Oracle's Closing Argument

MAY 23, 2016

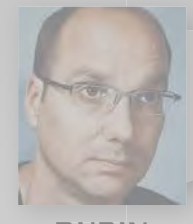
Don't get locked out!

TX 31

$60 MILLION

FORFEITED IF ANDROID FAILED TO GET TO MARKET IN 3 YEARS

TX 1004



RUBIN

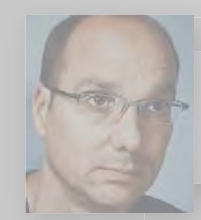
Under "incredible schedule pressure"

Tr. at 761:10-12

PAGE

"Disappointed in Android's timing"

TX 401



RUBIN

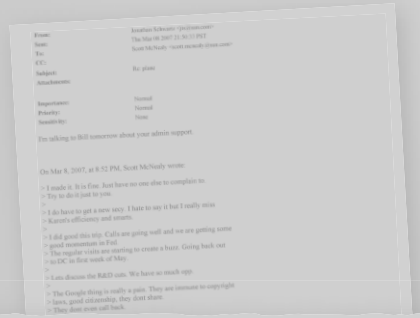
"beyond out of time."

TX 5114

SCHMIDT

"as quick a time to market as [we] could"

Tr. at 412:16-19



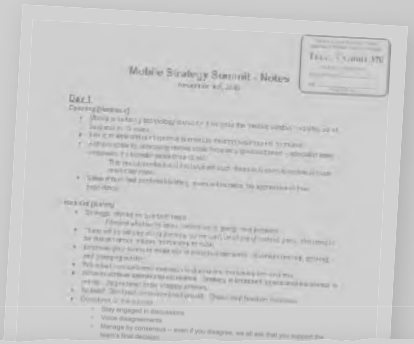
Google is "immune to copyright laws, good citizenship, they don't share."

TX 563

RUBIN

"I wanted to win."

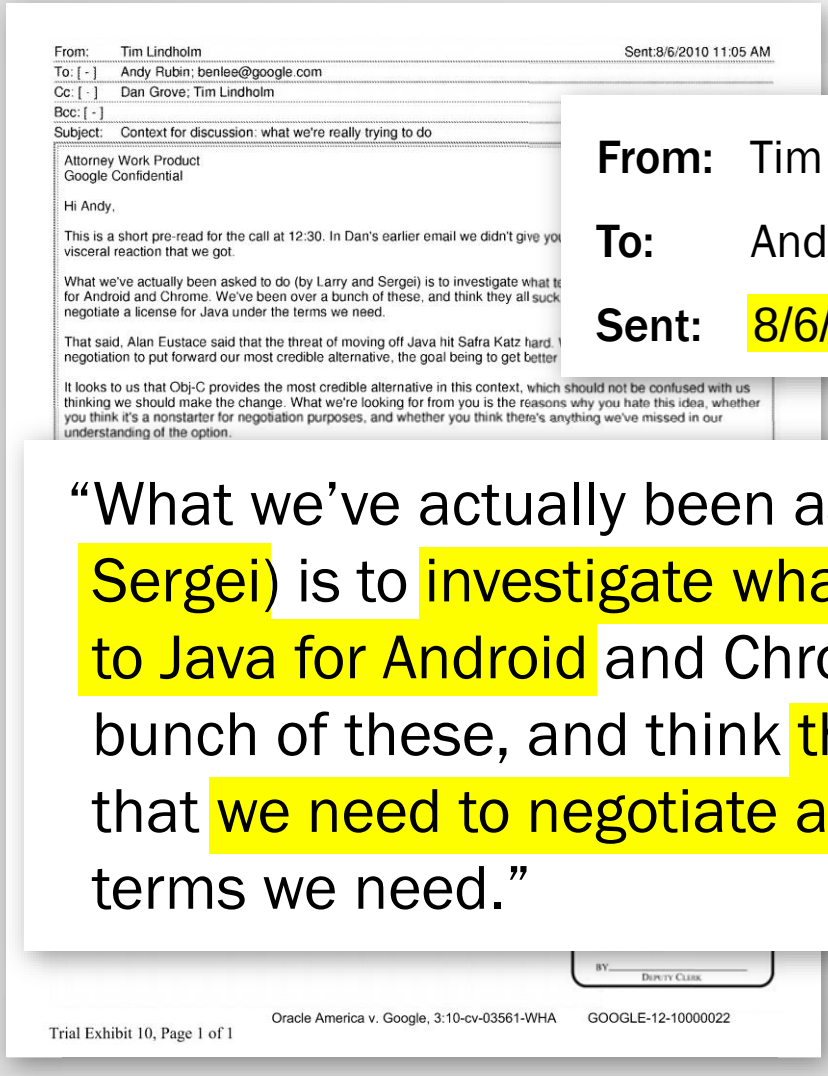
Tr. at 761:12



"If we miss the mobile window, we'll be out of business in 10 years"

TX 370

Google: Java Alternatives “all suck”



From: Tim Lindholm Sent:8/6/2010 11:05 AM
To: [-] Andy Rubin; benlee@google.com
Cc: [-] Dan Grove; Tim Lindholm
Bcc: [-]
Subject: Context for discussion: what we're really trying to do

Attorney Work Product
Google Confidential

Hi Andy,

This is a short pre-read for the call at 12:30. In Dan's earlier email we didn't give yo
visceral reaction that we got.

