

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

I/P ENGINE, INC.

Plaintiff,

v.

AOL, INC., *et al.*,

Defendants.

Civil Action No. 2:11-cv-512

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A
MATTER OF LAW ON LACHES**

Introduction

Pursuant to Federal Rule of Civil Procedure 52(c), Defendants Google Inc., AOL, Inc., Target Corp., Gannett Co., Inc., and IAC Search & Media, Inc. respectfully move for judgment as a matter of law that any pre-suit damages in this case are barred by laches.

Laches presumptively applies if a patentee delays bringing suit for more than six years after it knew or should have known of the alleged infringement. In this case, I/P Engine claims that Defendants infringe the Asserted Patents by filtering ads based on a "Quality Score" that allegedly combines content and click-through data. Yet as early as July 2005, Google publicly described Quality Score in almost exactly the same way that I/P Engine's Complaint described Quality Score. In light of this public disclosure, I/P Engine and its predecessors-in-interest had actual or constructive knowledge of the alleged infringement at least as early as July 2005, which is more than six years before this suit was filed in September 2011. Thus, a presumption of laches applies.

I/P Engine, however, has come forward with no competent evidence to rebut the laches presumption. It has provided no valid excuse for the six-plus year delay in filing suit, nor has it proffered any evidence that Defendants were not prejudiced by the delay. To the contrary, the

testimony in this case shows that Defendants did suffer significant evidentiary prejudice from the six-plus year delay in bringing this suit. Accordingly, I/P Engine's pre-suit damages are barred by laches.

Legal Standard

A. Judgment as a Matter of Law Under Rule 52(c)¹

“Rule 52(c) provides that ‘if a party has been fully heard on an issue during a non-jury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.’” *Lake Ridge Apts., LLC v. BIR Lakeridge, LLC*, No. 07-08, 2008 WL 2718872, *2 (E.D. Va. Feb. 13, 2008) (quoting Fed. R. Civ. P. 52(c)). “This Rule ‘authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.’” *Id.*

B. Laches

The defense of laches, when proven, bars a patent plaintiff from winning any damages that accrued before the filing of suit. *See A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1041 (Fed. Cir. 1992) (en banc). A laches defense has two elements: “(1) the plaintiff delayed filing suit for an unreasonable and inexcusable length of time from the time the plaintiff knew or reasonably should have known of its claim against the defendant; and (2) the delay operated to the prejudice or injury of the defendant.” *Id.* at 1032. However, “[a] presumption of laches arises where a patentee delays bringing suit for more than six years after the date the patentee knew or should have known of the alleged infringer's activity.” *Id.* at 1037. When the

¹ Because laches is an issue to be decided by the Court, not a jury, Defendants respectfully bring this Motion under Rule 52(c) instead of Rule 50(a). However, Defendants have no objection to the Court construing this Motion as a Rule 50(a) Motion, should the Court so desire.

presumption applies, the laches elements of undue delay and prejudice “must be inferred, absent rebuttal evidence.” *Id.* at 1038 (emphasis in original). The plaintiff then bears the burden of rebutting the presumption by producing sufficient evidence to raise a genuine issue of material fact as to whether unreasonable delay and prejudice actually exist. *See id.* at 1038.

When a patent transfers ownership, “a transferee of the patent must accept the consequences of the dilatory conduct of immediate and remote transferors.” Donald S. Chisum, CHISUM ON PATENTS § 19.05[2][A][ii] (2011); accord *Eastman Kodak Co. v. Goodyear Tire & Rubber Co.*, 114 F.3d 1547, 1559 (Fed. Cir. 1997). Thus, if a series of patent owners collectively delayed asserting a patent for more than six years, a defendant may invoke the six-year presumption of laches against any later attempt to assert that patent.

