q. Thank you.

9 In paragraph 13 of your declaration through

10 paragraph 17 of your declaration, you talk about

11 investments of time and money and resources of Google

12 that have been attributed to a new computer hardware

13 product, correct?

14 A. That's correct.

15 Q. How much of these resources were expended in

16 2009?

17 A. In 2009? My guess is it's probably about a third

18 of the total.

19 Q. Okay. And how much of these resources were

20 expended in 2010, between January and September of 2010,

21 probably about another third?

22 A. Maybe, probably half.

23 Q. Okay. So now we have one half plus one-third of

24 the resources spent before September of 2008, right, on

25 this new product?

1 A. Right.

2 Q. So that's -- sorry, Your Honor, I'm trying to do
3 the math here in my head. It's five-sixths of the money
4 was spent before September 2008, right?

5 A. No. Wait. I thought you were talking about
6 from -- you're talking about CHROME OS.

7 Q. This new computer hardware product that you talk
8 about in paragraph 13 through 17.

9 A. Yes. So in 2009 I would say we spent in all of
10 2009 approximately a third. In 2010 I would say --

11 Q. I want to say January through August of 2010, how
12 much?

13 A. January to August of 2010?

14 Q. Uh-huh (affirmative).

15 A. 35, 40 percent.

16 Q. Okay. Thank you. So we've got 60 or 70 percent
17 of this new computer hardware product development money
18 being spent before Google ever adopts the CHROMEBOOK
19 mark, correct?

20 A. Yes.

21 Q. Because, in fact, Google could have picked a
22 hundred different names, correct, because you were
23 indifferent?

24 A. Uh-huh (affirmative).

25 Q. Thank you. How many CHROMEBOOKS have been

1 manufactured so far?

2 MR. WILLSEY: Objection, Your Honor. That's
3 confidential information. Clear the courtroom or do
4 this somehow, there's a protect order, fine. I'm sure
5 we wouldn't want that going public. I'm not sure why
6 Mr. Zenger needs --

7 THE COURT: Before I seal the record, tell
8 me what difference it makes as to how many have been
9 manufactured in terms of this argument.

10 MR. ZENGER: Well, let me -- Google is
11 arguing to this court that it is being harmed -- that it
12 will be harmed if you grant an injunction, and I need to
13 know the level of that harm because I think there's some
14 points that you need to understand about what they've
15 done so far.

16 THE COURT: Any response from Google?

17 MR. WILLSEY: I still don't understand why
18 he needs specific numbers as to how many products have
19 been manufactured.

20 THE WITNESS: I can talk about that without
21 talking about specific numbers that have been
22 manufactured.

23 MR. ZENGER: I want to know how many.

24 MR. WILLSEY: He wants to know specifically
25 how many, that's confidential. But I don't see how it's

1 relevant. He hasn't explained there's some point to --

2 THE COURT: I'm going to sustain the
3 objection as to a specific number. If you want to agree
4 with counsel on what that number is and submit it to the
5 court under seal, I will consider it in that fashion.

6 Q. (By Mr. Zenger) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
7 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX?

8 A. XX
9 XX
10 XX
11 XX
12 XX
13 XX
14 XX
15 XX
16 XX
17 XX
18 XX
19 XX
20 XX
21 XX
22 XX
23 XX
24 XX
25 XX

1 XXX
2 XXX
3 XXX
4 XXX
5 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

6 Q. As a project manager, you know that those are the
7 typical kinds of product cycles for new products that
8 you're building from scratch, right?

9 A. That's correct.

10 Q. I'm going to ask you the question again. When
11 did manufacturing begin by Samsung?

12 THE COURT: Maybe you need to clarify your
13 question as to what you mean by manufacturing. When did
14 the first product come off the manufacturing line?

15 MR. ZENGER: Your right. I'll ask two
16 questions because you're right.

17 Q. (By Mr. Zenger) XXX
18 XXXXXXXXXXXXXXXXXXXXXXX?

19 A. XXX
20 XXX
21 XXX
22 XXX
23 XXX
24 XXX
25 XXX

1 XXX
2 XXX
3 XXX.

4 Q. XXX.

5 A. XXX.

6 Q. XXX.

7 A. XXX

8 XXX

9 XXX.

10 Q. At what point in that preparation or tooling or
11 preparation for actual manufacturing, when did Google
12 tell Samsung the name to put -- when did Google tell
13 Samsung to place or emboss or stick the CHROMEBOOK name
14 on -- into its machinery and tooling, when was that
15 instruction given by Google to Samsung?

16 A. So we did not instruct Samsung to use CHROMEBOOK
17 in the name of its products. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
18 XXX XXXXX
19 XXXXXXXXXXXXXXXXXXXXXXX. So Samsung and Acer should have
20 designed all their packaging product with a product name
21 that could have used CHROMEBOOK but may not have.

22 Q. So it's your testimony that Samsung was not
23 required to place the CHROMEBOOK name on these devices?

24 A. That's correct.

25 Q. Is there a license between Isys and --or, excuse

1 me, is there a license between Google and Samsung
2 regarding the use of the CHROMEBOOK name?
3 A. There is a license. It's a mark that we allow
4 both Acer and Samsung to use.
5 Q. By license?
6 A. That's right.
7 Q. XXX
8 XXX
9 XXXXXXXXXXXX?
10 XXX
11 XXX
12 XXX.
13 XXX
14 XXX.
15 XXX.
16 Q. XXX
17 CCC
18 XXX?
19 A. XXXXXXXXXXXX.
20 Q. And the hardware that was built by Samsung it was
21 built by Samsung engineers, correct?
22 A. That's correct.
23 Q. And those Samsung engineers were not under the
24 control of Google, were they?
25 A. They are not under the control, but the hardware

1 requirements, the specifications were all controlled by
2 Google.

3 Q. So Google gave hardware specifications for their
4 product --

5 MR. WILLSEY: Objection. Your Honor,
6 objection. May I ask that the court require a showing
7 as to why this is relevant. He's asking a lot of
8 questions about detailed, sensitive information in
9 relation between the defendants, Google, Acer, and
10 Samsung, and I fail to see how any of this worthwhile or
11 directly relevant to the TRO that they're asking for.

12 THE COURT: I'm having trouble too,
13 Mr. Zenger, understanding why this makes any difference
14 to the ultimate outcome.

15 MR. ZENGER: Okay.

16 Q. (By Mr. Zenger) How many CHROMEBOOKS are slated
17 to be manufactured in the next two months, Mr. Lin?

18 A. Sir, I don't have that exact information for you.

19 Q. Hundreds of thousands, correct?

20 A. I don't have that information for you.

21 Q. Are you involved in this CHROMEBOOK project?

22 A. I am.

23 Q. Are you the project manager?

24 A. I'm deeply involved.

25 THE COURT: Mr. Zenger, there's no purpose

1 to you, other than badgering the witness.

2 MR. ZENGER: I'm sorry, I don't mean to
3 badger the witness.

4 THE COURT: We've been over this ground a
5 whole bunch of times, it's getting late in the
6 afternoon, you need to get at the information that's
7 relevant. If you're attempting to attack his
8 credibility because he doesn't know that, I've got that
9 point.

10 MR. ZENGER: Okay. Sorry. Sorry.

11 Q. (By Mr. Zenger) Mr. Lin, it's true, isn't it,
12 that one of the ways that Google assessed its potential
13 product, market, or customers -- let me back up. Google
14 allocated a thousand CHROMEBOOKS for free to people,
15 right, as an initial kind of assessment of how it could
16 be accepted by people in the market, right?

17 A. Are you talking about the CR48 pilot program?

18 Q. I guess. Is that what you're referring to on
19 page 6 when you say, for example, 1,000 allocated
20 CHROMEBOOK computers sold out in approximately four
21 hours?

22 A. No.

23 Q. What's that?

24 A. The CR48 pilot program was a prototype notebook
25 computer that we manufactured. We did not sell it. We

1 manufactured 60,000 computers and gave it away to
2 schools, universities, government agencies, large
3 enterprises, and consumers to get initial feedback about
4 CHROME OS and whether the value proposition that we
5 expected was what they would actually find.

6 Q. When was that?

7 A. That was beginning in December of last year and
8 continued through May of this year.

9 Q. And the name used on that device was CR48?

10 A. CR48.

11 Q. CHROMEBOOK was not used?

12 A. CR is the element for CHROMIUM, 48 is the most
13 unstable of the stable isotopes.

14 Q. So when you stated in paragraph 16 that 1,000
15 allocated CHROMEBOOK computers were sold out in
16 approximately four hours, what are you referring to
17 there?

18 A. So when the -- in the days after we announced the
19 upcoming availability of CHROMEBOOKS we wanted to reward
20 the million applicants who applied to be pilot testers
21 for the CR48, so we made a thousand of these first
22 CHROMEBOOKS available on an early basis so that these
23 guys could be the first kids on the block to have them.

24 Q. So they were offered to the same pool of people
25 that participated in the CR48 data project?

1 A. And any of their friends that were interested.

2 Q. Thank you. Was that some type of private e-mail
3 that was sent out or how did that --

4 A. It wasn't particularly for private. We sent it
5 to a public forum, which all of the pilot program
6 participants were -- had access to.

7 MR. ZENGER: Okay. Thank you.

8 THE COURT: Before we leave that issue, was
9 there a price charged?

10 THE WITNESS: For these thousand they paid
11 full price, so it was just an early sale.

12 THE COURT: Did these 1,000 units have the
13 logo of CHROMEBOOK on them?

14 THE WITNESS: Yes, they did.

15 Q. (By Mr. Zenger) Who were they manufactured by?

16 A. Samsung.

17 Q. What day were they sold on?

18 A. I believe it was Monday or Tuesday a week ago,
19 two weeks ago. I would have to take a look at the exact
20 date. It was June -- June 1st maybe.

