

EXHIBIT 6

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12 UNITED STATES DISTRICT COURT
13
14 NORTHERN DISTRICT OF CALIFORNIA
15
16 SAN JOSE DIVISION

16 SOFTWARE RIGHTS ARCHIVE, LLC,

17 Plaintiff,

18 v.

19 GOOGLE INC., AOL LLC, YAHOO! INC., IAC
SEARCH & MEDIA, INC., and LYCOS, INC.,

20 Defendants.

Case No. CV 08-03172 RMW (PVT)

**DEFENDANTS' MOTION TO DISMISS
FOR LACK OF STANDING**

HEARING ON MOTION
DATE: December 3, 2010
TIME: 9:00 a.m.
Judge: Ronald M. Whyte

22 GOOGLE INC., AOL LLC, YAHOO! INC., IAC
23 SEARCH & MEDIA, INC., and LYCOS, INC.,

24 Counter-Claimants,

25 v.

26 L. DANIEL EGGER, SOFTWARE RIGHTS
ARCHIVE LLC, AND SITE TECHNOLOGIES
INC.,

27 Counter-Defendants.

Case No. CV 10-03723 RMW (PVT)

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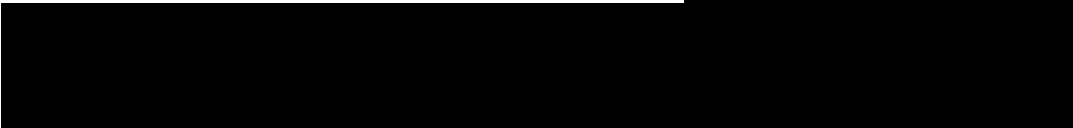

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1 **I. NOTICE OF MOTION AND BRIEF STATEMENT OF RELIEF REQUESTED**

2 PLEASE TAKE NOTICE that on December 3, 2010 at 9:00 a.m., or as soon thereafter as
3 counsel may be heard, Defendants Google Inc., Yahoo! Inc., AOL LLC, and Lycos, Inc.
4 (“Defendants”) will, and hereby do, respectfully move to dismiss this action with prejudice
5 pursuant to Federal Rule of Civil Procedure 12(b)(1).¹ This Motion is based on the following
6 memorandum of points and authorities in support, the Declaration of Robert F. Perry and
7 accompanying exhibits, the entire record in this matter, and on such evidence as may be presented
8 at the hearing of this Motion.

9 Plaintiff Software Rights Archive, LLC lacks substantial rights in the asserted patents and
10 has no Article III standing to pursue this action. 

11 
12  Altitude is “a
13 litigation finance / investment firm” that forms shell subsidiaries for the purpose of bringing
14 litigation that Altitude directs and controls, while shielding itself, the true stakeholder, from
15 exposure as a party. A federal court in Delaware recently dismissed two actions brought by
16 Altitude shell companies for lack of standing in precisely these circumstances—*i.e.*, where
17 Altitude, not the plaintiff, controlled litigation and settlement strategy, depriving the plaintiff of
18 substantial rights to the patents. This action, too, must be dismissed.

19 **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

20 In 2007, just prior to filing this action, Plaintiff secured funding from Altitude for a
21 litigation campaign to enforce United States Patent Nos. 5,544,352; 5,832,494; and 6,233,571
22 (“patents-in-suit”). But that funding came with a catch: in return, Plaintiff had to cede to Altitude
23 *absolute* authority over all decisions regarding enforcing and licensing the patents-in-suit.
24 Plaintiff retained the nominal right to sue, but Plaintiff can bring suit only at Altitude’s direction,
25 and Altitude can force Plaintiff at any time to indulge infringement or to grant a license. The net
26 effect is that, when Plaintiff brings a lawsuit, such as this one, it has no rights of its own to

27 ¹ Defendants apprised the Court of their intent to file this motion in their October 6, 2010 Rebuttal
28 Statement to SRA’s Proposal For Narrowing Claims And Defenses, And In Support Of Stay Pending
Reexamination of Patents-in-Suit. (D.I. 201 at 3 n.2.)

