

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

L/P ENGINE, INC.,)	
)	
Plaintiff,)	
)	
VS.)	CIVIL ACTION NO.
)	2:11-CV-512
AOL, INC., et al,)	
)	
Defendants.)	

ORAL/VIDEO DEPOSITION OF
STEPHEN L. BECKER, Ph.D.
SEPTEMBER 8, 2012

CONFIDENTIAL - OUTSIDE ATTORNEYS' EYES ONLY

ORAL DEPOSITION OF STEPHEN L. BECKER, Ph.D.,
produced as a witness at the instance of the Defendants,
was duly sworn, was taken in the above-styled and
numbered cause on the SEPTEMBER 8, 2012, from 8:24 a.m.
to 5:54 p.m., before Chris Carpenter, CSR, in and for
the State of Texas, reported by machine shorthand, at
the offices of ANDREWS & KURTH, 111 Congress Avenue,
Suite 1700, Austin, Texas 78701, pursuant to the Federal
Rules of Civil Procedure and the provisions stated on
the record or attached hereto.
Job No. CS416513

1 there regarding the efficacy of individual components or
2 changes to the coefficients, as it were, within the
3 accused Smart Ads system. I have not attempted to
4 separately parse those out because they all fall within
5 what I've been asked to assume is infringement. And so
6 it might be interesting to know that coefficient Set A,
7 as compared to coefficient Set B, produces an
8 incremental benefit that wasn't present in B; but if
9 both A and B infringe, as I've been asked to assume,
10 then that parsing is not in my mind necessary nor was
11 there sufficient data to do it. Google certainly hasn't
12 produced it.

13 Q. (By Mr. Perlson) The -- well, I think in your
14 -- well, first of all, the -- there are aspects of Smart
15 Ads that go beyond what is -- I'll start over.

16 Do you know, first of all, I'm going to
17 refer to SmartASS as Smart Ads, and you'll know what I'm
18 talking about?

19 A. Yes, I agree with that and I'm more than
20 willing to adopt that convention.

21 Q. So what is Smart Ads?

22 A. Smart Ads, as I understand it, was a system
23 that was put in place by Google in 2004, that provides a
24 more intelligent way of selecting the ads that will be
25 shown to users in response to queries. A central

1 component of Smart Ads was the, I think it's been
2 described as a machine learning system that analyzes
3 large amounts of content related and collaborative-
4 related data to generate predicted click-through rates
5 that are used in the process of selecting which ads to
6 show and where to show them.

7 Q. The patents do not cover all aspects of Smart
8 Ads, correct?

9 MS. ALBERT: Objection, vague. No
10 foundation.

11 A. Well, you know, there certainly are elements of
12 -- if you look at sort of a flow chart of how Smart Ads
13 works, I would agree that there are steps in the process
14 that in and of themselves or not accused of infringing,
15 but the system as a whole is infringing, at least I have
16 to assume that it is, and thus, to say that, you know,
17 there are pieces of it that aren't, I -- is a little --
18 I can't completely agree with that. I mean, as I
19 understand it, this is an integrated system that is --
20 you can't sort of break the pieces out and say, well,
21 this, on a stand-alone basis, this aspect of Smart Ads
22 would work without the other pieces of Smart Ads that
23 are specifically the things that are causing it to
24 infringe, without those pieces in there. So in that
25 sense, the patent -- patented invention is central to

1 the functioning of Smart Ads. There are certainly
2 elements of it that are not identified as, you know,
3 infringing steps or parts of the claims.

4 Q. (By Mr. Perlson) Okay. So there's certain
5 aspects of Smart Ads that are not identified as
6 infringing the patents-in-suit, correct?

7 MS. ALBERT: Objection.

8 A. Steps in the process that they do that I, as I
9 understand the infringement read, are not specifically
10 identified as necessary steps for infringement.

11 Q. (By Mr. Perlson) And Smart Ads is not used --
12 well, let me -- do you understand that Google runs an
13 auction in connection with AdWords?

14 A. Yes.

15 Q. The auction is not accused in this case,
16 correct?

17 A. The auction, per se, is not. They were running
18 an auction before Smart Ads was put in place. In 2003,
19 there was an auction, and so clearly the stand-alone
20 auction element of their overall ad serving system is
21 not the accused.