21 Q. All right. Are you familiar with a person at
22 Google named Emily Burns?

23 A. I am.

24 Q. Have you talked to Emily Burns regarding this
25 matter?

1 A. Yes.

2 Q. What's been the nature of your discussion with
3 Emily Burns?

4 MR. WILLSEY: Objection to the extent this
5 calls for Ms. Burns -- objection to the extent this
6 calls for material that's protected by the
7 attorney-client privilege. Ms. Burns is an in-house
8 attorney at Google.

9 THE COURT: I will sustain the
10 attorney-client privilege. But I think this question
11 simply asks is she an attorney.

12 MR. WILLSEY: Right. I just wanted to get
13 this out in the air.

14 THE COURT: I understand.

15 Q. (By Mr. Zenger) And did you -- why did you talk
16 to Ms. Burns?

17 A. She gave me an update on interactions with Isys.

18 Q. Did she tell you things that I had told her?

19 A. I'm not sure. What did you tell her?

20 Q. Did she tell you that I told her in -- early on
21 that Isys had a problem with Google introducing a
22 product bearing a CHROME mark in the hardware sector?

23 MR. WILLSEY: Objection. We're now getting
24 to a level of specificity where he will be revealing
25 privileged information.

1 THE COURT: If the question simply asks
2 whether or not information from Mr. Zenger was passed
3 through the attorney to you, there is no privilege.

4 MR. ZENGER: Thank you.

5 THE COURT: And you can answer that
6 question. You're not however to go beyond that in your
7 response.

8 MR. WILLSEY: Thank you, Your Honor.

9 THE WITNESS: She did tell me that she had
10 spoken with you.

11 Q. (By Mr. Zenger) Did she tell you that I told her
12 that Isys had a problem with Google presenting a
13 hardware product bearing a CHROME mark?

14 MR. WILLSEY: Objection. Now he's asking
15 him for specifics as to whether Ms. Burns, in-house
16 attorney, told Mr. Lin certain specific things. He's
17 asking for a revelation of attorney-client privilege.

18 THE COURT: There's no privilege if all he's
19 doing is communicating what Mr. Zenger said.

20 MR. ZENGER: Exactly right.

21 THE COURT: It's limited to that response.
22 There is no privilege, and he may respond.

23 THE WITNESS: What was it that you said?

24 THE COURT: Yes, that's the question, what
25 did she tell you that Mr. Zenger said.

1 THE WITNESS: What she told me was that Isys
2 had an issue with Google continuing to use the CHROMIUM
3 mark.

4 Q. (By Mr. Zenger) And this was weeks or months
5 before the May 11th announcement of the CHROMEBOOK
6 product, correct?

7 A. This was long after.

8 Q. You're telling me your only discussions with
9 Ms. Burns was after?

10 A. That's correct.

11 Q. Did Ms. Burns tell you that those statements that
12 I made to her were made before the CHROME announcement,
13 CHROMEBOOK announcement on May 11th?

14 A. No.

15 Q. Thank you.

16 So for the development of this new hardware
17 product, how much money did Google spend?

18 A. For the development of CHROME OS?

19 Q. No. The new hardware product you talk about in
20 paragraphs 13 through 17 of your declaration. You say
21 it began developing a new hardware product in 2009. How
22 much did Google spend on that new computer hardware
23 product?

24 MR. WILLSEY: I object on grounds of
25 confidentiality. If Mr. Zenger would like Mr. Lin to

1 verify the general range of dollars that's intentionally
2 included in his declaration, I have no objection to
3 that, but if he's going for a specific figure, it's
4 highly confidential.

5 MR. ZENGER: That would be great. Give me a
6 range.

7 THE COURT: I'll sustain the objection. If
8 you want to rephrase the question, I'll allow him to
9 answer.

10 Q. XXX
11 XXX
12 XXXXXXXXXXXXX?

13 A. XXX.

14 Q. XXX
15 XXXXXXXXXXXXXXXXXXXXX?

16 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

17 XXX
18 XXXXXXXXXXXXXXXXXXXXXXX.

19 MR. WILLSEY: Your Honor, it's --

20 THE COURT: He's given you enough. I'm
21 going to sustain the objection.

22 MR. ZENGER: Thank you.

23 May I have just one second. Thank you, Your
24 Honor.

25 THE COURT: Any what effectively is direct

1 examination from Google?

2 MR. WILLSEY: Your Honor, can you give me
3 one minute to confer with co-counsel?

4 THE COURT: You may.

5 MR. WILLSEY: We have no questions for
6 Mr. Lin.

7 THE COURT: Thank you. You may step down
8 Mr. Lin.

9 Any additional witnesses to be called,
10 Mr. Zenger? Any additional witnesses?

11 MR. ZENGER: No.

12 THE COURT: Any witnesses to be called by
13 the defendants?

14 MR. WILLSEY: No, Your Honor. We brought
15 Mr. Lin here and we thought we may call him. He's
16 provided all the information we would want.

17 THE COURT: Let me ask counsel as to what
18 your preference is, do you want to argue this tonight or
19 do you want to come back at 8:30 in the morning?

20 MR. ZENGER: Your Honor, because this launch
21 is supposed to happen tomorrow, we would like to argue
22 it, we would like to argue it right now.

23 MR. WILLSEY: We would also.

24 THE COURT: Let's take a ten-minute break,
25 and let me ask you to think about one thing in your

1 argument that's not been directly addressed. One of my
2 concerns, and you may correct me and instruct me in ways
3 that I don't understand the trademark law, is whether or
4 not the use of the word CHROME and CHROMIUM has
5 sufficient strength by Google that there is a risk of
6 confusion by the association of those terms with the
7 plaintiff's mark. Even though it may not be used in
8 exactly the same area where there is closeness in the
9 area in which it's used, the strength of the mark, and
10 the association of that mark that there's likelihood of
11 confusion between the source of the mark or some
12 affiliation with Google. You may think about that
13 because that's an issue I want you to address in
14 argument.

15 MR. ZENGER: Your Honor, do have an
16 indication of whether you would like argument limited to
17 a certain number of minutes just so I can be looking at
18 my notes.

19 THE COURT: How long do you think you'll
20 need?

21 MR. ZENGER: I think I'm not going to need
22 more than 20 or 25 minutes.

23 MR. WILLSEY: I won't need more than that.

24 THE COURT: We'll be in great shape then.

25 MR. ZENGER: Thank you.

1 THE COURT: We'll be in recess for about ten
2 minutes.

3 (Recess.)

4 THE COURT: Please be seated. We're back in
5 session in *Isys v. Google* and others.

6 Mr. Zenger, you may proceed.

7 MR. ZENGER: Thank you, Your Honor.

8 THE COURT: Before you start into your
9 argument, I would like you to tell me the specific words
10 that you believe I would use to grant your temporary
11 restraining order, tell me the exact language that you
12 think the order should state in terms of to restrain the
13 conduct that you're seeking to stop, and then proceed to
14 tell me why you think that I should issue that order.

15 MR. ZENGER: Okay. Just one second. I was
16 going to get a copy of what we already submitted.

17 Your Honor, we submitted a proposed order,
18 do you have a copy of that proposed order?

19 THE COURT: I don't have it in front of me,
20 no.

21 MR. ZENGER: Oh.

22 MR. STOLEBARGER: We've got one, Your Honor.

23 MR. ZENGER: Thank you. Your Honor, on
24 June 6th we submitted the proposed order to the court
25 and we would have it read -- do you want me to give you

1 the verbiage of the whole thing?

2 THE COURT: Yes, exactly what it is you're
3 asking me to say in the temporary restraining order
4 against the defendants.

5 MR. ZENGER: Okay. I might modify this a
6 little bit, but that's basically what you're asking me
7 to do. Upon the court's consideration of the memorandum
8 and evidence submitted in support thereof --

9 THE COURT: I don't need all that. What I
10 need is the specific prohibitory language, you shall not
11 do the following.

12 MR. ZENGER: It is hereby ordered that
13 Google, its officers, agents --

14 THE COURT: Skip all that too. Get to the
15 language that says stop doing this.

16 MR. ZENGER: Okay. From directly or
17 indirectly using, offering for sale, ordering,
18 advertising, or promoting in the United States or in
19 commerce under the CHROMEBOOK mark, the CHROMEBOX mark,
20 or any designation confusingly similar to Isys'
21 CHROMIUMPC mark.

22 THE COURT: That's it.

23 MR. ZENGER: Products bearing those marks.
24 That's one.

25 The second one is from otherwise continuing

1 to oppose Isys' trademark application serial number
2 85067977 by asserting rights in CHROMIUM trademark.
3 That's with respect to Google.

4 With respect to Samsung, to immediately
5 cease and desist from any sales, distribution,
6 advertising, marketing, promoting, or publishing of --
7 or publishing of products bearing the mark CHROMEBOOK or
8 CHROMEBOX or any colorable imitation thereof.

9 THE COURT: So Acer is the same language.

10 MR. ZENGER: Acer is the same.

11 With respect to Amazon and Best Buy, to
12 immediately cease and desist from any sales,
13 distribution, advertising, marketing, promoting, and
14 publishing the marks CHROMEBOOK, CHROMEBOX, or any
15 colorable imitation thereof in connection with computer
16 hardware.

17 THE COURT: All right. Now, go through each
18 of the four elements that you think -- or that must be
19 met in order for a temporary restraining order, and you
20 can approach them in any order that you think is best
21 for you.

22 MR. ZENGER: Thank you. Your Honor, I would
23 like to start with the harm. There is -- Mr. Lin
24 testified that in order for a new product to be
25 developed from scratch it takes a long product cycle and

1 lots of time and effort, and if that is interfered with,
2 then that is a significant and substantial and, in his
3 own words, an irreparable harm. He stated that several
4 times in his declaration.

5 Well, you've heard Mr. Sullivan testify that
6 that's exactly what he did with his product and a
7 product to bear the name of CHROMIUMPC. It was a
8 product started from scratch which he began many years
9 ago, even in the early 2000s. He has spent nearly ten
10 years and millions of dollars in developing and
11 preparing for this launch. He testified that he has a
12 wholesale market and a retail market, and that retail
13 market is with the CHROMIUMPC brand.