² All references to “Ex. _” refer to the Declaration of Robert F. Perry filed concurrently herewith.

1 vindicate. Its allegations of infringement are really claims that *Altitude*'s exclusionary interests
2 have been violated. In other words, Plaintiff has no independent right to exclude others from
3 making, selling, or using the patented invention, and it therefore has no legally recognized interest
4 that entitles it to bring or join an infringement action. As a consequence, Plaintiff lacks Article III
5 standing, and dismissal of the action is appropriate.

6 **III. BACKGROUND**

7 Tracing the ownership of the patents-in-suit is no easy feat. For purposes of this motion, it
8 is not disputed that Daniel Egger, a named inventor of the patents-in-suit, acquired rights to the
9 '352 patent and the applications that matured into the remaining patents-in-suit in 1998.³ See Ex.
10 B, SRA_0003801-4. Egger then created Software Rights Archive, Inc. ("SRA, Inc.") and assigned
11 the patents-in-suit to that entity.

12 As early as March 2006, Egger and SRA, Inc. consulted with Altitude representative Joby
13 Hughes about obtaining funding to support a campaign to enforce the patents-in-suit. See Ex. C,
14 SRA_0031250. By February 2007, that relationship blossomed, and SRA, Inc. and Altitude
15 signed a binding letter of intent. See Ex. D, SRA_0030393-97. The letter of intent set forth terms
16 for an investment by Altitude in SRA, Inc., under which Altitude would "have control of all
17 settlement, litigation, enforcement and licensing decisions." See Ex. E, SRA_0030408; see also
18 Ex. D, SRA_0030394.

19 The eventual implementation of Altitude's investment included converting SRA, Inc. into
20 Software Rights Archive, LLC—the plaintiff in this lawsuit. See Ex. F, SRA_0031596-627
21 (Membership Interest Purchase Agreement). Altitude also interposed a series of shell companies
22 between itself and Plaintiff. [REDACTED]

23 [REDACTED]
24 [REDACTED] Robert Kramer, an Altitude principal, signed the agreement through which SRA
25

26 ³ Egger and the other named inventors initially assigned the patents-in-suit in the mid-1990s to
27 Libertech, Inc. After a name change, Libertech was purchased by Deltapoint, Inc., which filed for
28 bankruptcy in 1999. Egger ultimately purported to re-acquire the patents from Deltapoint. Defendants
have argued previously that Egger did not actually obtain title to the patents because Deltapoint was not the
record title owner at the time of the assignment. *Software Rights Archive, LLC v. Google Inc. et al.*, Case
No. 2:07-cv-00511 (E.D. Tex.) D.I. 66. The District Court for the Eastern District of Texas denied
Defendants' motion to dismiss, however. *Id.* D.I. 138.

1 LLC purchased Plaintiff. *See* Ex. F at SRA_0031622 (Membership Interest Purchase Agreement).
2 That transaction purported to grant to SRA LLC “the sole and exclusive right, power and authority
3 to manage and control all licensing, enforcement, settlement and other commercialization efforts
4 with respect to [Plaintiff] and the Patents without prior consent or approval of” Egger. *See* Ex. F
5 at SRA_0031609 (section 5.4(a)). [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 At Altitude’s direction, Plaintiff filed an infringement lawsuit in Texas on November 21,
9 2007. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 There can be no legitimate dispute that Altitude carefully orchestrated the structure to
17 provide SRA as the face of the lawsuit, while it pulled all of the strings behind the scene. The
18 arrangement was deliberate, calculated, and designed to keep Altitude out of the fray while
19 allowing it to control the case, the settlement efforts, and eventually the flow of money resulting
20 from the assertions of these patents.

21 **IV. LEGAL STANDARD**

22 Standing is a threshold requirement in a patent infringement action, just as it is in all civil
23 suits. *See Sicom Sys. Ltd. v. Agilent Techs., Inc.*, 427 F.3d 971, 975-76 (Fed. Cir. 2005). The
24 party bringing suit has the burden to establish that it has standing. *See id.* at 976. If the plaintiff
25 fails to establish constitutional standing, dismissal is the appropriate remedy. *See Propat Int’l*
26 *Corp. v. RPost, Inc.*, 473 F.3d 1187, 1189 (Fed. Cir. 2007); *see also* Fed. R. Civ. P. 12(b)(1).