Argument

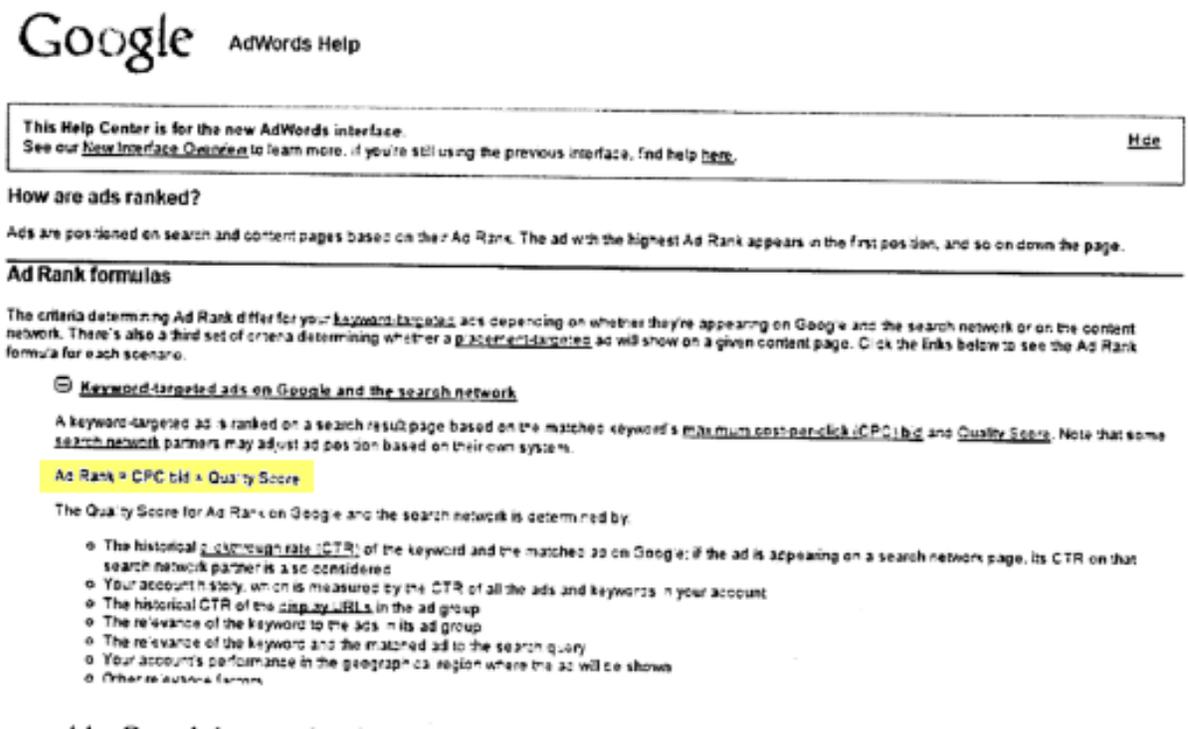
A. A Laches Presumption Applies Because I/P Engine and Lycos Had Constructive Knowledge of the Alleged Infringement Since July 2005.

For purposes of triggering the six-year laches presumption, the period of delay begins when the patentee gains actual or constructive knowledge of the alleged infringement, meaning that patentees have a duty to police their rights. *Wanlass v. General Elec. Co.*, 148 F.3d 1334, 1337-38 (Fed. Cir. 1998). “[I]gnorance will not insulate [a patentee] from constructive knowledge in appropriate circumstances.” *Id.* at 1338. To the contrary, reasonable patentees must investigate potentially infringing “pervasive, open, and notorious activities,” including “sales, marketing, publication, or public use of a product similar to or embodying technology similar to the patented invention, or published descriptions of the defendant's potentially infringing activities.” *Id.*