14 Google states that it will suffer harm in
15 the amount of XXX
16 XXX
17 XXX.

18 THE COURT: You're confusing the issues.
19 The issue is not -- on this element not what Google will
20 suffer. The question is what irreparable harm, what
21 evidence is there that your client will suffer
22 irreparable harm.

23 MR. ZENGER: Well, I think I was kind of
24 morphing over into the balance if harms there, but I'll
25 go to the harm to Isys. The harm to Isys is the

1 following, that it will lose -- the introduction of the
2 CHROMEBOOK product into the market will cause Isys to
3 lose the ability to have a CHROMIUMPC or CHROMIUMPC like
4 brand identified exclusively with Isys. That is the
5 reason for the trademark laws, and that is substantiated
6 by the basis that Isys began promoting, marketing, and
7 selling a hardware product bearing the CHROMIUMPC mark
8 in 2009 and has done so ever since. We acknowledge that
9 the use has not been enormous and we acknowledge that
10 the use has not been as big as Google's. But
11 nevertheless it began by CHROME -- by Isys spending
12 money from that time forward. And so my point is we
13 have a right by our uses to the mark CHROMIUMPC. And
14 the ability of CHROMIUM -- of Google with its Web site
15 it can immediately supersaturate the market with a
16 confusingly similar mark and do so in a way that
17 obliterates the presence and name recognition of
18 CHROMIUMPC with Isys. That was reflected in --

19 THE COURT: Why doesn't a money judgment
20 satisfy that harm?

21 MR. ZENGER: Because from henceforward when
22 Google -- when Isys enters the market, their reputation
23 and goodwill of Isys is eroded by people thinking that
24 they are copying Google instead of Google copying Isys,
25 and the reflection on that is in Exhibit 16 where people

1 are already assigning the CHROMIUMPC mark to Google.
2 And what is the goodwill that is wrapped up in the
3 CHROMIUMPC mark? It is this product here that is the
4 subject of many patents, which now will -- the
5 CHROMIUMPC mark will not be used in connection with this
6 good or product, but something that's inferior or
7 different or with which Isys wants no connection. Isys
8 doesn't want connection with Google's -- this device
9 that's used to just get on the Internet. This is the
10 CHROMIUM -- the product associated with CHROMIUMPC. And
11 the ability of -- or the consumer recognition, and we
12 now have actual confusion, not just likelihood of
13 confusion, but actual confusion that this brand name is
14 now associated with another product, not this product.
15 That is an irreparable harm to our goodwill and
16 reputation in our product and in our reputation as an
17 innovator, an inventor, and someone who can bring to
18 this market a modular product that can be changed so
19 easily so that every time there's a new change in a new
20 chip, you don't have to run out and buy another laptop
21 or computer. You take four screws out of the sides,
22 slide it out, put a new board in, slap it back in. That
23 is the goodwill associated with the CHROMIUMPC mark.
24 And if Google is permitted to obliterate -- or I don't
25 want to say obliterate -- or fill the market with

1 CHROMEBOOK, that goodwill and reputation is eroded, and
2 that is an irreparable harm that cannot be compensated
3 by money.

4 Second, the other thing that is a major
5 problem for us where we have an irreparable harm, we
6 keep hearing Google argue over and over and over again
7 Isys has no rights in this CHROMIUM mark and they cannot
8 rely on its pending application for any rights. But
9 what do they do, they've intentionally interfered with
10 our ability to perfect that registration. One of the
11 reasons that's important, Your Honor, is you heard the
12 testimony here today that Google did not adopt the
13 CHROMEBOOK mark until September of 2010. This is
14 critical because the day -- we believe right now we have
15 sufficient use to satisfy the trademark office for a
16 statement of use. All we have to do is now file an
17 alleged use and a statement of use and, bingo, we would
18 register but for what Google is now doing. This is why
19 that's important.

20 THE COURT: Don't they have every legal
21 right to make any arguments to the patent office that
22 they believe is appropriate as to why the trademark
23 should not issue in Isys' name?

24 MR. ZENGER: That's what I want to get to
25 just after I make this point. The reason it's important

1 for Isys to be able to proceed with its registration
2 without interference from Google is the following,
3 because this is what happens to the legally deemed
4 constructive use of Isys, as soon as that registration
5 happens, our use goes back to January 10, 2010. Our use
6 then, by the statute, and the whole provision of intent
7 to use application that Isys has relied upon says, I can
8 march along, I can ramp up. This is a small emerging
9 company that doesn't have the resources of Google, so
10 they're ramping up, ramping up, ramping up, and as soon
11 as it registers, that June 10th is their use date by the
12 statute because that's when they filed. And Google
13 didn't even --

14 THE COURT: Don't they have every right to
15 make whatever arguments they believe they can to the
16 Patent and Trademark Office as to why the trademark
17 should not register in Isys' name.

18 MR. ZENGER: Yes. Now, let me answer that
19 question. I just wanted to lay the context. This is
20 the reason why we believe what they have done is not
21 legally proper. You heard Mr. Lin and you've heard the
22 testimony, and I want to read Mr. Lin's own material
23 from Mr. Lin's own declaration regarding abandonment
24 because if they abandoned, which we believe they have,
25 and we believe his testimony was clear --

1 THE COURT: Isn't your argument on that
2 issue in front of the Trademark and Patent Office?

3 MR. ZENGER: No. But here's an important
4 part of that. In --

5 THE COURT: It seems to me like you're
6 asking me to issue an order that they can't file a
7 lawsuit to protect their claims or that they can't write
8 you a cease and desist letter or that they can't make
9 arguments to the Patent and Trademark Office as to why
10 they believe your use doesn't qualify.

11 MR. ZENGER: What we have proven here today
12 is that they have abandoned quality control in goods
13 associated with the CHROMIUM mark, and, therefore, under
14 the stated law they have lost and abandoned any rights
15 they have in the CHROMIUM mark.

16 THE COURT: Isn't that an argument that you
17 have a right to make to the Patent and Trademark Office?

18 MR. ZENGER: I do have that. But --

19 THE COURT: You want my to stop them from
20 even making the argument so they are precluded from
21 having the trademark office consider their version and
22 then consider your response that they should be deemed
23 to have abandoned their mark.

24 MR. ZENGER: I believe what has been
25 presented to Your Honor is sufficient facts to establish

1 that in fact they have abandoned that mark. And,
2 therefore, they cannot come to this court and claim that
3 their use in connection with CHROMIUM has given them
4 exclusive rights in the CHROMIUM mark. If they have
5 abandoned it, they cannot claim exclusive rights, and
6 that is one of their primary arguments in their brief in
7 this case is that we are infringing on their CHROMIUM
8 mark, but they have abandoned the CHROMIUM mark. And I
9 asked him the followup question about CHROME, and he
10 answered the question the same, that CHROME -- that the
11 CHROME open source was handled the same way.

12 And so what's been unequivocally established
13 is that Google exercised no control over the content or
14 quality of the products that were developed which bore
15 the CHROMIUM mark and it's twin sister CHROME any open
16 source project. You heard him testify that it is a true
17 statement that the CHROME OS is a free open source
18 software. That is what they have represented to the
19 world, but when they come to this court they argue
20 something different. So they are asserting before Your
21 Honor right now rights in a mark that they had abandoned
22 in 2008 and 2009 because I asked him a very key
23 question, and it's on this timeline, they established no
24 control in September of 2008, and that same policy
25 continues to this day.

1 THE COURT: Let me ask you this question.
2 Wikipedia has a trademark in the name Wikipedia. They
3 allow open access to their site all of the time to
4 change editorial comments on the site. Do you think
5 that causes them to lose their trademark?

6 MR. ZENGER: It may very well.

7 THE COURT: If they don't have some goodwill
8 established in the Wikipedia name, that if you wanted to
9 you could go out and sell Wikipedia straws or Wikipedia
10 learning tapes?

11 MR. ZENGER: Yes, sir, I could, because they
12 haven't used the mark in connection with those products
13 before. So they have established no right in straws and
14 tapes and the like. And that's exactly what Google did
15 not do in this case. Google never introduced the
16 hardware product bearing a CHROME mark, they didn't even
17 adopt a name until after we filed.

18 THE COURT: Assuming the court were to
19 accept that, how do you address the question I presented
20 to you before the break? Isn't there sufficient
21 goodwill associated between Google and the use of the
22 CHROME name that it would likely cause confusion as to
23 the source of your product?

24 MR. ZENGER: No. Let me tell you why. This
25 is what Google says to its software developers, do

1 whatever you want. We're not going to control the
2 content or the quality and we call it CHROMIUM OS. And
3 then you go look at what CHROMIUM means, just the normal
4 dictionary definition, it means CHROME. So how can they
5 have it both ways? They can't. If they lose CHROMIUM,
6 then they can't just simply say, we've revived all the
7 rights in CHROMIUM by using the word CHROME.

8 THE COURT: Haven't they reserved CHROME?

9 MR. ZENGER: No.

10 THE COURT: So the list of trademarks that
11 you took Mr. Lin through in which they listed Google
12 CHROME and a whole bunch of other uses of the word
13 CHROME you believe has no relevance to this issue?

14 MR. ZENGER: I'm saying it doesn't have any
15 relevance. But what were the marks that were protected?
16 The marks were Google in every case. And as we can show
17 in our Exhibit 22, when they use CHROME, they put their
18 little colored spherical logo with it where they put the
19 word Google with it when they're attempting to use it as
20 a brand name. Why? That's the same reason they didn't
21 file a CHROME trademark application, that's the same
22 reason it's not listed on their trademark chart because
23 they've never asserted that CHROME all by itself is a
24 brand name for them.

25 THE COURT: Isn't this argument

1 counter-productive for you because if it's generic for
2 them it's generic for you.

3 MR. ZENGER: Absolutely not, because we're
4 in an entirely different market segment. Never has
5 CHROME ever -- has Google ever attempted to establish a
6 hardware product such as this or any hardware product
7 with a CHROME mark. And you heard the testimony of
8 Mr. Lin, even the very hardware product development
9 that's the subject of this litigation for CHROMEBOOK
10 began in 2009 and went from 2009 through most of 2010
11 without even a name. Then --

12 THE COURT: I think we're getting afield.
13 We're supposed to be talking about irreparable harm. Do
14 you have any more argument to make on irreparable harm?