22 Q. And the patents don't say anything about an
23 auction, right?

24 MS. ALBERT: Objection, no foundation.

25 A. The -- I would agree that they don't

1 specifically say any -- they don't specifically teach an
2 auction. I would disagree if by that you suggest that
3 all auctions, no matter how they're conducted, must
4 therefore not infringe or not in any way be implicated
5 by these patents because that's simply not the case. We
6 have an example here where the way they use pCTR to
7 influence the auction outcome is identified as being
8 infringing. And so, certainly, the auction that existed
9 before Smart Ads was put in place is not taught by or
10 covered at all by the patent.

11 Q. The patents don't teach any auction at all,
12 right?

13 MS. ALBERT: Objection, vague. No
14 foundation.

15 Q. (By Mr. Perlson) Let me ask you a different
16 way: Does the word "auction" appear in the patents at
17 all?

18 A. No, not that I'm aware of.

19 Q. Does the word "bid" appear in the patents at
20 all?

21 MS. ALBERT: No foundation.

22 A. Not that I'm aware of.

23 Q. (By Mr. Perlson) Do you understand that what's
24 been accused in this case occurs before the auction is
25 run?

1 MS. ALBERT: Objection, harassing.

2 A. -- the way of you've asked your question, the
3 answer is I've answered that several times. The --

4 Q. (By Mr. Perlson) You've answered with a long-
5 winded answer. I need a yes or no.

6 When we're in front of the judge, he's not
7 going to let you do that. And we don't have a judge
8 here, it's Saturday. So you're going to need to answer
9 my question or else I'm going to need to bring a motion.

10 So let me just -- don't give me a long-
11 winded answer.

12 Answer my question: Did you specifically
13 calculate the value attributed to the use of pCTR in the
14 auction? Yes or no?

15 MS. ALBERT: Objection. I'm going to
16 state for the record that you're harassing. He's asked
17 and answered. And if you're going to act
18 unprofessional, we will call it a day.

19 Q. (By Mr. Perlson) Please answer my question,
20 sir.

21 MS. ALBERT: Same objections. Asked and
22 answered.

23 A. I have answered this question several
24 times. The -- I have calculated the value of pCTR as it
25 is used in the process that includes the

1 A. You need to describe for me what you mean by
2 separately used in the auction.

3 Q. Ranking ads in the auction.

4 MS. ALBERT: Same objection.

5 A. Purely the ranking of ads?

6 Q. Yes.

7 A. Yes, I understand that.

8 Q. And that's not accused, is it, sir?

9 [REDACTED]

10 Q. Correct.

11 A. I don't believe that that is accused.

12 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17 Q. Do you understand that Google makes money off
18 of people clicking on ads that are bid on, on a CPC
19 basis, sir?

20 MS. ALBERT: Objection, vague. No
21 foundation.

22 A. That's -- yes. Generally, that is the business
23 model for a large part of Google.

24 MR. PERLSON: How can you object to that
25 question as having no foundation? I'm asking him

1 questions regarding his opinions that he's offered up.

2 MS. ALBERT: You haven't put anything in
3 front of him. You're talking about facts.

4 MR. PERLSON: You're saying that he
5 doesn't have an opinion -- you're don't say that he has
6 foundation as to what goes on in AdWords?

7 MS. ALBERT: That's not -- I didn't see
8 AdWords mentioned there.

9 MR. PERLSON: Look, we have a long day
10 here. It's a Saturday. You've got to stop doing this.

11 MS. ALBERT: I'm going to object if you
12 ask a bad question. It's my duty to do so.

13 Q. (By Mr. Perlson) What's a CP -- do you
14 understand what an ad CPC bid is, sir?

15 A. I'm sorry, a CPC bid?

16 Q. Yes. In AdWords.

17 A. Yes.

18 Q. What is it?

19 A. It's a cost per click. It's what the
20 advertiser says that they are willing to pay if somebody
21 clicks on their ad.

22 Q. Okay. And is that -- is it those types of ads
23 that -- is it revenue from those types of ads that are
24 part of your royalty base?