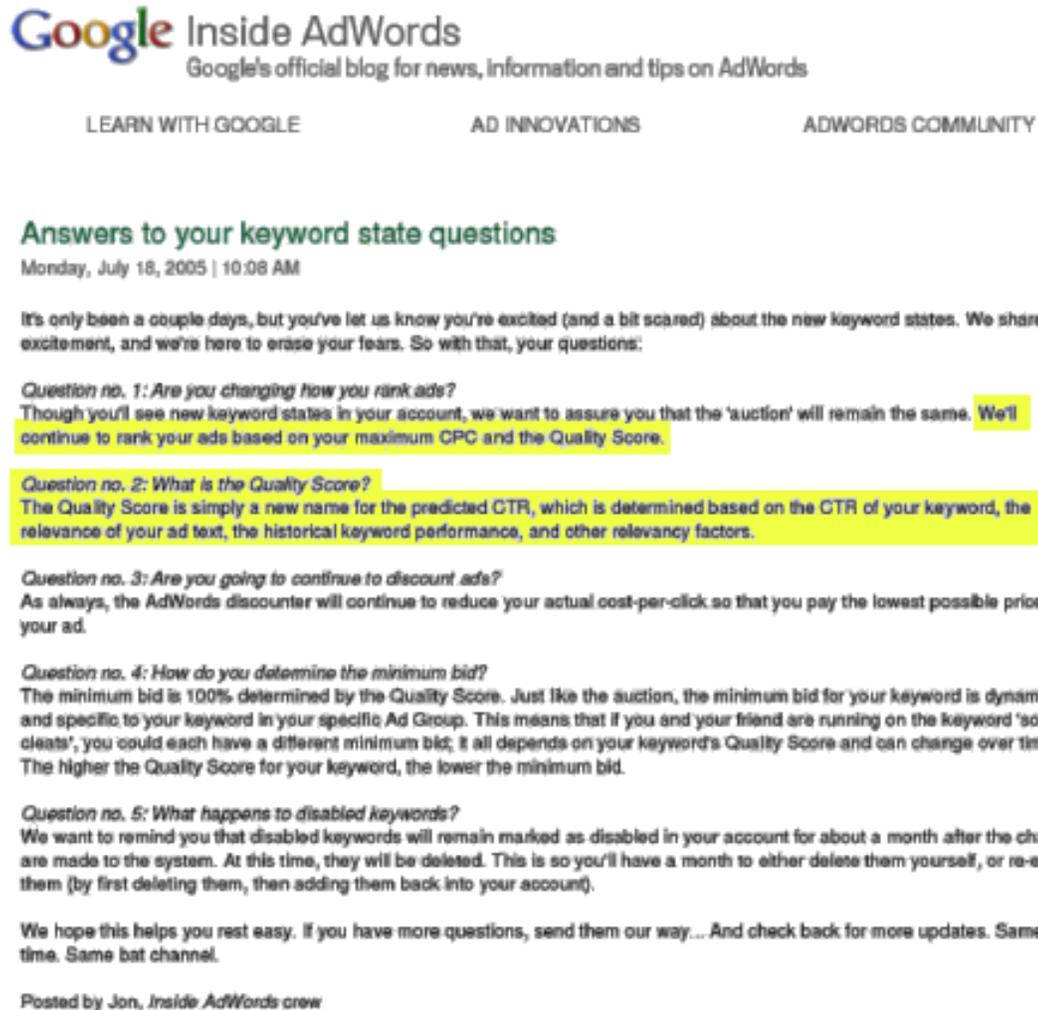
Under these standards, I/P Engine and Lycos (the prior owner of the Patents) had constructive knowledge of the alleged infringement by no later than July 2005. In that month,

Google published a public blog post (introduced into evidence as PX-176) that matches almost word for word the infringement allegations that I/P Engine pleaded in its Complaint.

The totality of I/P Engine’s specific infringement allegations are described in two short paragraphs of its Complaint. First, Paragraph 37 of the Complaint states that the accused systems use the patented technology because they “present[] search and advertising results based on a combination of: (i) an item’s content relevance to a search query; and (ii) click-through-rates from prior users relative to that item.” Next, the Complaint alleges that Google adopted the patented technology “with its use of ‘Quality Score.’” (D.N. 1, ¶ 43). It states that Quality Score “is a combination of an advertisement’s content relevance to a search query (e.g., the relevance of the keyword and the matched advertisement to the search query), and click-through-rates from prior users relative to that advertisement (e.g., the historical click-through-rate of the keyword and matched advertisement).” (*Id.*) In support of this proposition, the Complaint cited a single page from Google’s AdWords Help site.