What we've actually been asked to do (by Larry and Sergei) is to investigate what t
for Android and Chrome. We've been over a bunch of these, and think they all suck
negotiate a license for Java under the terms we need.

That said, Alan Eustace said that the threat of moving off Java hit Safra Katz hard.
negotiation to put forward our most credible alternative, the goal being to get better

It looks to us that Obj-C provides the most credible alternative in this context, which should not be confused with us thinking we should make the change. What we're looking for from you is the reasons why you hate this idea, whether you think it's a nonstarter for negotiation purposes, and whether you think there's anything we've missed in our understanding of the option.

BY_____
DEPUTY CLERK

Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-12-10000022

Trial Exhibit 10, Page 1 of 1

From: Tim Lindholm

To: Andy Rubin

Sent: 8/6/2010

“What we’ve actually been asked to do (by Larry and Sergei) is to investigate what technical alternatives exist to Java for Android and Chrome. We’ve been over a bunch of these, and think they all suck. We conclude that we need to negotiate a license for Java under the terms we need.”

Android Was “Devastating”

NEAL CIVJAN

Former VP Worldwide
OEM Software Sales

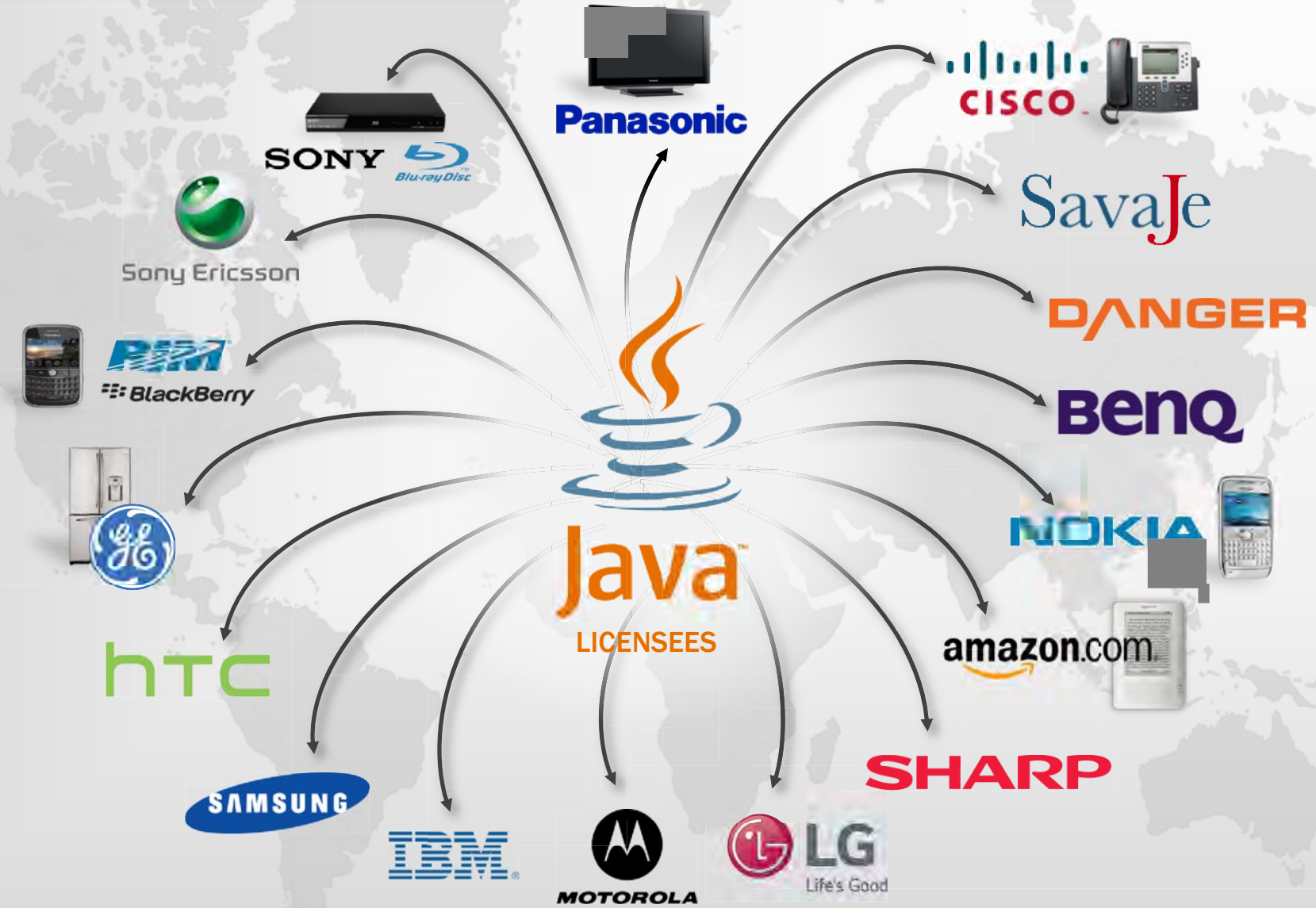
Sun microsystems

Q. All right. Can you tell us, sir, in one word the impact of Android on Java?

A. It was devastating.

Tr. at 1639: 23-25

The World's Leading Companies License Java for Their Products



Google Was the Only One That Didn't Play by the Rules

LARRY PAGE

Chief Executive Officer

Google

Q. Can you name a single company that uses Java APIs that has not taken a license from Sun or Oracle except for Google?

A. As I said, I'm not an expert on that and I already said that I didn't.

Q. Was that testimony that you gave, and do you stand by it?

A. Sure. Yes.

Tr. at 1828: 3-9

Google's CEO: "I didn't know the detail"

LARRY PAGE

Chief Executive Officer

Google

Q. You know that we are here in this courtroom today because Google copied more than 11,000 lines of computer code and the structure, sequence and organization of 37 Java API packages. Do you know that, sir?