25 A. A subset of the revenue from ads, yes.

1 [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

13 Q. And you didn't talk to anybody that would have
14 been at Overture, at the time, either about that,
15 correct?

16 A. Correct.

17 Q. And in the Overture-Interchange agreement, do
18 you know who approached who about the license?

19 A. No.

20 Q. And do you know whether Overture had threatened
21 litigation against Interchange?

22 A. Generally, the same answer as with the prior
23 two.

24 Q. And do you know what the market cap of Marchex
25 was in 2005?

1 A. I don't have that committed to memory. I may
2 have -- I recall some information about their financials
3 in my report, but without my report in front of me, I
4 just can't tell you.

5 Q. Would you agree that Marchex in -- well, let me
6 ask it definitely.

7 Would you agree that in 2004, Marchex was
8 a much smaller company than Google was?

9 A. Yes.

10 Q. Would you agree that Marchex had much smaller
11 revenues than Google did in 2004?

12 A. Yes.

13 Q. Would you agree that in 2004, [REDACTED] was a much
14 smaller company than Google?

15 A. Yes.

16 Q. Would you agree that [REDACTED] had much less
17 revenues than Google?

18 A. Yes.

19 Q. In 2004, would you agree that Interchange was a
20 much smaller company than Google was at the time?

21 A. Yes.

22 Q. Would you agree that in 2004, Interchange had
23 much less revenues than Google did at the time?

24 A. Yes.

25 Q. Would you agree that in 2004, Google would have

1 had access to much more cash on hand than Marchex?

2 MS. ALBERT: Objection.

3 A. Yes. I think that's a reasonable statement.

4 Q. (By Mr. Perlson) Would you agree that in 2004,
5 Google would have had access to much more cash than

6 [REDACTED]

7 A. Yes.

8 MS. ALBERT: Same objection.

9 Q. (By Mr. Perlson) Would you agree that in 2004,
10 Google would have had access to much more cash than
11 Interchange?

12 MS. ALBERT: Same objection.

13 A. Yes.

14 Q. (By Mr. Perlson) Would you agree that in 2004,
15 Google was a much more profitable company than Marchex?

16 A. Yes.

17 Q. Would you agree that in 2004, Google was a much
18 more profitable company than [REDACTED]

19 A. Yes.

20 Q. Would you agree that in 2004, Google was a much
21 more profitable company than Interchange?

22 A. Yes.

23 Q. Do you know whether all the patents that
24 Overture licensed to Marchex were actually used by
25 Marchex?

1 MS. ALBERT: Objection.

2 A. I don't know whether all of them were. It
3 certainly, the, you know, agreements themselves indicate
4 to me that, at least the '361 patent, that there were
5 products that Marchex had that would be covered by the
6 license that would practice the '361. The implication,
7 in adding other patents into the license agreement,
8 suggests in the grant and in the definition of the cover
9 of the license product, that there was a meeting of the
10 minds that it would be good to have a license to those
11 patents in order to provide Marchex with the ability to
12 go offer those products and services. And if they were
13 willing to pay a license fee on those products, it
14 suggests, as an economic matter, that they viewed either
15 they had some embodiment of those patents or were going
16 have that and thus needed a license.

17 Q. (By Mr. Perlson) Do you -- well, what -- what
18 is it that, in the agreements, that indicated that
19 Marchex was using at least the '361 patent?

20 A. I'd need to see the agreement to tell you
21 specifically. I think there's -- I think in the sort of
22 reference to the fact that they have advertising
23 products that require a license. Again, I -- you know,
24 as a memory test, I can't tell you without the document
25 in front of me.

1 Q. Do you know how Overture and Marchex came to
2 the ultimate royalty terms?

3 A. No.

4 Q. Do you know anything about the negotiation of
5 that license?

6 A. No, not beyond, you know, what's reflected in
7 the -- in the agreement itself. I haven't seen drafts
8 or anything, for example.

9 Q. Do you know how the terms were -- the terms of
10 the Overture and [REDACTED] agreement were arrived at?

11 A. No.

12 Q. Do you know anything about the negotiations of
13 those agreements?

14 A. No.

15 Q. Do you know how the terms of the Overture and
16 Interchange agreement were arrived at?

17 A. No, not beyond what the -- what's reflected in
18 the document itself.

19 Q. Do you know anything about the negotiations of
20 the Overture and Interchange agreement?

21 A. No.

22 Q. Do you know whether Interchange used the '361
23 patent?

24 A. Not without looking at the document, I can't
25 tell you whether there's any evidence that they did. As

1 with my prior answer, the implication is that they were
2 using something or they wouldn't have felt the need to
3 take the license. But, again, without the document, I
4 can't tell you.