15 MR. ZENGER: Yes, and that is, we are being
16 irreparably harmed right now by having our trademark
17 application delayed based on a false premise because the
18 opposition shown in Exhibit 9 there is only one basis
19 for that opposition in Exhibit 9. It isn't common law
20 use of CHROMIUM, it isn't common law use of CHROME, it
21 isn't Google's common law uses of Google CHROME or
22 anything. There's only one single solitary basis in
23 that opposition, and it is Google's trademark, pending
24 trademark application for CHROMIUM. And guess what they
25 swore under oath, there is a false statement that they

1 made under oath to the United States Trademark Office,
2 on May -- on March the 3rd -- May the 3rd, 2011, they
3 are continuing to prosecute that CHROMIUM application.
4 And listen to what they swear under oath, they swear
5 under penalty of perjury and incarceration that no other
6 person is entitled to use the mark in commerce. This is
7 what they're saying -- this is the representation they
8 were making to the trademark office last month. Yet --

9 THE COURT: It doesn't sound to me like a
10 representation of fact. It sounds to my like an
11 assertion of rights.

12 MR. ZENGER: No. They are saying no other
13 person has the right to use the mark.

14 THE COURT: Isn't that true?

15 MR. ZENGER: No. From 2008 forward, 2008
16 forward they've let all of their CHROME developers use
17 it uncontrolled and without any control on the quality.
18 That, Your Honor, under the case law cited in our brief,
19 is abandonment, and they lose all rights --

20 THE COURT: I'm going to have you go to that
21 next issue. The next issue is likelihood of success on
22 the merits. Tell me first of all what evidence there is
23 that you own the trademark you're trying to stop from
24 being infringed.

25 MR. WILLSEY: Okay. Beginning in 2009 Isys

1 began -- or chose this mark in a market segment no one
2 wants in, including Google. They began spending money.
3 What was the very first thing they did? They told the
4 whole world we're coming with a hardware product called
5 CHROMIUMPC.

6 THE COURT: That's your Exhibit 2.

7 MR. ZENGER: That is our Exhibit 2. That's
8 the beginning. What did they do? They spent money on
9 the Web site, they spent money updating it, they spent
10 money putting the infrastructure in place, all those
11 things, ramping up for their retail side of the market.
12 Then what did they do? They had devices like this
13 built, and they took these devices to customers and
14 spent time and money and resources promoting this
15 device.

16 THE COURT: I don't care about the device.
17 What I care about --

18 MR. ZENGER: A product bearing this name.

19 THE COURT: What I care about is the use of
20 the name.

21 MR. ZENGER: Okay.

22 THE COURT: Other than Exhibit 2, which
23 contains some use of the name CHROMIUMPC, and that is --
24 remind me when that went up, 2009?

25 MR. ZENGER: November 2009 they told the

1 world here we come.

2 THE COURT: So they've got that use. And
3 any other use?

4 MR. ZENGER: Yes. They went to customers
5 promoting this product bearing this brand name, taking
6 this product with them, transporting this product.

7 THE COURT: What's the evidence that they
8 had sufficient use of that with customers to create
9 common law rights in the name?

10 MR. ZENGER: Because that's how you use --

11 THE COURT: They have two sales.

12 MR. ZENGER: Rights derived from use.

13 THE COURT: We actually have two pre-sales
14 for which there's no evidence of where they were
15 actually shipped.

16 MR. ZENGER: That's correct.

17 THE COURT: That's the only use we have.

18 MR. ZENGER: No. That's the use with
19 respect to the Web site. But Mr. Sullivan testified
20 that he and others from Isys carried this device bearing
21 the CHROMIUMPC product to customers, they traveled
22 around the United States presenting this product,
23 transporting this product in commerce attempting to
24 elicit sales. Mr. Sullivan --

25 THE COURT: Before the product was ready or

1 available for sale.

2 MR. ZENGER: Well, yes.

3 THE COURT: Okay. I just want to make sure
4 we get the facts straight here.

5 MR. ZENGER: Okay. Okay.

6 THE COURT: Any other uses that you believe
7 that they had that would establish their right to the
8 tradename?

9 MR. ZENGER: Yes. The same similar kind of
10 uses at trade shows, such as the CES. You heard
11 Mr. Sullivan testify that they also had this product
12 there, it was out for people to see, and that this
13 product is in many circumstances as equally developed as
14 these other products that were for sale. And so the
15 important part of that is, as we moved from
16 November 2009, early stages, through 2010, now we're
17 into 2011 we're getting closer to our launch date and
18 our product is more and more ready to go. And so we
19 then go to the CES show and say this is coming and it
20 will be ready to go the later part of this year. And
21 then we further that by in May of this year announcing
22 that we believe it's going to be available again in the
23 latter part of this year. And in connection with that
24 announcement only, nearly 500,000 people responded and
25 recognized the CHROMIUMPC mark being associated with

1 Isys and its subsidiary Xi3. We believe that those
2 uses, when you combine them together, are enough to
3 establish sufficient rights in the mark.

4 Now, that being the case, we've also seen,
5 as I said before, not merely a -- we believe there's a
6 likelihood of confusion because of the similarity of PC
7 and Book and CHROME and CHROMIUM, but we not only have a
8 likelihood of confusion, but we now have actual
9 confusion beginning to occur even as early as last
10 Thursday when people now are attributing that mark to
11 someone else. That's not likelihood of confusion,
12 that's actual confusion. So we believe there is
13 sufficient bases that there is not merely a
14 likelihood -- there is at least a likelihood of
15 confusion between these marks, because look what
16 happened, Your Honor, last week by someone in the
17 market, they put CHROMEBOOK and CHROMIUMPC right
18 together thinking they were the same thing. That is
19 actual confusion. So we believe that we are likely to
20 succeed on that point.

21 In addition, what else do we have? We have
22 the interim decision of the trademark office that the
23 CHROMIUMPC mark is distinct and registrable above all
24 other marks searched by the trademark office. And as
25 shown in Exhibit 3, there is a search result from the

1 people at the trademark office, and part of what they
2 did to search for this was they used the Internet. And
3 on page 18 of Exhibit 3, the examiner even used all of
4 these electronic data bases, including Google. And what
5 did -- what was the determination of those of the
6 trademark office, that in the hardware sector CHROMIUMPC
7 was distinct and subject to registration only pending
8 notice of opposition. Nobody else has opposed. The
9 only people that opposed have been Google, and they've
10 only asserted one thing, abandoned rights, and we
11 believe we will succeed.

12 THE COURT: Do you believe that this court
13 is required to give any weight at all to what they
14 indicated in their tentative approval letter?

15 MR. ZENGER: I believe that absent the court
16 telling the trademark office not to enter -- or not to
17 register a mark, that they have the authority to
18 register marks, and so that --

19 THE COURT: They may have the authority to
20 register the mark, but as to the question of whether
21 you're likely to succeed on the merits, their separate
22 determination on that issue has no legal effect upon
23 this court's ability to make a separate distinction.

24 MR. ZENGER: I think it does, Your Honor,
25 and here's the point, because we believe we're entitled

1 to that registration and because we believe the only
2 opposition is brought in bad faith based on abandoned
3 rights, there should have been no opposition, we should
4 have -- the trademark office would have simply said,
5 give me a statement of use and a specimen, we could have
6 already done that, this mark could have already
7 registered, and the moment it registers, based upon the
8 rules of an intent to use application, what happens?
9 Our use goes back to June 2010 before Google ever even
10 adopted the CHROMEBOOK mark. And they were monitoring
11 this mark of ours. So that further shows that we were
12 the senior users, we put the whole world on notice.
13 They can't come in after the fact with a confusingly
14 similar mark. I think that's material to whether we're
15 going to succeed on the merits.

16 Now, here's another point, why we are likely
17 to succeed on the merits. The entire proposition of an
18 intent to use application is to prevent what's going on
19 right here, so that a small emerging developing company
20 like Isys doesn't get run over by a vehement like Google
21 who has the power to develop quicker, enter the market
22 quicker, and have huge market saturation nearly
23 instantly. What did Google -- what did Isys do? In
24 2009 they announced to the world we're coming to the
25 world with the CHROMIUMPC mark. Did Google ever say one

1 word to us in 2009 about that? No. Did they say
2 anything to us after we filed our application, other
3 than wait for it to be published for opposition? No.
4 They say they chose this mark in September last year.
5 Why didn't they write to us in September last year and
6 say please change your mark. Instead they let us
7 continue to go down our product development road. This
8 causes -- this is what is called copying, it's evidence
9 of copying, and evidence of copying increases our
10 ability and our likelihood to succeed on the merits. So
11 we believe for those reasons we are likely to succeed on
12 the merits.

13 Now, going to harm, the harm that is going
14 to be done to Isys --

15 THE COURT: Are you going to the balancing
16 of the harms?

17 MR. ZENGER: I'm going to go to the harm
18 first.

19 THE COURT: I thought we already went
20 through the harm.

21 MR. ZENGER: We've gone through the harm.
22 Now I'm going to go to the balancing of the harm. XXXX
23 XXX
24 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. But you've got to put that
25 number in perspective, Your Honor. And we submitted to

1 this court Exhibit Number 17, not objected to by Google.
2 What does it say? This is Google's own statement and
3 representation to the world about its fiscal strength.
4 This is what they say: They say in the very first
5 paragraph that they had to set aside \$500 million for a
6 period of time, and that that amount would not have a
7 material adverse effect on our business or cash flow.
8 In other words, the same article says that their
9 quarterly income in the first quarter of this year was
10 \$8.5 billion. That means their daily revenue is
11 approximately \$95 million. That means in less than a
12 quarter of a day their revenue is over \$20 million.
13 Maybe, Your Honor, just during the time of this hearing,
14 in the last six hours, they have had \$60 million in
15 revenue. This little risk they took is pennies to them.
16 This is no substantial horrible harm to them. And what
17 did you hear Mr. Lin say? He said that 60 or 70 percent
18 of their tens of millions of dollars was developed on a
19 product that never even bore a name. So their tens of
20 millions of dollars has to be reduced to 30 percent of
21 whatever their tens of millions of dollars are, which
22 drives that number down even further. The point being,
23 while they come in here and say they're going to be
24 terribly harmed by interference with their product
25 launch, guess what, so is Isys. Isys is a small

1 company. But what this is saying is the big guy can
2 come in here and trounce on the little guy because he
3 has more money and can do it faster. That, sir, is not
4 fair.