27 The Patent Act confers the right to bring a civil action for infringement only on “a
28 patentee.” 35 U.S.C. § 281. The Federal Circuit looks to the Patent Act to “define the nature and

1 source of the infringement claim and determine the party that is entitled to judicial relief.”
2 *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339 (Fed. Cir. 2007). Holders of all substantial
3 rights deriving from a patent plainly qualify as patentees, have constitutional standing, and may
4 bring suit. *See Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d 870, 875
5 (Fed. Cir. 1991). Plaintiffs who hold some, but not all, substantial rights may have constitutional
6 standing but lack prudential standing. That category of plaintiffs does not have an “independent
7 right to sue for infringement as a ‘patentee’ under the patent statute” and must join the true patent
8 owner in any infringement action. *Abbott Labs. v. Diamedix Corp.*, 47 F.3d 1128, 1132 (Fed. Cir.
9 1995). A person with *no* substantial rights, however, has no legally recognized interest and
10 therefore has no Article III or prudential standing. Such a person cannot bring suit even if the
11 patent owner is joined as a party. *See Propat*, 473 F.3d at 1189; *Morrow*, 499 F.3d at 1341.

12 The key consideration in determining whether a party has some or all substantial rights is
13 “whether the agreement conveys *in full* the right to exclude others from making, using and selling
14 the patented invention in the exclusive territory.” *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d
15 1372, 1379 (Fed. Cir. 2000) (emphasis in original). Accordingly, the Federal Circuit has
16 identified several primary indications of substantial rights, such as the “right to permit
17 infringement,” *Sicom*, 427 F.3d at 980; *Intellectual Property Development, Inc. v. TCI Cablevision*
18 *of Calif., Inc.*, 248 F.3d 1333, 1345 (Fed. Cir. 2001); the right to enforce a patent and settle
19 without another party’s consent, *see Sicom*, 427 F.3d at 979; *Intellectual Property Development*,
20 248 F.3d at 1345; and the right to license the patent rights to third parties, *see Morrow*, 499 F.3d at
21 1343.

22 A party’s standing to sue turns on the substance of its rights rather than mere labels. “A
23 party that has been granted all substantial rights under the patent is considered the owner
24 regardless of how the parties characterize the transaction that conveyed those rights.” *Speedplay,*
25 *Inc. v. Bebop, Inc.*, 211 F.3d 1245, 1250 (Fed. Cir. 2000). Thus, a party with bare legal title to a
26 patent does *not* hold the substantial rights necessary to confer standing. *See Morrow*, 499 F.3d at
27 1343; *Propat*, 473 F.3d at 1189 (“Even if the patentee does not transfer formal legal title, the
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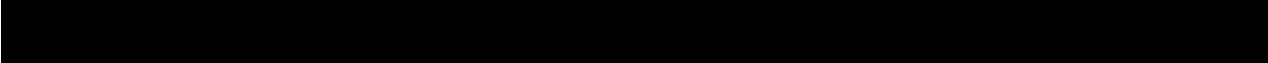
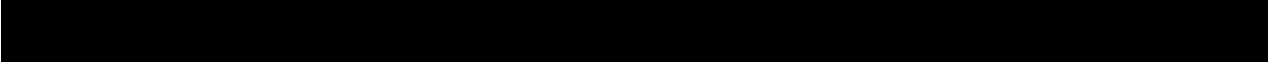
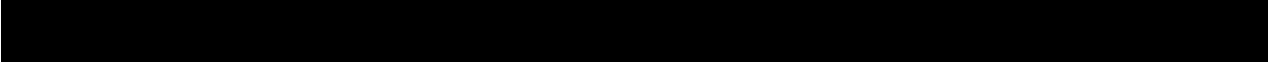
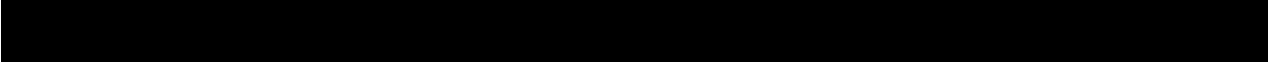
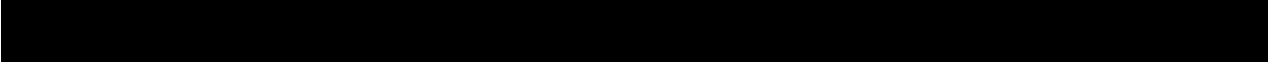
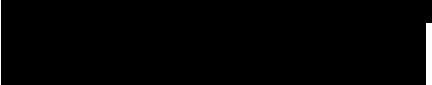
1 patentee may effect a transfer of ownership for standing purposes if it conveys all substantial
2 rights in the patent to the transferee. In that event the transferee is treated as the patentee . . .”).