5 Q. Do you think that by taking a license to a
6 patent that there's an implication that, generally, that
7 the party that is licensing the patent will have --
8 either has used or has an intention to use that patent?

9 MS. ALBERT: Objection, vague.

10 A. No. Not in all agreements, no. I --

11 Q. (By Mr. Perlson) What --

12 A. A --

13 Q. I'm sorry.

14 A. I think in a non-exclusive -- in a
15 non-exclusive license, generally, an as economic matter,
16 what the licensee is buying is the right to use. And
17 they're -- you know, this sort of primary economic
18 rationale for acquiring that license would be that
19 either you presently have a need to use that technology
20 or you anticipate that you might have a need to use that
21 technology. Thus, you know, if you agree to a running
22 royalty on your current sales of a particular product,
23 economically, it implies that you're at least willing to
24 pay for the right to use that technology.

25 Q. Does that same implication not exist with a

1 lump sum?

2 A. It depends on the circumstances surrounding the
3 lump sum. If -- there may be other motivations to enter
4 into a lump-sum license.

5 Q. Well, let's say there's a lump-sum license
6 agreement entered into outside of the context of a
7 litigation settlement agreement, would that carry with
8 it an implication that -- that you either are using or
9 you anticipate you might have a need to use that
10 technology?

11 MS. ALBERT: Vague.

12 A. It depends on the circumstances of the license
13 and the terms of the license. There certainly are --
14 I've seen lump-sums agreements where I think that's a
15 reasonable inference. And there are other circumstances
16 where -- where it isn't.

17 Q. (By Mr. Perlson) What sort of circumstances
18 would you look at?

19 A. Well, for example, whether it's exclusive or
20 non-exclusive. You know, if somebody acquires exclusive
21 rights to a patent with sublicense and enforcement
22 rights, as part of that package of exclusive rights, I
23 think there's -- economically, you can imagine a
24 circumstance where the -- where the licensee may not
25 have any present intention of actually commercializing a

1 product that embodies the patent but rather is acquiring
2 either the enforcement rights to use as a strategic tool
3 in its -- in sort of a competitive arsenal or it's
4 making a business investment and planning to monetize
5 the sublicense rights.

6 Q. What about a lump-sum license outside of
7 litigation that seeks a -- that is a non-exclusive
8 license, would that carry with it an implication that
9 the party licensing the technology either uses or
10 anticipates it may want to use that technology in the
11 future?

12 MS. ALBERT: Objection, speculation.

13 A. Yeah, there certainly are circumstances where
14 that would be a reasonable inference. I think I would want
15 to look at the circumstances surrounding a particular
16 license before -- I don't think you can make a blanket
17 statement.

18 It may be that there's substantial doubt
19 about the ultimate enforceability of a particular
20 patent, but one could obtain a -- with a nominal lump-
21 sum payment, you can obtain a non-exclusive right, and
22 thus, you gain some just freedom to operate by paying
23 that nominal lump-sum amount, even if you don't really
24 think that, at the end of the day, you would be
25 infringing with the products that you might come out

1 with. But it's just, as a business decision, it makes
2 economic sense to just buy some freedom as opposed to
3 buying, specifically, the right to use that technology.

4 Q. (By Mr. Perlson) Well, there could be -- that
5 could be the case even with a running royalty as well;
6 couldn't it?

7 A. It could be. But, economically, it's makes
8 less sense that someone would, you know -- if you took a
9 hypothetical that somebody has a product that they're
10 selling, selling some widget, and they don't believe
11 that on any -- they don't feel any need for the patent
12 but to tie that particular product to a royalty stream
13 to somebody, you just generally don't see that happen.

14 Q. For the purposes of the hypothetical
15 negotiation, do you assume that Google and Lycos would
16 have known the terms of the Overture and Marchex
17 agreement?

18 A. Essential, I do, because I use that. I'm sort
19 of, as the damage analyst, imagining what a reasonable
20 royalty is and -- and the sort of set of information
21 that we impart to the consideration of the hypothetical
22 negotiation, that's, you know, Factor 12 information, is
23 something that I assume is relevant and, therefore, you
24 know, would have been known by the parties.

25 [REDACTED]

■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]

8 Q. Do you know how many -- would you agree that in
9 2004, Google had more -- many more end users of its
10 product and Marchex did?