A. No. I don't know the detail of what's alleged.

Tr. at 1826:2-6

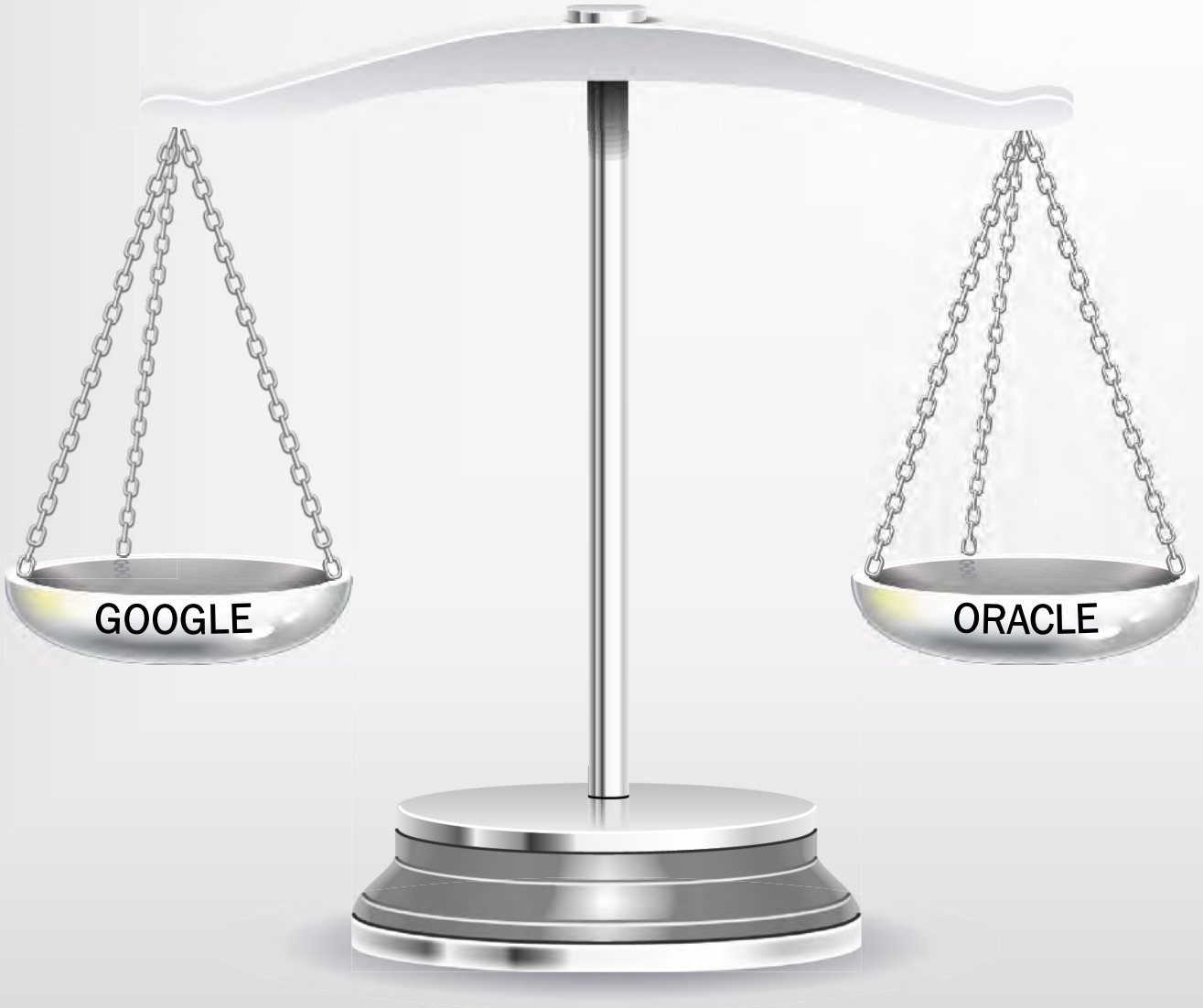
What This Case Is About

"Google's use of the declaring lines of code and the structure, sequence, and organization of those 37 API packages constituted copyright infringement unless you find that Google has carried its burden as to the defense of fair use."

Jury Instruction 20 at p. 11

GOOGLE HAS THE BURDEN OF PROOF

Weighing the Fair Use Factors



FAIR USE EXCUSE

Fair Use Factors

1

COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2

CREATIVITY

The nature of the copyrighted work;

3

SUBSTANTIALITY

The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4

MARKET HARM

The effect of the use upon the potential market for or value of the copyrighted work.

Jury Instruction 22 at p. 12