PX-176, the July 2005 blog post, gives virtually the same description of Quality Score and ad rank given in the Complaint:



The screenshot shows the top of a blog post from Google's 'Inside AdWords' series. The header includes the Google logo, the title 'Google Inside AdWords', and the subtitle 'Google's official blog for news, information and tips on AdWords'. Below the header are three navigation links: 'LEARN WITH GOOGLE', 'AD INNOVATIONS', and 'ADWORDS COMMUNITY'. The main content area features a green heading 'Answers to your keyword state questions' and a timestamp 'Monday, July 18, 2005 | 10:06 AM'. The body text begins with an introductory paragraph and then addresses five questions. The first question asks about ranking ads, and the answer states that ranking will remain the same based on maximum CPC and Quality Score. The second question asks about the Quality Score, and the answer explains it is a new name for predicted CTR based on keyword CTR, ad text relevance, and historical performance. The third question asks about discounting ads, and the answer states that the AdWords discounter will continue to reduce the actual cost-per-click. The fourth question asks about minimum bids, and the answer explains they are 100% determined by the Quality Score. The fifth question asks about disabled keywords, and the answer states they will be deleted for a month after changes. The post concludes with a closing paragraph and is signed 'Posted by Jon, Inside AdWords crew'.

Google Inside AdWords
Google's official blog for news, information and tips on AdWords

LEARN WITH GOOGLE AD INNOVATIONS ADWORDS COMMUNITY

Answers to your keyword state questions

Monday, July 18, 2005 | 10:06 AM

It's only been a couple days, but you've let us know you're excited (and a bit scared) about the new keyword states. We share your excitement, and we're here to erase your fears. So with that, your questions:

Question no. 1: Are you changing how you rank ads?
Though you'll see new keyword states in your account, we want to assure you that the 'auction' will remain the same. We'll continue to rank your ads based on your maximum CPC and the Quality Score.

Question no. 2: What is the Quality Score?
The Quality Score is simply a new name for the predicted CTR, which is determined based on the CTR of your keyword, the relevance of your ad text, the historical keyword performance, and other relevancy factors.

Question no. 3: Are you going to continue to discount ads?
As always, the AdWords discounter will continue to reduce your actual cost-per-click so that you pay the lowest possible price for your ad.

Question no. 4: How do you determine the minimum bid?
The minimum bid is 100% determined by the Quality Score. Just like the auction, the minimum bid for your keyword is dynamic, and specific to your keyword in your specific Ad Group. This means that if you and your friend are running on the keyword 'soccer cleats', you could each have a different minimum bid; it all depends on your keyword's Quality Score and can change over time. The higher the Quality Score for your keyword, the lower the minimum bid.

Question no. 5: What happens to disabled keywords?
We want to remind you that disabled keywords will remain marked as disabled in your account for about a month after the changes are made to the system. At this time, they will be deleted. This is so you'll have a month to either delete them yourself, or re-enable them (by first deleting them, then adding them back into your account).

We hope this helps you rest easy. If you have more questions, send them our way... And check back for more updates. Same bat time. Same bat channel.

Posted by Jon, Inside AdWords crew

Just like the page cited in I/P Engine's Complaint, the July 2005 blog post states that ads are ranked on maximum CPC and Quality Score. The blog post goes on to explain, just like ¶¶ 37 and 43 of the Complaint, that "[t]he Quality Score is simply a new name for the predicted CTR, which is determined based on the CTR of your keyword, the relevance of your ad text, the historical keyword performance, and other relevancy factors." Because the July 2005 blog post

mirrors the infringement allegations from the Complaint, I/P Engine and Lycos must be charged with constructive knowledge of the alleged infringement no later than July 2005, which is more than six years before this suit was filed in September 2011.

To be clear, the point is not whether this blog post is a technically accurate description of how Google's system actually works. Rather, the point is that this blog post mirrors the allegations about Google's system that I/P Engine made when it filed its Complaint in 2011. Thus, based on this public information, I/P Engine's Complaint could have been filed as early as July 2005 – meaning that I/P Engine had constructive knowledge of its infringement claims as of that date.

Not only does the language in this blog post mirror the language from I/P Engine's Complaint, but I/P Engine also confronted Google engineer Jonathan Alferness with this blog post in an attempt to prove its infringement case at trial. (*See* Trial Tr. 1080:12-1082:7.) Specifically, I/P Engine questioned Mr. Alferness as to whether this blog post came from Google's official blog (*id.* at 1081:23-1082:7) and whether the description of Quality Score in this blog post is technically accurate. (*Id.* at 1080:21-1081:18.) The fact that I/P Engine tried to use this blog post to prove its infringement case at trial further shows that I/P Engine had constructive notice of its infringement claims as of the blog post's publication date – *i.e.*, July 2005.