11 MS. ALBERT: Objection, form.

12 A. Yes.

13 Q. (By Mr. Perlson) Would you agree that in 2004,
14 Google would have had many more users of its products
15 than [REDACTED]

16 A. Yes.

17 Q. Would you agree that in 2004, Google would have
18 had many more users than Interchange did?

19 MS. ALBERT: Same objection.

20 A. Yes.

21 Q. (By Mr. Perlson) Would you agree that in 2004,
22 Google would have had superior bargaining power in a
23 licensing negotiation than Marchex?

24 MS. ALBERT: Objection, vague.

25 A. Not in all dimensions, no.

1 Q. (By Mr. Perlson) In what dimensions would it?

2 A. Certainly it has -- its size makes it a more
3 attractive licensee to Lycos than Marchex represented to
4 Overture. That's an area where it gets -- a dimension
5 on which it would have had something that was attractive
6 that would have given it an edge in the negotiation.

7 You know, Google's size, the fact that
8 they're larger, substantially larger than Marchex and
9 [REDACTED] and Interchange, in other regards, you know, cuts
10 both ways.

11 Q. So do you think that [REDACTED] would have had
12 superior bargaining power to Google in 2004?

13 A. No. I don't think that it would have been
14 superior to Google's for -- in one regard, for the size
15 dimension that we talked about in terms attractiveness
16 as a licensee, much the same as my answer with respect
17 to Marchex.

18 Q. And so the dynamics of Marchex business were
19 quite different than Google's in 2004, correct?

20 MS. ALBERT: Objection, vague.

21 A. I -- aspects of it were. I mean, the Internet
22 was -- specifically, Google's search advertising
23 business was growing like gang busters in 2004.

24 Q. And Marchex's was not?

25 A. Well, I think the evidence I've seen suggests

1 that it's -- that, you know, their growth at the time
2 was -- hardly anybody had growth like Google's.

3 Q. And so their and [REDACTED] growth, at the time,
4 was much smaller than Google's, correct?

5 A. Yes.

6 Q. And Interchange's growth in 2004 was much
7 smaller than Google's?

8 A. Yes.

9 Q. And I think you just said that Marchex's growth
10 in 2004 was much smaller than Google's?

11 A. Yes.

12 MR. PERLSON: I think we have to change
13 the tape.

14 THE VIDEOGRAPHER: Off the record at
15 11:46 a.m.

16 (Lunch recess.)

17 THE VIDEOGRAPHER: We are back on record
18 at 12:58 p.m.

19 Q. (By Mr. Perlson) Dr. Becker, in the Marchex and
20 Overture agreement, do you have any reason to believe
21 the assumptions of certainty regarding the validity,
22 enforceability, and infringement of the patents-in-suit
23 that we make regarding the hypothetical negotiation were
24 present in that transaction?

25 MS. ALBERT: Objection to form.

1 A. I think it's reasonable to assume that they are
2 sufficiently similar to the hypothetical negotiation to
3 serve as a comparable.

4 Q. (By Mr. Perlson) What's the -- why do you think
5 it's reasonable to assume that?

6 A. Well, in the -- first off, just sort of looking
7 at degrees versus a settlement, arm's length sort of
8 nonsettlement-related license, it's certainly, I think,
9 reasonable to assume that unlike the settlement
10 situation where the parties are usually expressly
11 stating that they have great disagreement about the
12 validity and enforceability and infringement, the fact
13 of an arm's length nonlitigation license has a much
14 higher presumption that there was a -- some level of --
15 a high degree of meeting of the minds about the validity
16 and enforceability and need for the license.

17 With respect to that particular set of
18 agreements, I guess you asked specifically about
19 Marchex, that -- the '361 patent was sort of widely
20 written about and a well-known patent as one that had --
21 was something that people in the industry who were going
22 to implement that type of system were going to need to
23 deal with Overture, and that suggests to me or provides
24 evidence that the industry recognized that that
25 patent -- that there was sort of a general recognition

1 by most parties that that patent was valid and
2 enforceable, and, you know, then for somebody to sign up
3 willingly for a license, particularly one with a running
4 royalty, would suggest that they viewed that -- at least
5 the particular licensed product that they were going to
6 make absent the license would it infringe.