Real Examples of Fair Use

§ 107. Limitations on exclusive rights: Fair use

". . . the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as ~~criticism~~, ~~comment~~, ~~news reporting~~, ~~teaching (including multiple copies for classroom use)~~, ~~scholarship~~, or ~~research~~, is not an infringement of copyright.

17 U.S.C. § 107

Factor 1: Google Used the Java APIs for Commercial Reasons

1

COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"In evaluating the first statutory factor, the extent of the commercial nature of the accused use must be considered. In this case, all agree that Google's accused use was commercial in nature but disagree over the extent."

Jury Instruction 26 at p. 14

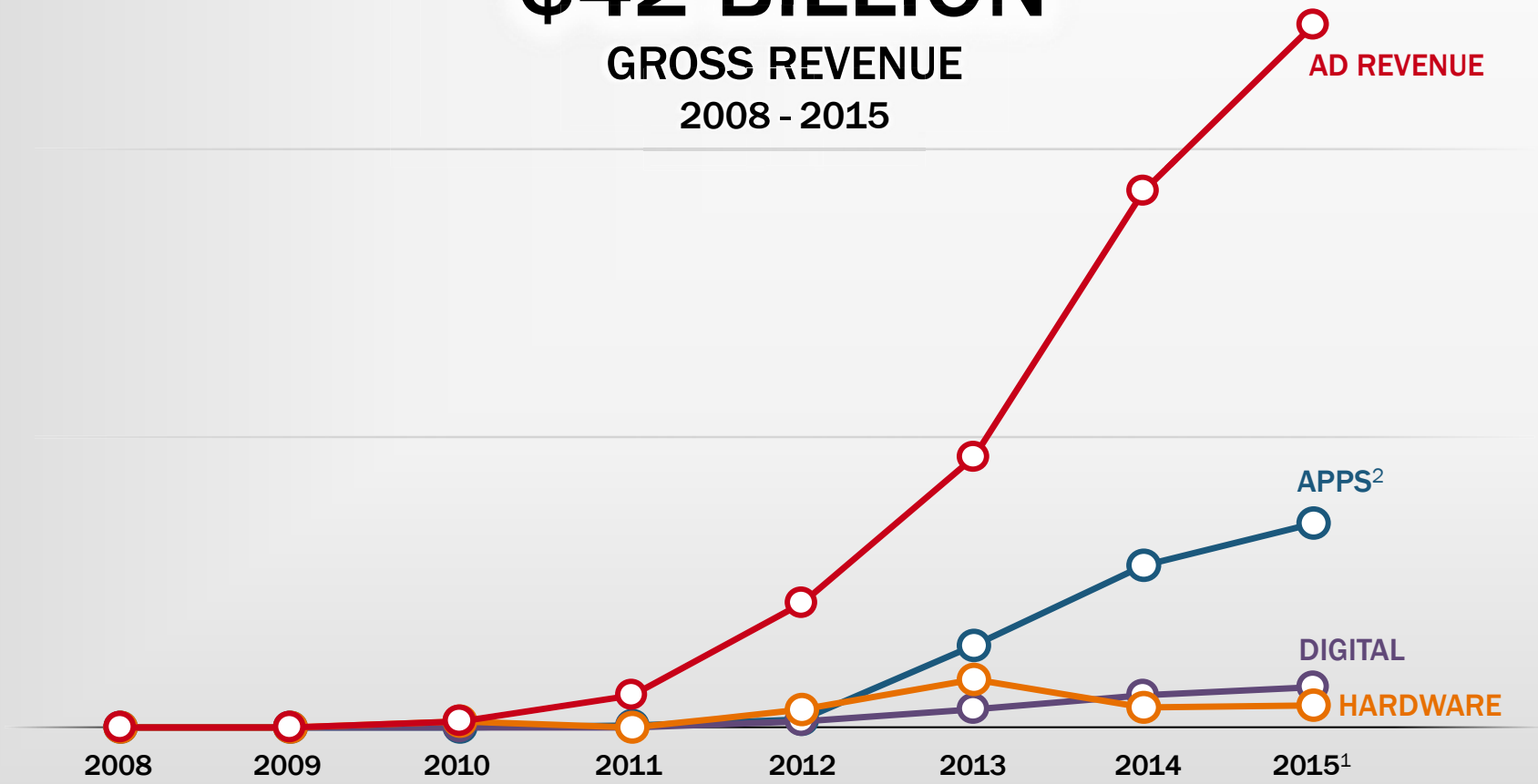
Extent of Commerciality: 42 Billion Dollars