5 Isys told the world in 2009 we're coming,
6 and they filed their intent to use application and they
7 relied upon it. And what does Google do? They lay in
8 the weeds --

9 THE COURT: In fact, what Isys said is we're
10 coming with a Google software.

11 MR. ZENGER: Isys said we're coming -- no,
12 Isys said we're coming with a hardware product called
13 CHROMIUMPC.

14 THE COURT: That uses Google software.

15 MR. ZENGER: That may, okay?

16 THE COURT: And then they made a product
17 announcement, and there's no evidence that they ever
18 contacted Google to verify whether they could use the
19 software or made any other arrangements to verify that
20 they could actually meet what they announced to the
21 world they were going to do.

22 MR. ZENGER: And guess why they made that
23 announcement. You heard Mr. Lin testify, and we have
24 the exhibits right before us in which he swore under
25 oath that the following statements were true, CHROME OS

1 is a free open wear -- is a free open source software.
2 That is Google's representation to the world.

3 THE COURT: That doesn't mean that it could
4 be used for commercial purposes without complying with
5 the restrictions that Google has placed on that.

6 MR. ZENGER: Here's the announcement they
7 made, it is a free open source software, that's what
8 they say.

9 THE COURT: Why is there no evidence that
10 somebody from Isys didn't call up Google and verify that
11 they could use that software on their product before
12 they announced it?

13 MR. ZENGER: Your Honor, we were confused by
14 the very statements that Google makes, and the same
15 thing is made in connection with their very product
16 launch. I would like to read to you those words again
17 from Google's own product launch, the very words, if I
18 may, because I think this is critical to Isys'
19 good-faith belief that they could send out a product
20 bearing CHROME OS. I'll get that here, here it is.
21 Here is Google's statement to the world, on July 7,
22 2009, okay, all the way back here, this is what they
23 say, Introducing the CHROMIUM -- the Google CHROME OS,
24 or CHROME OS. Again they didn't say CHROME, they said
25 Google CHROME, here's what they say, Google CHROME OS is

1 an open source, lightweight operating system that will
2 initially be targeted at netbooks. Later this year we
3 will open-source its code. Open source. You heard
4 Mr. Lin testify that the CHROME open source was treated
5 the same as the CHROMIUM open source. And what did they
6 do with that? They lacked control, but their own
7 statement says, it's a CHROME open source. And that's
8 all that Isys -- that is what Isys has consistently said
9 since its inception.

10 Look at Exhibit 2 for the CHROME OS, what
11 does it say? It says, we will produce and provide an
12 open source software. And guess what CHROME OS had said
13 earlier on, it will be an open source code. All that
14 Isys did was reiterate and restate what Google had
15 already said.

16 THE COURT: Help me understand this, because
17 as I understand open source from the testimony, it
18 simply means that once you download it by complying with
19 the restrictions on our site, you can modify it for your
20 own purposes and your own uses any way you want, but you
21 can't sell it to somebody else.

22 MR. ZENGER: You can give it to somebody
23 else. You just have to tell them the changes that
24 you've made so they know, that's the deal.

25 THE COURT: What's the evidence that

1 supports that?

2 MR. ZENGER: It says right in their BSD
3 agreement.

4 THE COURT: Mr. Lin said, maybe I
5 misunderstood him, that they can use it any way they
6 want for their own purposes, but if they are going to
7 sell it to someone else or they're going to give it to
8 somebody else, they've lost the right to do that because
9 that falls within what they restrict.

10 MR. ZENGER: Okay. Then I asked Mr. Lin
11 this question, show me the language in the agreement
12 that shows Google's ability to control the content, and
13 he said, quote, he said, there is none.

14 THE COURT: That's not exactly what he said.

15 MR. ZENGER: He couldn't point to any --

16 THE COURT: He said those restrictions are
17 in a separate reference document.

18 MR. ZENGER: But you don't have to go to
19 that separate reference document to get the mark -- the
20 software and to modify it, he said that. You don't have
21 to go there. All you have to do is say, I've signed up
22 for the BSD, then I can go get the software, then I can
23 do with it whatever I want. And, by the way, when they
24 said what can I name my new build now, they said name it
25 CHROMIUM OS. So the point is, Your Honor, they are

1 asserting a -- they're trying to assert rights and
2 they're trying to claim a harm that doesn't exist
3 because they abandoned control over CHROMIUM and CHROME.
4 And so now they come in here and say, well, our big
5 launch is going to be messed up. Well, guess who else's
6 big launch is going to be messed up? Isys' launch is going
7 to be messed up because when Google gets done the name
8 CHROMEBOOK will be so engrained in hundreds of millions
9 of people nearly instantly that it will obliterate our
10 attempt to have name recognition between CHROMIUMPC and
11 Isys exclusively, and we have that actual confusion
12 already starting last week. So --

13 THE COURT: Why don't you go to the last
14 issue, public interest.

15 MR. ZENGER: Public interest. The public
16 interest here is in recognizing two things: First, the
17 policies behind an intent to use application. Small
18 startup companies are allowed to announce to the world
19 where they are going and they should have the ability to
20 move in that direction without being run over by a Mack
21 tuck.

22 THE COURT: Is it not correct that an intent
23 to use gives them no protection as to the trademark
24 until they've established use and the registration
25 issues?

1 MR. ZENGER: I think that's right. I would
2 say it a little bit different. I would say the intent
3 to use application itself does not infer rights. And so
4 the rights would derive from the use, that's correct.
5 But in this case the importance of the sanctity of that
6 ITU procedure is a small startup company is to announce
7 to the world I'm moving in this direction, everybody
8 stay away.

9 THE COURT: They don't have to stay away.

10 MR. ZENGER: They do have to say away
11 because they should be able to pursue that mark to
12 registration, and the only thing right now between us
13 and registration --

14 THE COURT: Someone else can use the mark
15 and rely upon the fact that they can prove earlier use.

16 MR. ZENGER: That is true, they could do
17 that.

18 THE COURT: So someone else who -- all they
19 intend to do is I'm giving you notice that I'm going to
20 attempt to prove that my use predates everybody else's
21 using it. Until they have done that, they have no
22 rights at all.

23 MR. ZENGER: Well, they have rights in their
24 use, and if they are in a different market segment --

25 THE COURT: They may have common law rights,

1 but they don't have the filing of the intent -- notice
2 of intent to use doesn't confer rights in and of itself.
3 It's simply a warning.

4 MR. ZENGER: It's a warning, that's right.
5 But that's the reason why in this case it's important
6 for us to consider the conduct of Google. We file -- we
7 tell the world in November 2009 we're coming, we file
8 the intent to use application that put everyone on
9 nationwide constructive notice we're coming, and after
10 that they adopt a similar mark. And then they say, oh,
11 now we're going to finish our product development before
12 you because we have more money, we're going to launch
13 before you because we have more money, and then we get
14 obliterated off of the planet because we can't --

15 THE COURT: But if you're ultimately
16 successful at trial, at that point you can bar them from
17 using the mark.

18 MR. ZENGER: Yes. But the evidence has
19 shown to you already that they abandoned the very basis
20 they are using to interfere with us to perfect sooner.
21 That's the problem here. There's only one thing
22 standing between us and our registration and having our
23 constructive use to go back earlier and all those
24 things --

25 THE COURT: Let me tell you on your

1 abandonment argument, you still have not persuaded me
2 that allowing open source is sufficient to constitute
3 abandonment of the mark. Do you have any legal
4 authority that would support that argument?

5 MR. ZENGER: Certainly. We have legal
6 authority in our brief that we cite, and I want to go
7 also to the statements made -- I began reading from
8 Google's own branding page and you stopped me.

9 THE COURT: Don't bother pulling that out
10 because that's not going to influence me in any way.

11 MR. ZENGER: All right, fine. Let me then
12 go to our brief. Beginning at the bottom of page 2 and
13 going over on to page 3, we have cited cases from the
14 Seventh Circuit, the Ninth Circuit, the Fifth Circuit,
15 the CCPA, which is the predecessor to the Federal
16 Circuit, and to the Tenth Circuit that indicate that
17 uncontrolled uses -- uncontrolled content under mark
18 works a deception on the public, it's inherently
19 deceptive, and constitutes abandonment of all rights in
20 the trademark and --

21 THE COURT: Tell me the facts of the case
22 that you are citing.

23 MR. ZENGER: I am reciting the Barcamerica
24 International case.

25 THE COURT: Tell me what the facts were on

1 that case that supported that holding.

2 MR. ZENGER: I don't have the factual
3 setting in my mind. The case citation is 289 F.3d --

4 THE COURT: I see the statement from the
5 case, but I need to know exactly what the facts were
6 that the court found that that was a requirement.

7 MR. ZENGER: I don't -- I don't have an
8 exact copy of it. The cases talk about --

9 THE COURT: How about the Stanfield v.
10 Osborne Industry case from the Tenth Circuit, what were
11 the facts in that case that supported the lack of
12 control over the product?

13 MR. ZENGER: I don't recall the exact fact
14 setting in that case, Your Honor. I believe -- I do
15 have a copy of the case here, but I don't have the exact
16 fact setting in mind.

17 THE COURT: What I'm trying to understand --

18 MR. ZENGER: I understand --

19 THE COURT: I'm not trying to make your life
20 miserable, but I'm trying to determine whether or not
21 these general statements in fact are supported by the
22 holdings of the case because it seems to me that there
23 is some distance between saying that they allow open
24 source and saying that they are not asserting any
25 control over the product or the use of the name to the

1 extent that they should be deemed to have abandoned.