I/P Engine may argue, as it did in the summary judgment briefing, that this blog post did not provide constructive notice of Google's alleged infringement because it does not disclose every element of every asserted claim. Yet there are no cases holding that a publication must disclose every element of every asserted claim in order to give a plaintiff constructive notice of the alleged infringement. To the contrary, "publication . . . of a product similar to or embodying technology similar to the patented invention" is sufficient for constructive notice. *Wanlass*, 148 F.3d at 1338

(emphasis added). Here, I/P Engine has alleged infringement based on the same supposed facts contained in the blog post – namely, Google’s use of a “Quality Score” that allegedly includes both click-through rate and ad text relevance. Thus, the disclosures in the blog post are at least “similar to” the claimed invention under I/P Engine’s reading of the claims. Accordingly, I/P Engine and Lycos must be charged with constructive knowledge of their infringement claims as of July 2005, which is more than six years before this suit was filed in September 2011. As a result of this six-plus year delay, a presumption of laches applies.

B. I/P Engine Has Not Rebutted the Laches Presumption.

As a result of the six-year presumption, I/P Engine bears the burden of producing sufficient evidence to raise a genuine issue of material fact as to whether unreasonable delay and prejudice actually exist. *See Aukerman*, 960 F.2d at 1038. As discussed below, I/P Engine has failed to do so. Thus, the presumption of laches must stand.

1. I/P Engine has not rebutted the “unreasonable delay” prong

The only evidence that I/P Engine has offered to rebut the “unreasonable delay” prong of laches is to suggest that any delay was excusable because Lycos changed ownership in the early 2000’s. For example, I/P Engine elicited testimony from named inventor (and former Lycos employee) Donald Kosak about how Lycos was sold to Terra Networks in 2000 and Daum Communications in 2004. (Trial Tr. at 326:22-329:14.) Mr. Kosak also testified that Lycos’ new owners did not have a clear direction for what they wanted to do with Lycos or the patented technology. (*Id.* at 330:23-332:5.) When asked by the Court what relevance this line of testimony had, I/P Engine’s counsel replied that it was relevant for laches. (*Id.* at 331:20-25.)

Yet this evidence cannot excuse Lycos’ delay, for several reasons. First, as noted above, the period of delay in this case stretches from July 2005 to September 2011 – which is after Lycos’ sale to Terra in 2000 and Daum in 2004. Thus, the fact that Lycos changed ownership

before the delay period began is simply irrelevant. Similarly, the allegation that Lycos' new owners didn't have a clear direction for what they wanted to do with patented technology or with Lycos is not a valid excuse for Lycos' delay. If this were a valid excuse, then any corporate patentee could avoid a laches finding by simply pleading apathy or incompetence on the part of its managers and owners. Needless to say, the law does not recognize such an excuse.

Furthermore, Lycos' new ownership did not prevent Lycos from asserting its patent rights during the delay period. For example, Lycos asserted other patents against defendants Tivo and Netflix in January 2007, and this litigation remained pending until January 2011. *See Lycos, Inc. v. Tivo Inc. et al.*, No. 1:07-cv-11469 (D. Mass.).² Yet, despite Lycos' demonstrated ability to assert its patent rights during the delay period, Lycos never asserted the '420 and '664 Patents against any of the Defendants in this case.

Nor can the very fact that Lycos was asserting other patents against other parties excuse Lycos' failure to assert these Patents against these Defendants during the delay period. First, I/P Engine has offered no evidence that Lycos' other litigation against Tivo and Netflix had any effect on Lycos' ability to bring this lawsuit. Second, while other litigation over the patent-in-suit can sometimes excuse a plaintiff's delay for purposes of laches, other litigation over a different patent cannot do so. *See Humanscale Corp. v. CompX Intern. Inc.*, No. 09-86, 2010 WL 3222411, *11 (E.D. Va. Aug. 16, 2010) (rejecting patentee's argument that its delay was excusable due to ongoing litigation and reexaminations over different patents in the same field).