1 COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

$42 BILLION

GROSS REVENUE

2008 - 2015



[1]Ad revenues annualized based on six-month period ending June 30th [2]Q4 2015 revenue is a Google forecast

Android: Direct Revenue Impact

1 COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

Google

Android spreads value

Direct Revenue

- **Mobile Ads Revenue Enabled on Android -- $159M FY10**
  - Search $89M, AFMA $56M, AFMC/AFMS $14M

Direct Revenue Impact

- **Mobile Ads Revenue Enabled on Android -- $159M FY10**
  - Search $89M, AFMA $56M, AFMC/AFMS $14M
- **Android Market Revenue – $3.8M FY10 ($76M of apps sales)**

Benefits to Google

- **Technology Platform Leveraged by Other Google Products**
  - E.g., GoogleTV
- **Deeper, Stronger Relationships with Partners**
  - OEM: HTC, Motorola, Samsung, LG, etc.
  - Carrier: Verizon, T-Mobile, Vodafone, etc.
  - Semiconductor: Qualcomm, Intel, Nvidia, etc.
  - Software: Adobe
  - Media: Record labels, movie studios, news organizations, etc.

Benefits to the Ecosystem

- **Improved Mobile Ecosystem**
  - Changes in user expectations -- demanding better hardware, faster connections, better internet experience on phones
  - Lower-cost data plans
  - Reduced subscriber acquisition costs (Google brand drives users to carriers)
- **Improved Advertising Ecosystem**
  - Ad formats and targeting capability unique to smartphones (e.g., location)
  - Deeper user engagement and intent signals
- **Improved Publisher Ecosystem**
  - Emergence of entirely new publishing segment – Apps
  - Incremental traffic and more engaged users

HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-21-00008130

Trial Exhibit 1061, Page 15 of 24

TX 1061 at 15

Use of the Java API Packages Led to Google's Success

1 **COMMERCIALITY** ▪ TRANSFORMATIVE ▪ GOOD FAITH

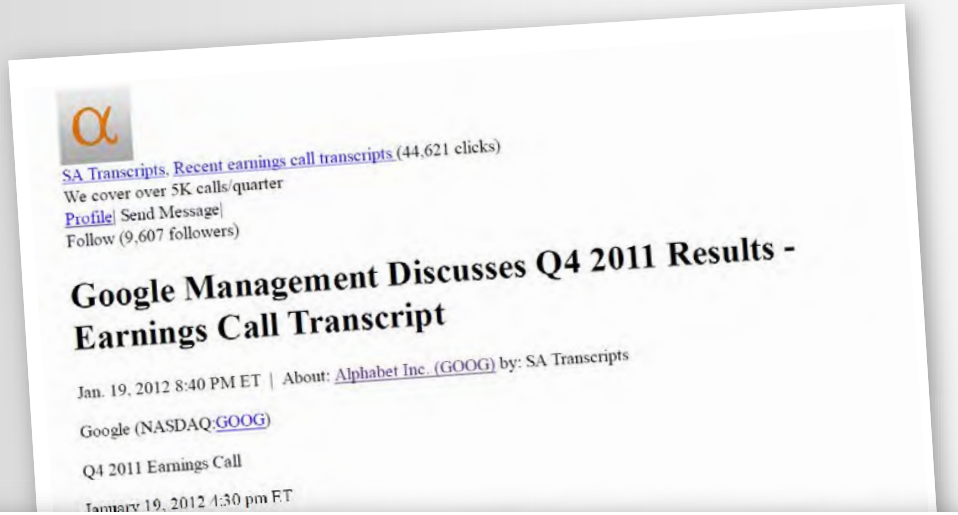
Search + Android = Huge

Q1, 2009 Presentation

TX 5183 at 7

Larry Page: Extent of Commerciality Is "Mind-boggling"

1 COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH



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Google Management Discusses Q4 2011 Results - Earnings Call Transcript

Jan. 19, 2012 8:40 PM ET | About: Alphabet Inc. (GOOG) by: SA Transcripts

Google (NASDAQ:GOOG)

Q4 2011 Earnings Call

January 19, 2012 4:30 pm ET

LARRY PAGE
Chief Executive Officer
Google

January 19, 2012:

"Android is, quite simply, mind-boggling. 700,000 phones are lit up every day. And I'm pleased to announce 250 million Android devices in total, up 50 million since our last announcement just in November. In just 2 days over the holiday weekend, 3.7 million Androids were activated. And today, we're announcing over 11 billion downloads from Android markets. Wow."