2 MR. ZENGER: Well, let me refer then to the
3 authority that was recited by the -- by Google and use
4 their own standard, if I may.

5 THE COURT: Are you referring to their
6 brief?

7 MR. ZENGER: Yes. I'll use their standard.
8 And it is not as broad a statement that talks about what
9 has to be weighed in the facts in order to establish
10 this right. Here we go, on page 10 of Google's own
11 brief, they say, well, let's talk about how much control
12 does have to be exercised in order to abandon, or in
13 order to not sufficiently control the quality, and they
14 do in fact cite the Stanfield case from the Tenth
15 Circuit, and here was the critical question of Stanfield
16 on page 10 of their brief. The question is whether the
17 plaintiff sufficiently policed and inspected the
18 licensee's operations to guarantee the quality of the
19 products the licensee sold or distributed. Okay, so --

20 THE COURT: Isn't there a difference there
21 between a licensee who is selling the product with the
22 mark on it --

23 MR. ZENGER: Yeah, that's exactly what was
24 going on here.

25 THE COURT: -- and an open source who is

1 allowing them to take the product and use it for their
2 own purposes and changing it, but they are not allowing
3 them to remarket it as the CHROMIUM or CHROME operating
4 system.

5 MR. ZENGER: Absolutely, they are. That's
6 exactly the instructions that Google gave to the
7 builders when they said what do we name our build, and
8 these are the builds that Mr. Lin said Google does not
9 control, and he said, use the CHROMIUM name, call your
10 builds that we don't control and that we refuse to
11 guarantee CHROMIUM. And if you look at Exhibit B to
12 Mr. Lin's declaration, the BSD agreement, what does it
13 say? Not one word about control. In fact it disclaims
14 it, and says we disclaim any warranty, any use, or even
15 any harm that might be caused by this. And what is
16 Google saying? We do not guarantee the quality of these
17 products, that's exactly what Google was saying. And so
18 the Stanfield case, here was the critical fact, did
19 Google -- did the trademark owner, or the person
20 alleging the trademark rights in Stanfield exercise
21 sufficient control, did they sufficiently police and
22 inspect the licensee's operations to guarantee the
23 quality, because that's the hallmark of trademarks.
24 Somebody who likes a Big Mac, whether you do or not,
25 they know that they can get the same thing in Alaska as

1 they do in Tallahassee, Florida, that's quality,
2 whatever taste level you have. But that's exactly what
3 Google said we are not going to do. So Google's conduct
4 shows that they did not sufficiently police and inspect
5 the licensee's operations to ensure the quality of the
6 product. That was the critical question, and that's
7 what we have here, that's the standard. They didn't.
8 They told the world we're not going to. They said other
9 people build the binaries, and we don't know what is in
10 there and we don't now how they're going to operate, and
11 they did that by telling people, use the CHROMIUM name.
12 That, sir, we believe is clear evidence of abandonment.

13 THE COURT: Let me hear from the defendants.

14 MR. ZENGER: Thank you.

15 THE COURT: Why don't you start with
16 irreparable harm.

17 MR. WILLSEY: Thank you, Your Honor. I
18 appreciate you giving me a place to start because, to be
19 honest, I'm happy to answer as many questions and talk
20 as long as you want, but I was a little befuddled as to
21 where to start after the other side's argument because
22 we've hit a lot of issues here.

23 On the harm, the issue of irreparable harm,
24 what plaintiff has failed to show is that there is any
25 consumer recognition or current goodwill or value in

1 CHROMIUMPC as a brand. They've talked a lot about
2 developing a product, and from what I can see it is a
3 very interesting, great looking product, and I'm sure
4 they've spent a lot of time developing it, but there's
5 no evidence that there is any market recognition of
6 CHROMIUMPC. And, in fact, the evidence they've
7 submitted in this case contradicts that proposition. At
8 the times when they have received attention for their
9 product they haven't been using CHROMIUMPC, they have
10 been using the Xi3 Modular Computer. That's the product
11 that got the award at the 2011 CES trade show. That is
12 the -- what's fascinating here is when plaintiff's own
13 trademark counsel took out an ad congratulating them for
14 this significant award, they didn't refer to it as
15 CHROMIUMPC. Why? I can only imagine because CHROMIUMPC
16 doesn't mean anything, it doesn't have any value, there
17 is no evidence in the record that they would be harmed
18 to any extent by not being able to call this product
19 CHROMIUMPC.

20 And it's another complication here I think
21 in the plaintiff's argument, they seem to believe that
22 if they were not granted a TRO here, this is a couple of
23 leaps of logic which is difficult for me to follow, they
24 would somehow not be able to sell their product. We're
25 only talking about the name CHROMIUMPC. That's what --

1 in fact, we're not even talking about that. The TRO, to
2 be specific, what they're asking for is they're asking
3 to hold up a multimillion dollar product launch where
4 they have failed to demonstrate any likelihood of
5 confusion between their alleged mark CHROMIUMPC and
6 CHROMEBOOK.

7 Back to irreparable harm, Your Honor, the
8 record is simply empty of any evidence that this name
9 has any value. So, therefore, they could not be
10 irreparably harmed if Google goes forward with the
11 CHROMEBOOK product launch. They point to -- and let me
12 touch upon one other part. Any supposed loss of future
13 value in CHROMIUMPC, so if their complaint is that in
14 the future we won't be able to reap value from this name
15 that we came up with, that can easily be fixed by
16 monetary damages. If we got to a trial they could put
17 in evidence of the costs of re-branding under a
18 different name, they could put in evidence of any lost
19 sales they suffered as a result of not being able to use
20 CHROMIUMPC. There's no conceivable way that a monetary
21 award at the end of a trial wouldn't fully remedy them
22 for this. They haven't come anywhere close to
23 establishing irreparable harm, and certainly not when
24 they're subject to a heightened bar here where they need
25 to show a clear and unequivocal showing.

1 Next, unless you want to hear more on the
2 issue of irreparable harm.

3 THE COURT: Go to likelihood of success on
4 the merits.

5 MR. WILLSEY: Likelihood of success on the
6 merits. As part of that discussion I'll answer right
7 off the top the question that you posed to us before we
8 took the break, and you had asked whether, I believe
9 whether CHROME and CHROMIUM are strong enough marks such
10 that there might be some confusion with respect to their
11 adoption and use of CHROMIUMPC, and the answer we
12 believe is that quite possibly that is the case, and
13 that is why we oppose their trademark application for
14 CHROMIUMPC based on the rights in CHROMIUM.

15 Plaintiffs seem to take the position that
16 this industry is split into two segments that don't
17 overlap, you've got hardware and you've got software, so
18 you can use a mark in one segment without infringing
19 somebody using an identical mark in the software
20 segment, for example. That's simply not the case. It's
21 an overly simple way to look at this. You have to look
22 at each type of product before determining whether the
23 products are related enough to support a finding of
24 likelihood of confusion.

25 The computer hardware/software space is no

1 different than any other industry in that regard. It
2 is -- here we're talking about a hardware product that
3 needs operating software to work. In this instance we
4 believe that their use of CHROMIUMPC for a device that
5 needs operating software to work is confusingly similar
6 to CHROMIUM which is the operating software that makes
7 that product work. It's also entirely possible that
8 computer software and hardware aren't related in other
9 contexts. For example, you could have a graphic image
10 chip designed by a company, let's say like Invidia,
11 that's computer hardware, it's something that you put
12 into a Play Station game and it makes images on the
13 screen. You could have a software program that's
14 written to track the results of youth league sports
15 games. Now, those two products are not going to be
16 viewed as related. There's probably not a company in
17 the world out there that makes graphic images chips and
18 software that helps someone run a youth sports league.
19 So there is no bright-line rule as to whether hardware
20 and software are related for trademark infringement
21 purposes. But here we're talking about a product that
22 is run by operating software. So the answer to your
23 question is yes, it is possible that the rights in
24 CHROME and CHROMIUM are broad enough to expand over to
25 prevent them from using CHROMIUMPC, which is why the

1 opposition was filed.

2 Now, as for likelihood of success on the
3 merits, they have a significant duty, particularly in
4 the -- I mean it's their burden at trial, but
5 particularly here in the TRO context, they have -- they
6 need to make a clear and unequivocal showing that they
7 own protectable rights in the term CHROMIUMPC, they have
8 to show -- to follow their argument out, they have to
9 prove that Google has abandoned all rights in CHROMIUM
10 as a trademark. They've got to show that CHROMIUMPC
11 doesn't infringe CHROMIUM. They then have to show that
12 somehow Google's anticipated use of CHROMEBOOK or
13 CHROMEBOX, which are clearly derived from it's CHROME
14 mark, would somehow infringe plaintiff's CHROMIUMPC
15 mark. We've already talked about irreparable harm, but
16 on those elements, they've failed to come close to
17 establishing their burden, Your Honor.

18 As to whether they own protectable rights in
19 CHROMIUMPC, so I think we don't need to spend time on
20 the value of their pending trademark application. It's
21 an intent to use application and it doesn't give them
22 any existing rights.

23 As to whether they have established that
24 they have created common law rights that are
25 enforceable, the only evidence we had here is, concrete

1 evidence, and I wouldn't even go that far to call it
2 concrete, is two possible pre-sales. Mr. Sullivan
3 referred to them as pre-sales. He didn't know whether
4 the product had shipped or to whom or what was on the
5 box, and they never spoke to a consumer. And we're
6 supposed to rely upon these two pre-sales to hold that
7 they have protectable trademark rights in CHROMIUMPC
8 sufficient to support a temporary restraining order that
9 would halt a product launch that has been under
10 development since 2009. It's simply not credible, and
11 at this stage I don't think there's anything to suggest
12 that they can prove that they have trademark rights.