7 Q. You're not aware of any industry recognition in
8 relation to the patents-in-suit in this case, are you?

9 MS. ALBERT: Objection, form.

10 A. No.

11 Q. (By Mr. Perlson) You wouldn't say that the
12 patents-in-suit in this case were well known in the
13 industry, correct?

14 A. In -- in the actual world, no. I mean, I think
15 in the -- in the circumstances that we are asked to
16 assume in the hypothetical negotiation, if, in my mind,
17 particularly given Lycos as the holder of that patent,
18 if you put yourself back at that same point in time and
19 had the level of certainty about enforceability and
20 validity of that patent, that there appears to have been
21 with respect to the '361, I don't doubt that there
22 wouldn't have been some public recognition of that. But
23 because it's the hypothetical negotiation and not -- and
24 that didn't actually occur, we don't have any public
25 recognition that I can point to.

1 Q. Well, for the purposes of your analysis of the
2 hypothetical negotiation, are you assuming that the
3 patents at issue in this case would have had the same
4 level of industry recognition as the '361 patent?

5 A. No. Not -- not the -- the fact of the industry
6 recognition in and of itself is not something that I'm
7 assuming. I think I just finished telling you that one
8 of the things that I think is driving the industry
9 recognition is the recognition that this is a patent --
10 that the '361 was a patent that, with respect to what it
11 covered, people were going to have to deal with it. If
12 people generally thought that they're not going to be
13 able to enforce that, you wouldn't have seen the kind of
14 reaction to it that the industry had.

15 So the public recognition or industry
16 recognition is more an indicator of it being similarly
17 situated to what we have to assume the Lycos patents
18 would have been in the -- in the hypothetical
19 negotiation. I don't need to assume that there be
20 public recognition. It might have occurred, but it's
21 kind of irrelevant, because all that matters is what do
22 the parties in the room understand.

23 Q. Overture itself used the '361 patent at the --
24 at the time of the Marchex and Intelligent [REDACTED]
25 licenses?

1 out of the royalty base. And so with respect to, sort
2 of, the general infrastructure that they have, that's
3 taken into account that way.

4 Q. Well, but Smart Ads itself has its own
5 infrastructure that Google has to provide, correct?

6 A. Yes.

7 Q. And how did you take into account the Smart Ads
8 infrastructure in your analysis?

9 A. Well, that's taken -- that's -- that's taken
10 into account in the royalty rate on the apportioned base
11 by applying a rate that -- you know, [REDACTED]

[REDACTED]

24 [REDACTED] If the patent were providing everything that you
25 needed, you just sort of walk in and say, "Hey, great
I'll turn on the switch, and we're off to the races."

1 Q. The -- let me start over.

2 The -- you agree that the accused revenues
3 in this case are the U.S. revenues of the accused
4 products?

5 A. Yes.

6 Q. Did you -- does -- does -- is your revenue base
7 limited to U.S. revenues?

8 A. My revenue base reflects the set of revenues
9 that Google consistently pointed to in its 'rog
10 responses as being U.S. revenues up through the date of
11 my report.

12 Q. Is your -- is your revenue base limited to U.S.
13 revenues, you think, sitting here today?

14 A. Sitting here today, I'm aware that -- that on
15 the eve of the filing of Dr. Ugone's report, additional
16 information, a new 'rog response was submitted by Google
17 that at least purports to have revenues that -- well, it
18 has revenues that are smaller than the revenues that it
19 previously disclosed by some amount.

20 And as I understand that data, it was
21 represented that, oh, now here are U.S. revenues. If,
22 in fact, those are the U.S. revenues and we have an
23 explanation as to why consistently the prior revenues
24 that are larger were pointed to in response to repeated
25 questions to disclose your U.S. revenues, then I would

1 agree that U.S. revenues are smaller than what I've
2 used.

3 Q. Okay. Do you have any plans to supplement your
4 report to account for that?

5 A. I have not been asked to do that yet. If I am,
6 it's something that I will do. It's not difficult to
7 do.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 Q. Do you understand what AdSense for Search is?

19 A. Yes, generally.

20 Q. Can you just describe it generally?

21 A. It is the sponsored -- the search advertising
22 products where the sponsored ads are served on nonGoogle
23 properties, so on what are called partner websites,
24 where they have a search box that receives a search
25 query from a user, and that query is, kind of, behind

1

[REDACTED]

25

MS. ALBERT: Objection.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

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■ [REDACTED]

14 MR. PERLSON: We have to take a break.

15 THE VIDEOGRAPHER: We're off record at
16 1:51 p.m.

17 (Recess.)