TX 6086 at 4

The 37 API Packages are in Every Android Phone

1 COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

ERIC SCHMIDT
Executive Chairman

Google

Q. And if we roll forward -- so this is 2011. He's saying 550,000 per day. You said, in about 2013, that you were at 1.5 million activations per day. Does that sound about right?

A. That's correct.

Q. And each and every one of those activations has the design of those 37 packages in it; right? Every one of those phones.

A. Yes.

Tr. at 398:1-8

Android Is Hugely Profitable

1 COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

ERIC SCHMIDT
Executive Chairman

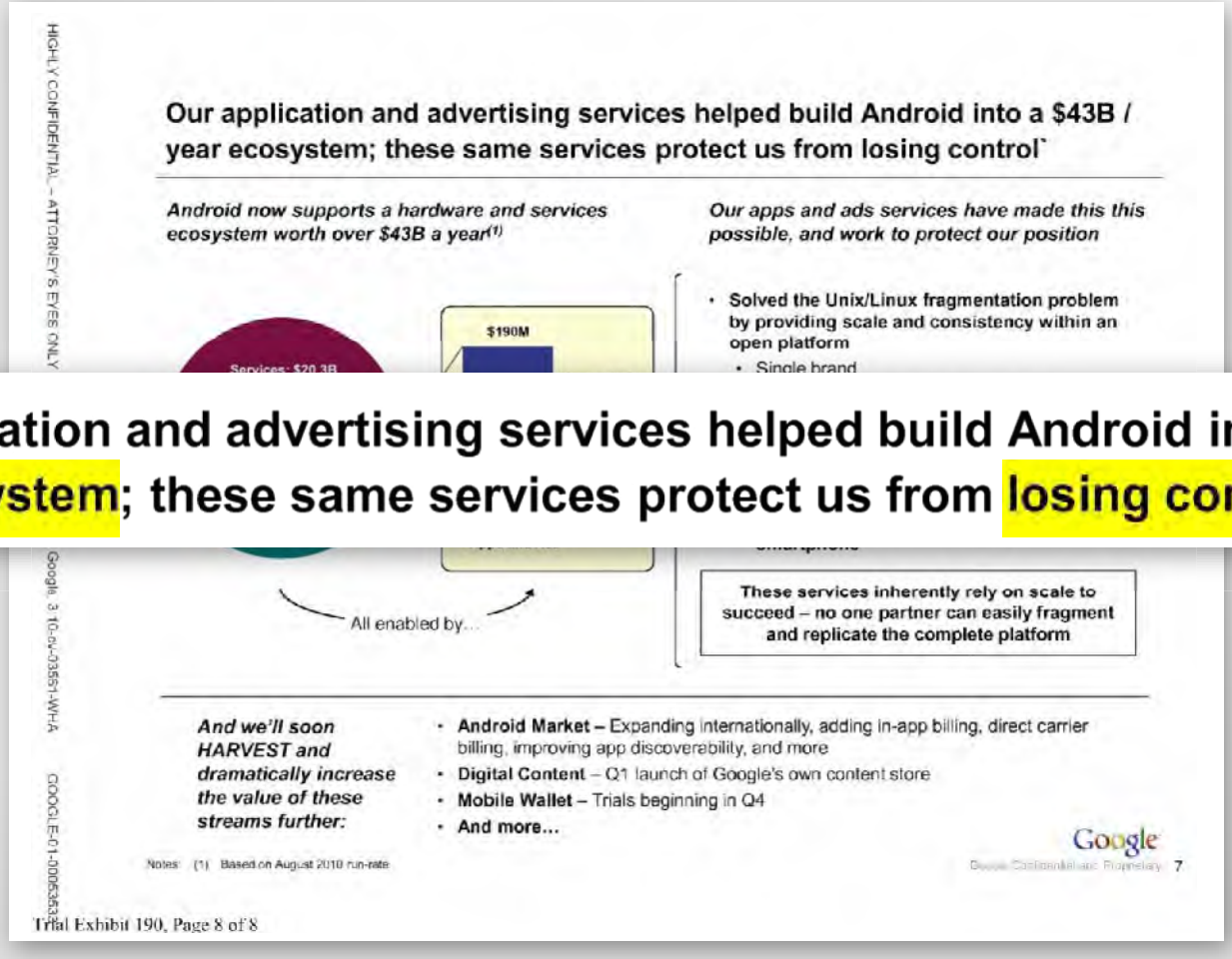
Google

"So, again, it's more lucrative. So, not only is there more searches, and there's more ads, but it's also more lucrative. So, on that basis alone, Android is hugely profitable."