² The Court may take judicial notice of the fact that this other litigation occurred. *See, e.g., Ward v. Maloney*, 386 F.Supp. 2d 607, 608 fn. 1 (M.D.N.C. 2005) ("The court has taken judicial notice, pursuant to Rule 201(b) of the Federal Rules of Evidence, of matters in the public record, including the court record and filings in other litigation . . .").

Third, “in order to excuse delay based on other litigation, the patentee must give notice to the alleged infringer of the existence of the other litigation and of an intent to enforce its rights against the infringer at the conclusion of the other litigation.” *Jamesbury Corp. v. Litton Indus. Products, Inc.*, 839 F.2d 1544, 1553 (Fed. Cir. 1988). While *Aukerman* indicated that the notice requirement should not be rigidly applied in every case, it endorsed this notice requirement whenever there is prior contact between the patentee and the accused infringer. *See Aukerman*, 960 F.2d at 1039 (“Where there is prior contact, the overall equities may require appropriate notice, as in *Jamesbury*.”). Likewise, in the post-*Aukerman* case of *Hall v. Aqua Queen*, the Federal Circuit held that the plaintiff could not use “other litigation” to excuse his delay because he did not give the defendants *Jamesbury*-style notice despite having significant contact with them at trade shows during the pre-suit period. *Hall v. Aqua Queen Mfg., Inc.*, 93 F.3d 1548, 1553-54 (Fed. Cir. 1996).

Here, Lycos had significant contact with Google in the pre-suit period, both by being a Google customer and using the Accused AdSense product. (Trial Tr. at 352:11-16.) Yet there is no evidence Lycos ever notified Google that it intended to assert the patents against Google following the conclusion of its other litigation, as required by *Jamesbury* and the post-*Jamesbury* case law. Accordingly, I/P Engine cannot use Lycos’ “other litigation” to excuse the six-plus year delay in filing this lawsuit.

2. I/P Engine Has Not Rebutted the “Prejudice” Prong of Laches

As the nation’s premier patent treatise notes, there are “few cases indeed in which a lengthy period of unexcused delay escaped a laches finding because of proof of want of injury.” CHISUM ON PATENTS § 19.05[2][c][iii]. This case is no exception, as I/P Engine has put forth no evidence rebutting the “injury” or “prejudice” prong of laches. For example, I/P Engine has offered no evidence that relevant documents are just as numerous and accessible now as they

would have been years earlier, or that witnesses' memories are just as fresh. *See Aukerman*, 960 F.2d at 1033 (“Evidentiary, or ‘defense’ prejudice, may arise by reason of a defendant's inability to present a full and fair defense on the merits due to the loss of records, the death of a witness, or the unreliability of memories of long past events.”). Because I/P Engine has put forth zero evidence rebutting the prejudice prong of laches, the presumption of prejudice (like the presumption of unreasonable delay) must stand.

Even if it were Defendants' burden to affirmatively show prejudice – and it is not, due to the six-year presumption – Defendants have shown evidentiary prejudice due to faded witness memories regarding important issues in this case. For example, named inventor Ken Lang could not remember whether his prior “NewsWeeder” system used content-based and collaborative filtering – an important fact in determining whether the NewsWeeder may have practiced the Asserted Patents for purposes of an on-sale bar. (*See* Laches Proffer, Ex. A (Lang Dep.) 81:1-15, 201:9-202:1.) Mr. Lang also could not remember whether he did a prior art search before filing his patent applications (*id.* at 152:22-153:7, 251:21-25), thus frustrating Defendants' ability to determine whether he may have located invalidating prior art or prior art that would support an inequitable conduct charge and render the Asserted Patents unenforceable. *See Aukerman*, 960 F.2d at 1035 (noting that “testimonial evidence is frequently critical to invalidity defenses and almost always so with respect to unenforceability”).

The other named inventor, Donald Kosak, could not recall his first invention that used content and collaborative filtering (Laches Proffer, Ex. B (Kosak Dep.) 75:4-14, 214:11-215:21) – again, an important fact in determining whether Mr. Kosak's prior invention(s) may have constituted an on-sale bar. He could not remember what involvement he had with the prosecution of the Asserted Patents (*id.* at 275:2-15), thus frustrating Defendants' ability to determine whether his behavior during prosecution could leave him open to an inequitable

conduct charge. He also could not remember how some of his early prototypes allegedly practicing the Asserted Patents even functioned. (*Id.* at 254:12-256:13.)