18 THE VIDEOGRAPHER: We are back on record
19 at 2:01 p.m.

20 Q. (By Mr. Perlson) In -- what percentage of your
21 time would you say that you spend doing expert work in
22 litigation?

23 A. If you include, you know, matters that clearly
24 are likely headed that way --

25 Q. Yes.

1 advertising market, that, you know, it can gain access
2 at least in terms of licensing its technology to a large
3 portion of the market.

4 Q. (By Mr. Perlson) And -- but the fact that
5 Lycos, as well, was making money off of Google's AdSense
6 for Search product, would at least be a factor that
7 Lycos would consider, correct?

8 MS. ALBERT: Objection.

9 A. It -- I think it would be subsumed in the point
10 that I've already discussed, which is that, as a general
11 proposition, Google presents Lycos with a substantial
12 opportunity to access the market. We've seen from
13 Lycos's history that they have bounced around from
14 search advertising provider to provider. So the
15 specific provider in that regard does not appear to be a
16 strong strategic consideration for them having switched
17 and switched and switched back and switched again, like
18 they appear to have done.

19 Q. (By Mr. Perlson) Are you aware that Lycos was
20 purchased in 2004?

21 A. Yes. I don't remember the exact date, but I
22 know that there was -- there was a transaction.

23 Q. Do you know how much it was purchased for?

24 A. I don't recall the exact amount.

25 Q. Did you include that amount in your report?

1 A. I don't know that I put the amount in the text
2 of the report. I'm sure that there are documents. I
3 know that there are documents that I've reviewed that
4 have that amount, if we're referring to the sale that
5 Dom or Daum, however you pronounce it.

6 Q. Do you think that that sale has any relevance
7 to the determination of a reasonable royalty here?

8 A. No, no. I think -- I mean, it's certainly a
9 fact that existed in the real world, but under the
10 circumstances of a hypothetical negotiation, you know,
11 in my view, if you allow that to influence the
12 negotiation, then you're sort of letting circumstances
13 that were not what we have to assume in the hypothetical
14 negotiation trump what we're supposed to assume in the
15 hypothetical negotiation.

16 Q. Like what?

17 A. It's a factor. I think we consider it, but
18 it's something that occurred under circumstances that
19 are different than...

20 Q. What would it trump?

21 A. Well, it would -- you know, we -- we have to
22 assume that sitting back at approximately May of 2004,
23 Google walks into a conference room at Lycos or Lycos
24 walks into a conference room at Google and says, "Hey,
25 we all agree that now that you've got this patent, we're

1 going to need a license because the search advertising
2 system that we are about to flip the switch on, that's
3 going to serve billions and billions of ads, is going to
4 infringe if we don't have a license from you." I mean,
5 that's a substantial economic fact that would be present
6 in the hypothetical negotiation that I think it's
7 reasonable to assume was not present in the actual May
8 of 2004.

9 Q. And under the -- the reasonable -- under the
10 running royalty that you've assumed, Google would have
11 known that it was going to pay to Lycos [REDACTED]
12 [REDACTED] in the first year of that license,
13 right?

14 MS. ALBERT: Objection.

15 A. I think it's -- they -- the structure that I
16 think is reasonable, that they would have agreed to, is
17 a percentage of the incremental benefit that Smart Ads
18 and -- would have produced. And at the time, evidence
19 I've seen indicates that Google certainly viewed and
20 understood that Smart Ads was going to be a -- provide a
21 benefit for them. And, you know, would they have known
22 or been forecasting [REDACTED], I
23 don't know; but I think they would know -- they would
24 have been able to do the math that it was a number of
25 that order of magnitude.

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■ [REDACTED]

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[REDACTED]
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[REDACTED]

MS. ALBERT: Objection.

A. Incorrect. I have selected a methodology and a royalty rate that anticipates and actually expects that there will be a number of factors in the -- in the overall generation of the revenues that go into the royalty base that fall on Google's side of the table in the -- in the final sort of allocation of those economic benefits that are reflected [REDACTED]

Q. (By Mr. Perlson) I'm not talking about the royalty, sir. I'm talking about apportionment. So let's focus on that right now, okay?