TX 951 at 9 (Oct. 14, 2010)

Android: A $43 Billion/Year Ecosystem

1 COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH



HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY

Our application and advertising services helped build Android into a $43B / year ecosystem; these same services protect us from losing control`

Android now supports a hardware and services ecosystem worth over $43B a year(1)

Our apps and ads services have made this this possible, and work to protect our position

- Solved the Unix/Linux fragmentation problem by providing scale and consistency within an open platform
  - Single brand

$190M

All enabled by…

These services inherently rely on scale to succeed – no one partner can easily fragment and replicate the complete platform

And we'll soon HARVEST and dramatically increase the value of these streams further:

- **Android Market** – Expanding internationally, adding in-app billing, direct carrier billing, improving app discoverability, and more
- **Digital Content** – Q1 launch of Google's own content store
- **Mobile Wallet** – Trials beginning in Q4
- **And more…**

Notes: (1) Based on August 2010 run-rate

Google

Google Confidential and Proprietary 7

Google, 3:10-cv-03561-WHA GOOGLE-01-0006353

Trial Exhibit 190, Page 8 of 8

Our application and advertising services helped build Android into a $43B / year ecosystem; these same services protect us from losing control`

TX 190 at 8

2010

Google's Use Is Highly Commercial

1 COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

ADAM JAFFE
Economics Expert

Q. And then as an economist, what is your opinion as to the -- what extent, if any, Google's use of the Java API packages is of a commercial nature?

A. So I think it was highly commercial. It was very central to their overall business strategy as a company. And it produced a very large amount of revenue.

Tr. at 1763:19-24

Factor 1: Google's Use of the Java API Packages Was Not Transformative

1

COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"A use is transformative if it adds something new, with a further purpose or different character, altering the first use with new expression, meaning or message rather than merely superseding the objects of the original creation. New works have been found transformative when they use copyrighted material for purposes distinct from the purpose of the original material."

- For a Distinct Purpose
- Alter Expressive Content
- Not a Substitute (superseding use)

Jury Instruction 24 at p. 13

Google's Copying of the Java API Packages…

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

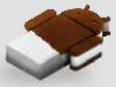
WAS NOT for a Distinct Purpose

DID NOT Alter Expressive Content

WAS a Substitute (superseding use)

Google Copied Line-for-line

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

	API VERSION	# OF LINES OF DECLARING CODE COPIED
Gingerbread	9	11,578
	10	11,578
Honeycomb	11	11,578
	12	11,578
	13	11,578
Ice Cream Sandwich 	14	11,432
	15	11,432
Jelly Bean	16	11,433
	17	11,434
	18	11,460
KitKat	19	11,470
	20	11,471
Lollipop	21	11,475
	22	11,475
Marshmallow	23	11,457

Google Witnesses Admitted: Android Uses the Java APIs for the Same Purpose

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

ANWAR GHULOUM
Google Engineering Manager

Google

Q. Do you agree with me that the – that Java classes and methods that are reproduced in Android serve the same purpose in Android that they serve in Java?

A. Yeah, I believe they serve the same purpose.

Depo. at 183:5-11

RETO MEIER
Android Developer Advocate

Google

Q. Because the Java APIs are used in the same way when writing an application for Java as they would be used when writing an application for Android; correct?

A. The Java APIs that are available in both platforms, you would expect them to work in the same way, yes.

Depo. at 105:24–106:5

Everyone Agrees: Android's Use of The Java APIs Was For The Same Purpose

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

DOUG SCHMIDT

Oracle Expert

The APIs are used in Android – the 37 copied APIs are used in Android for precisely the same purpose that they're used in Java…
So they're not altered.

Tr. at 1547:2-4

Google Copied the 37 Java API Packages and Used Them for the Same Purpose

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

DOUG SCHMIDT

Oracle Expert

Q. If we think about that from a developers' perspective in the security package, what's the significance of it having the same purpose?