13 Now, the issue of abandonment, I think this
14 falls into the likelihood of success on the merits
15 because in order for them to succeed they have got to
16 prove that we have -- that Google has abandoned rights
17 in CHROMIUM as a trademark, and all they've pointed to
18 are documents out there that are very consistent with
19 any open source software program. Open source is a
20 somewhat novel approach to product development, it's
21 also a phenomenally successful approach to the
22 development of software. It involves getting developers
23 out there who are not your employees excited about a
24 project and to have them work on it and improve it.

25 What plaintiffs have failed to show is that

1 there is -- they have failed to provide even a scintilla
2 of evidence that there is anyone actually out there
3 selling a software product under the CHROMIUM mark that
4 is of inferior quality. They would have to demonstrate
5 that to show that the mark has lost the ability to
6 function as a trademark.

7 They also have ignored the perception of the
8 market, which is fundamentally important in determining
9 whether a term can be protected as a trademark. There's
10 no evidence that people out there see CHROMIUM and no
11 longer think it means anything because they've been
12 exposed to inferior products, that it doesn't give you
13 that promise of product quality. Obviously, if this
14 litigation goes forward, the parties will fight out the
15 issue of abandonment, and they would fight that issue in
16 the context of a trademark opposition before the
17 Trademark Trial and Appeal Board at the PTO. But at
18 this stage to find that they have conclusively shown
19 that Google has lost all of its trademark rights because
20 essentially it's just an open source product I think is
21 beyond a stretch.

22 I don't think they have come close to
23 establishing -- let's say they assume that -- they
24 proved that Google abandoned rights in CHROMIUM, that
25 they haven't established protectable trademark rights in

1 CHROMIUMPC, they then would have to show that in order
2 to get a TRO specifically as they are requesting, that
3 CHROMEBOOK infringes CHROMIUMPC. We have nothing in the
4 record that supports any of the likelihood of confusion
5 factors. The only evidence we have is the testimony of
6 Mr. Sullivan, whose self-serving statements were that he
7 thought those two terms are similar. In any trademark
8 infringement case, and particularly in the context when
9 someone is asking for the extraordinary relief of a TRO,
10 you would think that they would actually go out and get
11 a consumer survey to find out whether people in the
12 market who are likely to buy these products would be
13 confused as to whether CHROMEBOOK comes from the same
14 source as something named CHROMIUMPC. We have no
15 evidence in that regard. Again, all we have is
16 statements that someone thinks these two terms are
17 similar.

18 Your Honor, I don't think they have come
19 close to showing substantial likelihood of success on
20 the merits, haven't shown irreparable harm. As to the
21 balancing of the harms, I think we've supplied the
22 record with the declaration of Mr. Lin. Google isn't
23 the only defendant here, and so Mr. Zenger will point
24 out that Google happens to make a lot of money. It's a
25 very successful company. That doesn't mean that just

1 because they are a successful company we can stop their
2 product launch because they won't hurt as much by losing
3 hundreds of millions as a different company would.
4 You've got -- this case goes far beyond just Google.
5 We've got the other defendants, the manufacturers,
6 XXX
7 XXX
8 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. They've got raw
9 materials devoted to this, they have factories, they
10 have employees who are working. And so when we get to
11 that balance of the harms factor, we're balancing the
12 harm they would suffer without an injunction, which is
13 minimal when you can't show that there's consumer
14 recognition of CHROMIUMPC versus grinding to a halt a
15 product launch that's supposed to happen tomorrow that
16 has been underway for years. I don't think that they
17 have shown that the balance of the harms weighs in their
18 favor.

19 As to the final point, the public interest,
20 I don't think they have made a compelling argument that
21 a TRO or preliminary injunction would serve the public
22 interest. In fact, I think it would do the opposite.
23 It would, number one, deprive consumers of this product
24 when they want it. Google has received pre-orders for
25 the product. The first thousand were sold a couple of

1 weeks ago. It's out there, consumers want it, and
2 issuing a TRO at this stage would deny consumers a
3 choice of computer products. Second, it almost goes so
4 far as to say if you use -- attempt to use a name in
5 connection with an open source program, you should give
6 up any hope of protecting that term as a trademark. And
7 there have been many successful software products
8 developed through open source programs. I think Mozilla
9 Firefox is one of the most famous browsers out there. I
10 can't see how this TRO would serve the public interest.

11 THE COURT: Go back to the open source
12 issue. What does the evidence support in terms of
13 efforts by Google to maintain some control, quality or
14 otherwise, over the use of the CHROMIUM operating system
15 in its open source program?

16 MR. WILLSEY: Sure, Your Honor. The
17 evidence that we have is in the form of Mr. Lin's
18 declaration, and the documents that support that
19 declaration would show that Google has implemented a
20 system under which it has developers out there in the
21 community who are called either reviewers or committers.
22 You have to be very good to become a committer. This is
23 all set forth in his declaration. Those individuals are
24 in charge of looking at new code that is developed under
25 the CHROMIUM open source program to make sure that it

1 works. Users of the CHROMIUM open source software are
2 urged to report bugs to Google. We could -- if Your
3 Honor has any questions about this, we could --

4 THE COURT: Is there a restriction on
5 someone who gets access and makes changes under the open
6 source program from reselling its version under the
7 CHROMIUM operating system name?

8 MR. WILLSEY: If they were doing that under
9 the CHROMIUM operating system, I believe Google would
10 take action, and Mr. Lin could come up and testify as to
11 a couple -- we felt that they didn't come close -- to
12 show abandonment of trademark rights is quite an uphill
13 battle, and we would be spending a day and-a-half on
14 that issue in trial.

15 THE COURT: For example, I want to make sure
16 I understand it, if somebody developed their own
17 notebook and they began marketing it saying CHROMIUM OS
18 inside. There may be a trademark -- another trademark
19 problem if they used inside. But let's say, you know,
20 this system runs on CHROMIUM operating system, is there
21 anything that you can point to in the documentation that
22 says to the open source users they can't do that?

23 MR. WILLSEY: In the documentation, no. But
24 I can -- I could bring Mr. Lin to the stand to testify
25 about two instances in which Google has taken action to

1 address someone who was doing exactly what you
2 described. I would be happy to bring him up here. I
3 felt that -- the reason -- we're getting late in the
4 day, and I thought they hadn't come close to showing
5 that, in addition to the other elements, so --

6 THE COURT: All right. But that would be
7 your proffer, that he would testify that Google has and
8 does take action to stop people who attempt to use their
9 CHROMIUM operating system in connection with their
10 re-marketing -- or their marketing of their own
11 products.

12 MR. WILLSEY: Yes. In conclusion, I mean
13 that hits most of the elements that I think I wanted to
14 cover here, and I don't think there is much more of a
15 need for me to address more except for one point that I
16 don't want to belabor, I think it's been made in the
17 briefs. But plaintiffs point to this confusion that
18 they say has already arisen, and if you look at the
19 record, these are documents all in the record, they have
20 repeatedly touted their product as something that is
21 going to run Google CHROME OS. They have done it on the
22 CHROMIUMPC Web site, they did it, I think most
23 shockingly, on the May 20th press release that they sent
24 out touting this fact, that their CHROMIUMPC would
25 run -- in fact, it would be the first product running

1 Google's CHROME OS software. As a result of that, we
2 submitted in the record, and they're noted in the first
3 footnote in our brief, numerous articles that picked up
4 on this press release that they put out, and erroneously
5 drew the conclusion that there was a connection between
6 Google and the plaintiff. So you've got their press
7 releases which leads to confusion in the press. It
8 doesn't end there. At that point, plaintiff actually
9 takes those articles and puts them back on their Web
10 site. In fact, that's where we found them. We just
11 went to the Web site, Xi3 Web site, because they want to
12 tout press about their CHROMIUMPC or their just -- I
13 guess, this is, you know, on the near horizon, but what
14 you find there is evidence of confusion that they've
15 themselves created and that they not only created but
16 are exacerbating by putting it back up on their Web site
17 so that more people can see it and draw a connection
18 between Google and the plaintiff.

19 So, Your Honor, that's all I have. I don't
20 represent Samsung, that is the one party who I can't
21 represent. I didn't know if --

22 THE COURT: Mr. Stolebarger, do you want
23 to --

24 MR. STOLEBARGER: Your Honor, I'll just join
25 in the arguments. I won't take any more time. I

1 thought it was pretty good.

2 THE COURT: Okay.

3 MR. ZENGER: I'm astonished at what I just
4 heard. They say we have no evidence of things that we
5 have to prove. Then when you ask them the proof in
6 their favor, they rely upon the exact same kind of
7 evidence that we've relied upon. He just stands here
8 and says we have evidence that --

9 THE COURT: Let's go to the first issue,
10 what evidence have you presented that would show that
11 there is any goodwill that Isys has established in the
12 CHROMIUMPC name?

13 MR. ZENGER: Because of Isys' efforts over
14 the years to promote its CHROMIUMPC name, including its
15 announcement of product in its May 20th announcement we
16 had 500,000 people who wrote articles, just like the
17 kind counsel was just referring to, and what did they
18 say? In every single instance that we are able to
19 review they associated CHROMIUMPC with Isys. There's
20 500,000, I'll take those.

21 THE COURT: Well, I don't have 500,000 in
22 front of me. I have Mr. Sullivan saying that there were
23 500,000 of which he read some part for which he couldn't
24 remember the content of a single one.

25 MR. ZENGER: Okay. I don't think he said I

1 don't remember the content. I believe what he said --

2 THE COURT: Tell me what the evidence is,
3 tell me what he did say.

4 MR. ZENGER: I believe his evidence -- his
5 testimony was they associated the CHROMIUMPC mark with
6 Isys and its affiliate Xi3.

7 THE COURT: I thought he said that they
8 liked the product.

9 MR. ZENGER: Well --

10 THE COURT: That's different than
11 associating the CHROMIUM name with the product.

12 MR. ZENGER: I would -- I don't remember
13 exactly what he said. That's my recollection of what he
14 said. But the fact is there are many, many articles out
15 there that attribute CHROMIUMPC to Isys, not to Google
16 and not to anybody else. What have we not seen here?
17 We haven't seen the other side present a single article
18 that says that the people believe that CHROMIUMPC is
19 coming from Google. To the opposite effect, we have
20 actual confusion of people assigning our mark to
21 CHROMIUM. That's a problem. So all I'm saying --

22 THE COURT: It seems to me it cuts the other
23 way. It shows that people are confusing your mark with
24 Google, and you're trading on whatever goodwill Google
25 has established in the mark.