3
4 **V. PLAINTIFF LACKS SUBSTANTIAL RIGHTS TO THE ASSERTED PATENTS
AND THEREFORE DOES NOT HAVE CONSTITUTIONAL STANDING**


5 Plaintiff has ceded to Altitude absolute and ultimate control over every decision regarding
6 assignment, licensing, enforcement, and settlement of the patents-in-suit. That means Altitude
7 holds all substantial, exclusionary rights—“the right to exclude others from making, using and
8 selling the patented invention.” *Prima Tek II*, 222 F.3d at 1379. To the extent Plaintiff retained
9 any rights, it holds only a bare title. Under clear Federal Circuit precedent, and as in recent
10 Delaware actions dismissed in similar circumstances, Plaintiff lacks Article III standing, and the
11 suit must be dismissed.

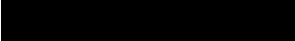
12 **A. Plaintiff Ceded All Substantial Rights In The Patents-In-Suit To Altitude**

13 Plaintiff is a mere cat’s paw, not a “patentee” entitled to bring a civil action for patent
14 infringement. 35 U.S.C. § 281. 

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22 Accordingly, Plaintiff has *no* substantial rights to the patents-in-
23 suit.

24 The dependent nature of Plaintiff’s rights tells the whole story. *See Sicom*, 427 F.3d at
25 979. 

26  Yet a party with substantial rights “would never need consent . . . to file

27 ⁴ 
28 

1 suit . . .” *Intellectual Property Development*, 248 F.3d at 1344. When Plaintiff does file suit,
2 Altitude may require Plaintiff to drop the suit, to settle, or to grant a license at any time and for
3 any reason. Plaintiff’s right to sue is therefore illusory at best. *See Speedplay*, 211 F.3d at 1251.
4 On the flip side, if Altitude wishes to enforce the patents against a purported infringer, Plaintiff
5 *must* bring that action. It has no “right to indulge infringements . . .” *Abbott Labs.*, 47 F.3d at
6 1132. The bottom line is that every effort by Plaintiff to enforce or license the patents-in-suit
7 comes at the direction of Altitude, and anything Plaintiff does can be undone by Altitude—a state
8 of affairs wholly inconsistent with Plaintiff’s assertion of its standing as a “patentee.”

9 It is no answer for Plaintiff to say that it holds the “title” to the patents or that it has not
10 formally assigned the patents to Altitude. “[W]hat matters is the substance of the arrangement.”
11 *Textile Productions, Inc. v. Mead Corp.*, 134 F.3d 1481, 1484 (Fed. Cir. 1998); *see also*
12 *Intellectual Property Development*, 248 F.3d at 1344 (must give “actual consideration of the rights
13 transferred”); *Speedplay*, 211 F.3d at 1250. In other words, the conveyance of *rights*—not mere
14 *title*—is what matters. Here, even if Plaintiff did not “transfer formal legal title,” it “effect[ed] a
15 transfer of ownership for standing purposes [by] convey[ing] all substantial rights” to Altitude.
16 *Propat*, 473 F.3d at 1189.