A. That's what we're focused on. I answered your question.

Q. I asking you specifically about the calculation of the apportionment. You agree that that is a separate part of your analysis, correct?

A. The apportionment step is a separate part from the determination of the royalty rate, but it's not completely separable in the sense that the selection -- that the royalty rate is one that -- the nature of that particular rate is one that is not the sort of rate that

1 would be reflective of the, you know, getting all the
2 way down to the isolated economic benefit of just the
3 patented, you know, the claimed steps. I think I
4 answered that earlier and it apparently wasn't clear.

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10 Q. But you have included those additional aspects
11 of Smart Ads in your apportionment, correct?

12 A. I'll say it for about the eighth time here.

13 Q. And answer me directly this time.

14 MS. ALBERT: Objection.

15 A. I'll answer you as directly as the question you
16 posed to me allows me to answer, without just giving you
17 testimony that isn't my opinion and is in fact what you
18 appear to be wanting to say, okay?

19 The royalty base that I have calculated is
20 a base that reflects, in a reasonable way, constraining
21 the revenues to the system that is accused of
22 infringing. That is clearly not 100 percent -- the
23 value of that system is not driven 100 percent by
24 benefits brought to the table by the invention. That's
25 why you apply a royalty rate to that base instead of

1 simply splitting those profits.

2 (Exhibit 5 marked for identification).

3 Q. (By Mr. Perlson) You've been handed what's been
4 marked as Exhibit 5.

5 A. Okay.

6 Q. Do you recognize this document?

7 A. Not immediately. I may have seen it.

8 Q. I guess why don't you turn to Page 49 of your
9 report.

10 A. The page numbers in the exhibit that you marked
11 are cut off. Can you give me a paragraph number?

12 Q. Oh. 177.

13 A. Your copy, I hope it wasn't in my original,
14 cuts the page numbers off.

15 Q. My copy is cut off, too, but not completely.

16 A. All right, I'm there.

17 Q. And you have a screenshot from an internal
18 presentation. Do you see that?

19 A. Yes.

20 Q. And you understand that that, the presentation
21 from Ben Love that you point to -- let me start over.

22 Do you know who created the presentation
23 that you refer to on Page 49 of your report?

24 A. Not sitting here. The presentation itself
25 has -- I'd have to go back and look at it. It may have

1 MS. ALBERT: Objection.

2 A. It -- we talked about this earlier in the day.
3 If there is a commercially viable alternative, the -- I
4 would have to evaluate and see evidence of what is the
5 impact on RPM and click-through rates and Google's
6 longterm revenue generating capability under that
7 alternative. And that evidence would have to be
8 evaluated as to whether, you know, what's commercially
9 acceptable. If you're getting exactly the same benefits
10 that you're getting from practicing the invention in the
11 way that I have to assume that it infringes, then
12 certainly if you can get the exact same benefits then it
13 would affect what they would be willing to pay. But
14 I've seen no evidence presented by anybody yet that they
15 can get those benefits.

16 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

23 MS. ALBERT: Objection.

24 A. Well, it would be a significant premise of my
25 analysis, because as I -- as I understand your

1 hypothetical, it's assumed that Google has not, in fact,
2 been infringing until 2010.

3 Q. (By Mr. Perlson) Right.

4 A. Is that what you're asking me to assume? Is
5 that -- the assumption that I'm supposed to make, which
6 is that the infringement that Google is accused of by
7 I/P Engine is in fact found, the patent is found to be
8 valid, it's found to be infringed, and that date of
9 alleged first infringement is in May of 2004. I've
10 built my analysis around that.

11 If they aren't infringing then, in 2004,
12 then obviously they should pay nothing in 2004.

13 Q. And I guess what I'm stating is that you would
14 agree that the -- Google's ad system from 2004 to 2009
15 was a commercially viable system, correct?

16 MS. ALBERT: Objection.

17 A. If -- if the system they had in 2008, for
18 example, or 2009, was not infringing in any way, then
19 that's as commercially viable and generates benefits at
20 whatever level it does, in much the same way that the
21 pre-infringing 2003 system was working, it just -- it
22 wasn't generating the kind of revenue and benefits that
23 they -- that the evidence indicates they got by
24 implementing the infringing system. So, yeah, 2009, if
25 it's not infringing, it's viable, it generates whatever