1 MR. ZENGER: Well, Your Honor --

2 THE COURT: That was the question I was
3 putting to you before the break.

4 MR. ZENGER: Well, let me go to this point:
5 They say we have no evidence of any consumer
6 recognition, but we believe that the overwhelming
7 response to our continued efforts, including our May
8 announcement, showed that hundreds of thousands of
9 people associated the mark with us. And I grant to you
10 we don't have those reams of articles sitting here, but
11 that's the proffered testimony.

12 THE COURT: I'm just looking at my notes,
13 and maybe I didn't write down -- I didn't attempt to
14 write down everything he said, but what I wrote down
15 what I thought was important, and maybe I missed
16 something that he said that you believe is important,
17 when he was talking about that he said people looked at
18 the site and they liked it. And he talked about they
19 got comments, hundreds of thousands of hits on the Web
20 site, up to 500,000, tens of thousands visited the Web
21 site, but none of them make any reference to whether or
22 not they were associating CHROMIUMPC with this cool
23 product that's advertised on the Web site.

24 MR. ZENGER: Well, a similar proffer, I
25 would proffer the testimony of Mr. Sullivan of all of

1 the articles that he read, each one associated the
2 CHROMIUMPC mark with Isys.

3 THE COURT: How did they do that?

4 MR. ZENGER: Because they talked about the
5 new product called CHROMIUMPC coming from Isys or Xi3.

6 Now, so an interesting thing I find here is
7 that when you ask Google to say what's your proof of
8 confusion, they rely on things like articles to
9 establish their burden, but say that we cannot, and they
10 say there's no evidence. Well, there is evidence of our
11 use. We have the testimony of Mr. Sullivan, not only
12 him, but other people who have spent time and resources
13 out actually selling and carrying this product,
14 transporting it in commerce, and offering it for sale.
15 But here's the problem for us, the unfairness is --
16 still lies in because we do it slower than a big
17 company, then -- and they can do it faster and bigger
18 they win. That is fundamentally unfair to us, and we
19 believe --

20 THE COURT: Aren't you confusing fast time
21 developing the product with faster in using the mark.
22 There's nothing that prevented your client from using
23 the mark on all those products and marketed at
24 wholesale.

25 MR. ZENGER: Because, Your Honor, as

1 Mr. Sullivan indicated, he has a wholesale side of his
2 business and a retail --

3 THE COURT: If they had been really serious
4 in using this mark, if they wanted to establish use, if
5 this was as important to them as you're now saying it
6 is, why didn't they make some effort to actually market
7 some of these neat little devices using the name
8 CHROMIUMPC?

9 MR. ZENGER: They began in November 2009.

10 THE COURT: With two pre-sales that maybe
11 were never even completed.

12 MR. ZENGER: And they went to customers and
13 presented --

14 THE COURT: We don't know that they went to
15 customers.

16 MR. ZENGER: He testified that they went to
17 customers.

18 THE COURT: They walked out and showed it to
19 people.

20 MR. ZENGER: They took it with them and
21 showed it to customers, and they did the same thing --

22 THE COURT: Do you have any legal authority
23 that showing it to people is sufficient to satisfy the
24 use in commerce standard?

25 MR. ZENGER: Yes. I have Google's own

1 standard that they cite in their brief that says part of
2 the ways that you determine use are the genuineness of
3 their attempts for premarket sales, they're going to the
4 trade shows, they're advertising in their marketing and
5 their promotional literature. Google admits it in their
6 brief. Google cites a standard, but then applies a
7 different standard, and when we apply that different
8 standard, they say it doesn't work for Isys but it works
9 for Google. All I'm saying here --

10 THE COURT: If it's the same for both of
11 them, where does that leave us in terms of granting a
12 temporary -- if both of you have equal actions to
13 develop the tradename -- or the trademark, doesn't that
14 mean you lose?

15 MR. ZENGER: I don't think it is because I
16 think part of the power that you have to exercise is
17 that power in equity. And what are the trademark laws
18 of the United States? They are in order to prevent this
19 kind of thing from happening, you file an intent to use
20 application, and small people get to rely on that so big
21 people just don't come in and scoop us. That's exactly
22 what happened in the Big O Tire case, a smaller
23 company -- or, excuse me, that's the reverse confusion.
24 But the point is that's why we have an intent to use
25 application so we can tell the world we're coming, stay

1 out of our space, and don't just scoop us.

2 THE COURT: You're trying to get a lot more
3 out of the intent to use notice than the law allows you.

4 MR. ZENGER: Not if we register.

5 THE COURT: You haven't registered yet.

6 MR. ZENGER: The only people standing
7 between us in registration is Google and their argument
8 that their CHROMIUM application bars that registration.
9 But we heard Mr. Lin say they don't control the quality,
10 they don't guarantee the quality, yet people can call it
11 CHROMIUM, and when they can't even stop anybody from
12 saying we have a CHROMIUM software product, they can't
13 do that because they've given that permission to the
14 world from 2008 forward.

15 THE COURT: Let me take you back because I'm
16 still back to the beginning as to what the standard here
17 is. The Tenth Circuit en banc decision says that a
18 disfavored temporary restraining order or preliminary
19 injunction, and it lists three examples: Preliminary
20 injunction that alters the status quo. It seems to me
21 you fall in that category because you're asking them to
22 be barred from pursuing their opposition to your notice
23 of intent to use. You're attempting to change the
24 status quo.

25 MR. ZENGER: No, I think they're attempting

1 to change the status quo because they abandoned it in
2 2008 and they are now trying to revise it and --

3 THE COURT: You're confusing the issue
4 because you specifically ask that they be barred from
5 pursuing their opposition to your attempt to get a
6 registration.

7 MR. ZENGER: That's correct.

8 THE COURT: That's a change of the status
9 quo. Status quo, they have a pending opposition, and
10 you want them to be required to withdraw that, or barred
11 from continuing to pursue that.

12 MR. ZENGER: I believe the status quo is
13 they have no rights, and that has been the status quo
14 since 2008, that's the status quo.

15 THE COURT: But the status quo doesn't have
16 anything to do with rights. Status quo has to do with
17 facts as they exist on the ground.

18 MR. ZENGER: Right, and on the ground --

19 THE COURT: They have a pending opposition.

20 MR. ZENGER: Yes, sir, they do.

21 THE COURT: The second one is a mandatory
22 preliminary injunction. Presumably I infer from this
23 that you're asking they be required to do something with
24 respect to the Patent and Trademark Office, if they're
25 not going to continue to pursue the opposition.

1 MR. ZENGER: No. I think it's sufficient if
2 this court --

3 THE COURT: Aren't you asking me to order
4 them to withdraw it?

5 MR. ZENGER: I'm asking you to make a
6 finding that they did not control the quality or
7 guarantee the quality of the products used under the
8 CHROMIUM name.

9 THE COURT: I'm asking -- the order that --
10 I asked you at the beginning to tell me the specific
11 language you want me to order. That language requires
12 them to do something, does it not?

13 MR. ZENGER: Or refrain from doing
14 something, yes.

15 THE COURT: The last one is preliminary
16 injunction that affords the movant all the relief that
17 it could recover at the conclusion of a full trial on
18 the merits.

19 MR. ZENGER: I didn't ask for --

20 THE COURT: I don't think you fall in that
21 category. But if that's the standard, then the standard
22 the court says, that you must -- the court must more
23 closely scrutinize to ensure the exigencies of the case
24 support granting of a remedy that is extraordinary, even
25 in the normal course, and in terms of that they say

1 you're not entitled to rely upon the modified likelihood
2 of success on the merits. Then here's the critical
3 language, Instead, a party seeking such an injunction
4 must make a strong showing both with regard to the
5 likelihood of success on the merits and with regard to
6 the balance of harms and may not rely on the modified...
7 So tell me how you believe you've made sufficient strong
8 story that under all of the exigencies of these
9 circumstance you're entitled to stop their launch of
10 this product.

11 MR. ZENGER: Then if that's the case, then I
12 would propose a modification to that language that I
13 think might answer your question but still meet our
14 need, and that is, that their launch and distribution by
15 Google, Samsung, Acer, Best Buy, and amazon.com be
16 delayed until the trademark office determines our
17 rights.

18 THE COURT: I don't have the authority to do
19 that.

20 MR. ZENGER: You could offer --

21 THE COURT: I can grant a temporary
22 restraining order and set a time for preliminary
23 injunction.

24 MR. ZENGER: Well, that temporary
25 restraining order could be for this immediate launch and

1 then let us come back for a preliminary injunction. And
2 to argue the point that the status quo is a market free
3 from being overwhelmed with a CHROMIUMPC like mark
4 and --

5 THE COURT: Anything further before I take a
6 brief break, then I'm going to make my decision?

7 MR. ZENGER: No, sir.

8 THE COURT: Anything further from anybody on
9 behalf of the defendants?

10 MR. STOLEBARGER: No, Your Honor.

11 MR. WILLSEY: No, Your Honor.

12 THE COURT: Let's take a brief break, then
13 I'll come back and tell you where we're going to go with
14 this.

15 (Whereupon, the court's ruling was
16 transcribed under separate cover.)

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C E R T I F I C A T E

State of Utah
County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter
for the State of Utah, do hereby certify that the
foregoing transcript of proceedings was taken before me
at the time and place set forth herein and was taken
down by me in shorthand and thereafter transcribed into
typewriting under my direction and supervision;

That the foregoing pages contain a true and
correct transcription of my said shorthand notes so
taken.

IN WITNESS WHEREOF, I have hereunto set my hand
this 18th day of July , 2011.

Karen Murakami
Karen Murakami, CSR, RPR