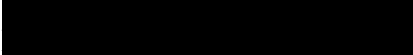
17 **B. Because Plaintiff Has Only Bare Legal Title, It Lacks Article III Standing**

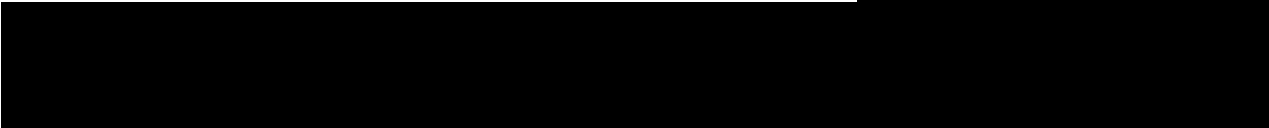
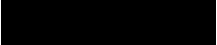
18 The fact that Plaintiff transferred all substantial rights is fatal to its assertion of
19 constitutional standing. Because Altitude holds and exercises the right to exclude others from
20 making, using, or selling the patented invention (or to indulge that behavior), it is “as if title had
21 passed” from Plaintiff to Altitude. *AsymmetRx, Inc. v. Biocare Medical, LLC*, 582 F.3d 1314,
22 1320 (Fed. Cir. 2009). At most, Plaintiff holds the right to be a nominal plaintiff in lawsuits
23 brought at Altitude’s behest. The Federal Circuit has never found such a bare right to sue
24 sufficient to support constitutional standing.

25 The root of the problem for Plaintiff “is that the exclusionary rights have been separated
26 from the right to sue for infringement.” *Morrow*, 499 F.3d at 1342. When Plaintiff ceded control
27 over the patents-in-suit to Altitude, it gave up those exclusionary rights and thereby extinguished
28

1 its ability to enforce the patents under 35 U.S.C. § 281. After all, Plaintiff cannot enforce rights it
2 does not have. *Abbot Labs.*, 47 F.3d at 1131 (holding that a party “who has no right to exclude
3 others from making, using, or selling the licensed products, has no legally recognized interest that
4 entitles it to bring or join an infringement action” (citing *Arachnid, Inc. v. Merit Indus., Inc.*, 939
5 F.2d 1574, 1579 & n.7 (Fed. Cir. 1991))). That means when Plaintiff brings a lawsuit, such as this
6 one, “its grievance is that the exclusionary interests held by” *Altitude* are being violated. *Morrow*,
7 499 F.3d at 1342. As a result, Plaintiff “is not the party to which the statutes grant judicial relief”
8 because it “suffers no legal injury in fact to the patent’s exclusionary rights.” *Id.* (citing *Warth v.*
9 *Seldin*, 422 U.S. 490, 500 (1975)).

10 Far from salvaging its standing claim, Plaintiff’s nominal “right to sue” confirms that it
11 lacks Article III standing. See *Textile Productions*, 134 F.3d at 1485 (“A ‘right to sue’ provision
12 within a license cannot, of its own force, confer standing on a bare licensee.” (citing *Ortho Pharm.*
13 *Corp. v. Genetics Inst., Inc.*, 52 F.3d 1026, 1034 (Fed.Cir.1995))). In *Propat*, for example, the
14 Federal Circuit affirmed a dismissal for lack of constitutional standing where the named plaintiff
15 could bring suit only upon obtaining another party’s “consent to its selection of targets for
16 licensing and suit,” even though that consent could not be unreasonably withheld. 473 F.3d at
17 1194. In this case, Plaintiff exercises its right to sue not with *Altitude’s consent* but at its
18 *direction*. Reasonably or unreasonably, *Altitude* can require Plaintiff to indulge infringement,
19 grant a license, file a lawsuit, dismiss an existing suit, or enter into a settlement, but Plaintiff
20 cannot independently do any of these things. In other words, Plaintiff’s rights are “more
21 consistent with the status of an agent than a co-owner.” *Id.* Thus, because the plaintiff in *Propat*
22 lacked standing, then *a fortiori* Plaintiff has no standing here.

23 Plaintiff’s agent status has real consequences for Defendants, which have been forced to
24 litigate against a party that has no authority to settle the lawsuit. 