The deposition of Lycos' 30(b)(6) representative, Mark Blais, also showed that Lycos' institutional memory had faded regarding important issues in this case. For example, Mr. Blais could not say whether Lycos evaluated the intellectual property of WiseWire (Mssrs. Lang's and Kosak's company) when it acquired WiseWire, thus frustrating Defendants' ability to determine what value Lycos ascribed to WiseWire's patents at that time. (Laches Proffer, Ex. C (Blais Dep.) 13:13-14:3.) Similarly, Mr. Blais could not say whether Lycos' parent companies evaluated Lycos' intellectual property (including the Asserted Patents) when they acquired Lycos in 2000 and 2004. (*Id.* at 30:10-31:21.) He could not say how much revenue Lycos was earning from Google's products around the time of the hypothetical negotiation – an important fact in determining how hard a bargain Lycos would have struck in this hypothetical negotiation. (*Id.* at 32:6-23, 109:10-110:4, 111:13-18.) He could not recall Lycos' corporate policies regarding patent enforcement and licensing around the time of the hypothetical negotiation – again, an important fact in determining how Lycos would have acted in the hypothetical negotiation. (*Id.* at 50:14-17, 51:9-13, 52:3-6, 52:16-20.) And he could not recall numerous details about the license agreement between Lycos and Overture regarding U.S. Patent No. 6,269,361 (“the ‘361 Patent.”) (*See id.* at 101:10-107:4.) This license agreement is critical to the damages analysis in this case, as Plaintiff has relied heavily on other license agreements over the ‘361 Patent to support its damages claims.

Ironically, I/P Engine has argued that Mr. Blais's deposition testimony should not come into evidence on the ground that Mr. Blais did not have personal knowledge about some of the events at Lycos that he was questioned about. (Trial Tr. at 1178:8-18.) While it is true that some of the relevant events preceded Mr. Blais' tenure at Lycos, and Mr. Blais thus did not have

firsthand knowledge of them, this itself shows how the unreasonable delay in bringing suit has prejudiced Defendants. Had this suit been brought years ago in a timely fashion, it is likely³ that Lycos could have offered a 30(b)(6) representative who was at Lycos for all the relevant events and had first-hand knowledge of them. Due to the passage of time, however, Lycos' most knowledgeable 30(b)(6) representative was Mr. Blais, who lacked firsthand knowledge about some of these events. In other words, the fact that Defendants were forced to rely on the incomplete knowledge of Mr. Blais to determine important facts about Lycos shows how Defendants have been prejudiced by the unreasonable delay in bringing this suit.

Not only have individual and corporate memories faded during the period of delay, but potentially critical documents have also been lost. For example, Mr. Lang and Mr. Kosak testified that they no longer possess most or all of their inventor notebooks and other documents from their time at WiseWire and Lycos. (Lang Dep. 119:21-120:11; Kosak Dep. 159:22-160:4, 164:11-18.) Thus, Defendants have been deprived of potentially critical documents regarding the conception of the Asserted Patents, the problems that Mr. Lang and Mr. Kosak felt they solved through the Asserted Patents, and other issues bearing on the novelty or scope of the Asserted Patents.

Accordingly, even if the six-year presumption did not exist, Defendants have easily shown prejudice by a preponderance of the evidence, as required for laches. *See Aukerman*, 960 F.2d at 1045 (“we hold that ‘preponderance of the evidence’ is the appropriate evidentiary standard to establish the facts relating to the laches issue.”).

³ Showing that Defendants have “likely” been prejudiced is sufficient for laches, as the facts underlying laches need only be proven by a preponderance of the evidence. *See Aukerman*, 960 F.2d at 1045.

Conclusion

For the foregoing reasons, Defendants respectfully request judgment as a matter of law that any pre-suit damages in this case are barred by laches.

Dated: October 31, 2012

/s/ Stephen E. Noona _____

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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