25 
26 
27 As it stands, *Altitude* has the best of both worlds. It can select accused
28 infringers, enforce the patents, and negotiate settlements—all without any risk that may flow from

1 actually being a named party. Indeed, Defendants subpoenaed Altitude for documents relevant to
2 this action and were forced to move to compel Altitude's compliance. Only after being ordered to
3 do so, Altitude finally produced some responsive documents many months after receiving the
4 subpoena, and subject to a demand that Defendants share the costs associated with Altitude's
5 production of documents. Ex. I (June 24, 2009 e-mails from A. Hayes to counsel ("As a non-
6 party, Altitude is entitled to recover its reasonable costs in responding to the subpoena."); Ex. J
7 (Order Granting Motion to Compel, Case No. 1:09-mc-00017-JJF, D.I. 28, May 22, 2009).

8 Of course, this is not Altitude's first rodeo. Altitude has created and funded a number of
9 patent holding companies for the purpose of bringing patent infringement suits. Just a few months
10 ago—around the time transfer was granted in this case—a lawsuit brought by another Altitude-
11 controlled entity was dismissed for lack of standing on precisely the grounds raised by Defendants
12 here.⁵ See, e.g., *Enhanced Sec. Research, LLC v. Juniper Networks, Inc.*, No. 09-871-JJF, 2010
13 U.S. Dist. LEXIS 72745, at *3-4, 11 (D. Del. July 20, 2010), *appeal docketed*, No. 2010-1437
14 (Fed. Cir. Aug. 3, 2010); *Enhanced Sec. Research, LLC v. Cisco Sys.*, No. 09-390-JJF, 2010 U.S.
15 Dist. LEXIS 63831, at *14-15 (D. Del. June 25, 2010), *appeal docketed*, No. 2010-1436 (Fed. Cir.
16 Aug. 2, 2010). In those cases, Altitude created sister shell corporations, depositing the nominal
17 right to sue in one corporation ("ESR") and all decision making authority in the other ("SRH").
18 *Enhanced Sec. Research, LLC*, 2010 U.S. Dist. LEXIS 72745, at *3, 11; *Enhanced Sec. Research,*
19 *LLC*, 2010 U.S. Dist. LEXIS 63831, at *14-15. Under that arrangement, ESR "retained legal title
20 to the patents-in-suit" but "transferred 'all substantial rights' to" SRH. *Enhanced Sec. Research,*

21
22 ⁵ See Ex. H at SRA_00051255 [REDACTED] In two separate lawsuits, ESR
23 initially sued a group of defendants, in May 2009, without naming the entity that controlled the decisions
24 related to assertion and settlement of cases involving the patents-at-issue. (*Enhanced Sec. Research, LLC*
25 *v. Cisco Sys.* ("Cisco Sys. I"), Case No. 09-390, D.I. 1; *Enhanced Sec. Research, LLC v. Juniper*
26 *Networks, Inc.*, No. 09-871, D.I. 1.) In July 2009, Juniper Networks filed a Motion to Dismiss for Lack of
27 Standing. (*Enhanced Sec. Research, LLC v. Juniper Networks, Inc.*, No. 09-871, D.I. 19.) Then ESR —
28 fearing a declaratory judgment action in another forum against the entity that controlled assertion
29 decisions and possibly fearing a loss of key dates related to damages in *Cisco Sys. I* — filed a second suit
30 in August 2009, without dismissing the original suit, and added SRH, the entity that ultimately controlled
31 the disposition of the lawsuits. (*Enhanced Sec. Research, LLC v. Cisco Sys.* ("Cisco Sys. II"), Case No.
32 09-571, D.I. 1.) The District Court Judge dismissed the cases against Juniper Networks and *Cisco Sys. I*
33 for lack of standing and *Cisco Sys. II* was stayed pending the result of reexamination. (Case No. 09-871,
34 D.I. 64; Case No. 09-390, D.I. 178; Case No. 09-571, D.I. 161.) ESR and SRH (and of course the
35 controlling entity, Altitude) were thus aware of the grounds for a challenge to standing as far back as July
36 2009, over a year ago, and yet, Altitude did nothing to rectify the same standing problem in this case.

1 LLC, 2010 U.S. Dist. LEXIS 72745, at *13; *Enhanced Sec. Research, LLC*, 2010 U.S. Dist.
2 LEXIS 63831, at *15. That left ESR without “authority to make decisions concerning licensing
3 and assignments, whether to initiate enforcement proceedings and/or settlement discussions, how
4 to conduct litigation, and the approval of any settlements.” *Enhanced Sec. Research, LLC*, 2010
5 U.S. Dist. LEXIS 72745, at *13; *Enhanced Sec. Research, LLC*, 2010 U.S. Dist. LEXIS 63831, at
6 *15. In a straightforward application of Federal Circuit precedent, Judge Farnan correctly held
7 that ESR did “not have Article III standing” in either action. *Id.*

8
9 There is no reason to depart from that reasoning here because Altitude and Plaintiff have
10 the same division of rights. Like ESR, Plaintiff “lacks important indicia of a true ownership
11 interest in the patent,” *Propat*, 473 F.3d at 1194, and has at best an illusory right to sue, *see*
12 *Speedplay*, 211 F.3d at 1251. Altitude has sole “authority to make decisions concerning licensing
13 and assignments, whether to initiate enforcement proceedings and/or settlement discussions, how
14 to conduct litigation, and the approval of any settlements.” *Enhanced Sec. Research, LLC*, 2010
15 U.S. Dist. LEXIS 72745, at *13; *Enhanced Sec. Research, LLC*, 2010 U.S. Dist. LEXIS 63831, at
16 *15. As a result, Judge Farnan’s cogent analysis shows not only that Plaintiff lacks standing here
17 but also that Altitude’s favored model for enforcing patents is not permitted by the patent statutes.

18 Finally, because Plaintiff transferred *all* substantial rights to Altitude and therefore lacks
19 constitutional standing, it cannot cure that defect by joining Altitude as a plaintiff. *See Morrow*,
20 499 F.3d at 1344; *accord Propat*, 473 F.3d at 1193-94; *Enhanced Sec. Research, LLC*, 2010 U.S.
21 Dist. LEXIS 63831, at *15 (“Joinder of Security Research Holdings as a party to the action cannot
22 cure this defect.”). “Joining the legal title holder only satisfies prudential standing requirements.
23 It cannot cure constitutional standing deficiencies. Since [Plaintiff] fails to meet constitutional
24 standing requirements, it *cannot* be a party to this suit for patent infringement.” *Morrow*, 499 F.3d
25 at 1344 (emphasis added). As a result, the case must be dismissed. Under the unusual facts of this
26 case, dismissal *with* prejudice also is appropriate, fair, and just.

27 Altitude did not merely err regarding its rights in the patents: dismissal with prejudice
28 would not be a draconian result. Nor is Plaintiff a party that inadvertently turned out not to have
all substantial rights despite its intention and best efforts to secure them. To the contrary, Altitude

1 set out deliberately with a faux patentee apparently capable only of suing, while hiding all
2 substantial rights in an entity it intended to keep out of the case altogether while that shielded
3 entity calls all of the shots and reaps all of the rewards. Altitude knowingly steered this case,
4 through SRA, to an inconvenient but plaintiff-friendly forum and resisted third party discovery on
5 it (*see* Exs. I and J) all the while protectively using Plaintiff SRA as a decoy.

6 This behavior is not an isolated occurrence but rather is illustrative of a concerted pattern
7 of activity in a number of cases including the two *Enhanced Sec. Research* actions, making clear
8 that Altitude's *modus operandi* is to pull the strings from behind a screen. Far from being an error
9 that Altitude should be given leave to correct, this pattern permits an inference that Altitude will
10 simply try some modification of its existing approach if permitted to refile this lawsuit in some
11 other guise. Altitude's approach abuses the system put in place to permit redress by aggrieved
12 holders of actual and full patent rights, consuming precious judicial and party resources in the
13 process. It would be unjust to give Altitude leave to try its deceptive puppetry yet again, in
14 another form.

15 The Federal Circuit's ruling in *Sicom* provides appropriate guidance here. In *Sicom*, after
16 having a first suit dismissed without prejudice for lack of standing, the plaintiff obtained from the
17 true patentee a bare "right to sue" and re-filed suit. *See Sicom*, 427 F.3d at 973-74. The district
18 court dismissed the second suit with prejudice because the bare right to sue did not confer
19 standing, and the Federal Circuit affirmed. *Id.* at 980.

20 Similarly, dismissal with prejudice is appropriate. The dismissal of Altitude-backed
21 plaintiffs in the *Enhanced Sec. Holdings* litigation put Altitude on notice that its litigation model
22 gives rise to a lack of standing for the shell plaintiffs it funds and controls. Despite controlling
23 this litigation, Altitude failed to cure or to alert the parties or the court of the jurisdictional defect.
24 Plaintiff thus "had its chance to show standing and failed" warranting dismissal with prejudice.
25 *Textile Productions*, 134 F.3d at 1485.

26 In this case, there is no reason to subject defendants to a second suit or to waste this
27 Court's resources on what will undoubtedly be a *Sicom*-like scenario—a cosmetic change in rights
28 that leaves Plaintiff without standing but subjects defendants to additional expense and hardship.

1 After all, it was no accident that Plaintiff was set up as a sham “patentee” for this litigation. As
 2 the *Enhanced Security Research* case shows, Altitude routinely uses layers of shell corporations as
 3 puppet entities to litigate rights possessed by Altitude. In light of this history, the likelihood that
 4 Plaintiff will regain independent authority over the patents through an arms-length renegotiation
 5 with Altitude is nil. *See H.R. Techs., Inc. v. Astechnologies, Inc.*, 275 F.3d 1378, 1385 (Fed. Cir.
 6 2002) (stating that dismissal with prejudice is appropriate where plaintiff will not be “able to cure
 7 the standing problem”). Dismissal without prejudice here will simply invite Altitude to devise a
 8 different scheme for Plaintiff to bring suit while Altitude makes the important decisions, all the
 9 while shielding itself from the risks of being a party to litigation. Altitude and Plaintiff do not
 10 deserve that second bite at the apple. Rather, Plaintiff “had its chance to show standing and
 11 failed.” *Textile Productions*, 134 F.3d at 1485. Dismissal of this action with prejudice is thus
 12 appropriate.

13 VI. CONCLUSION

14 For all the foregoing reasons, Plaintiff lacks Article III standing. Accordingly, Defendants
 15 respectfully submit that the Court should grant the motion to dismiss.

16 DATED: October 29, 2010

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DECLARATION OF CONSENT

Pursuant to General Order No. 45, Section X(B) regarding signatures, I attest under penalty of perjury that concurrence in the filing of this document has been obtained from Richard S.J. Hung.

/s/ Donald F. Zimmer /s/ _____
Donald F. Zimmer

Attorneys for Defendants
GOOGLE INC. and AOL LLC

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SOFTWARE RIGHTS ARCHIVE, LLC,
Plaintiff,

v.

GOOGLE INC., AOL LLC, YAHOO! INC., IAC
SEARCH & MEDIA, INC., and LYCOS, INC.,
Defendants.

Case No. CV 08-03172 RMW (PVT)

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS
FOR LACK OF STANDING**

GOOGLE INC., AOL LLC, YAHOO! INC., IAC
SEARCH & MEDIA, INC., and LYCOS, INC.,
Counter-Claimants,

v.

L. DANIEL EGGER, SOFTWARE RIGHTS
ARCHIVE LLC, AND SITE TECHNOLOGIES
INC.,
Counter-Defendants.

Case No. CV 10-03723 RMW (PVT)

1 Before the Court is Defendants' Motion to Dismiss for Lack of Standing. Based on the
2 arguments presented in the motion, the pleadings on file, and any other relevant matter, Plaintiff
3 Software Rights Archive, LLC lacks substantial rights in the asserted patents and has no Article
4 III standing to pursue this action. Because the Plaintiff cannot cure the constitutional standing
5 deficiencies, the Court hereby GRANTS the Motion to Dismiss with prejudice.

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7 IT IS SO ORDERED.

8

9 Dated: _____

RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE

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