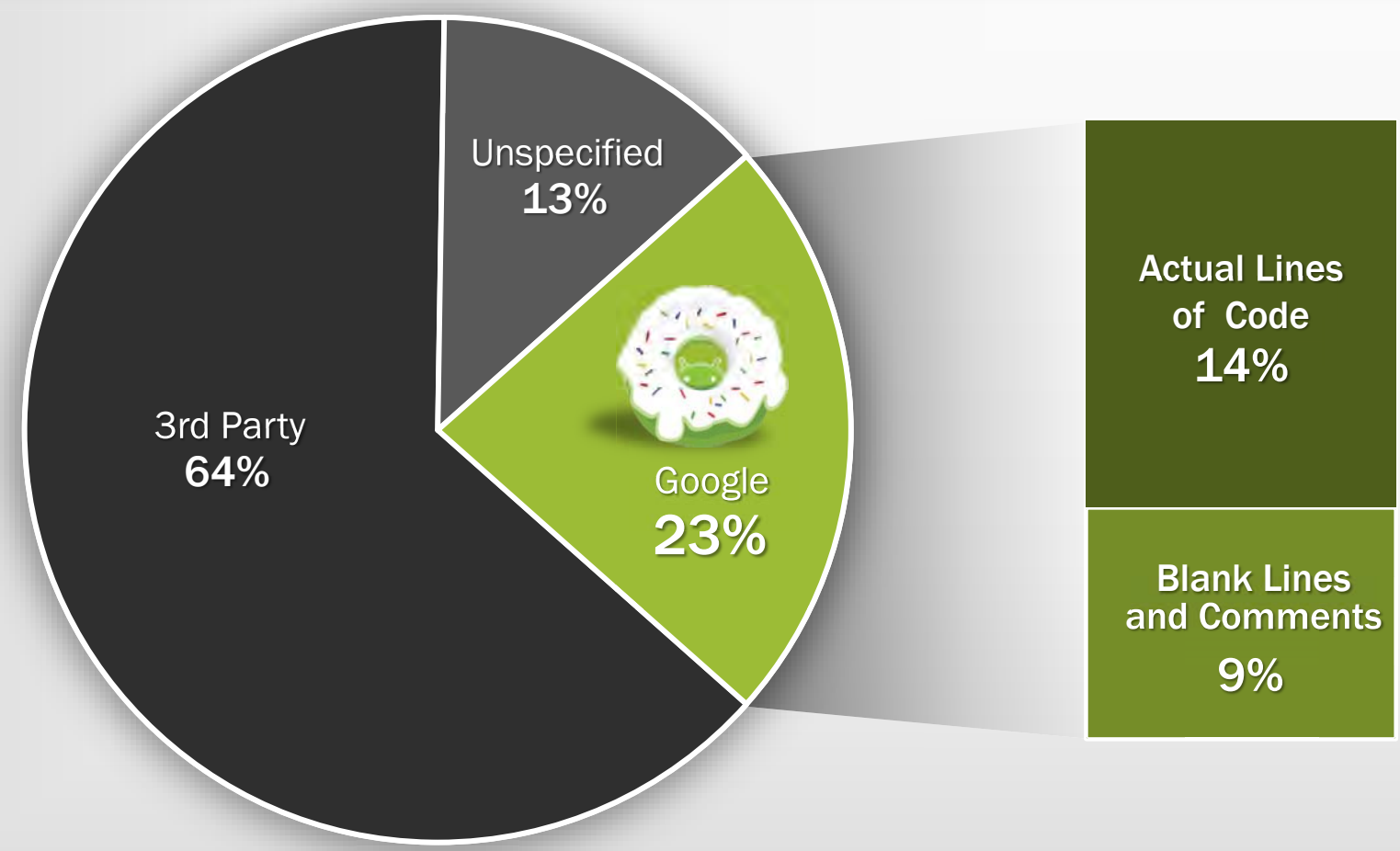
A. So it would mean that if somebody knew how to use security in Java SE, they would also know how to use this in the same way in Android.

java.awt.font	java.text
java.beans	java.util
java.io	java.util.jar
java.lang	java.util.logging
java.lang.annotation	java.util.prefs
java.lang.ref	java.util.regex
java.lang.reflect	java.util.zip
java.net	javax.crypto
java.nio	javax.crypto.interfaces
java.nio.channels	javax.crypto.spec
java.nio.channels.spi	javax.net
java.nio.charset	javax.net.ssl
java.nio.charset.spi	javax.security.auth
java.security	javax.security.auth.callback
java.security.acl	javax.security.auth.login
java.security.cert	javax.security.auth.x500
java.security.interfaces	javax.security.cert
java.security.spec	javax.sql
java.sql	

java.awt.font	java.text
java.beans	java.util
java.io	java.util.jar
java.lang	java.util.logging
java.lang.annotation	java.util.prefs
java.lang.ref	java.util.regex
java.lang.reflect	java.util.zip
java.net	javax.crypto
java.nio	javax.crypto.interfaces
java.nio.channels	javax.crypto.spec
java.nio.channels.spi	javax.net
java.nio.charset	javax.net.ssl
java.nio.charset.spi	javax.security.auth
java.security	javax.security.auth.callback
java.security.acl	javax.security.auth.login
java.security.cert	javax.security.auth.x500
java.security.interfaces	javax.security.cert
java.security.spec	javax.sql
java.sql	

Google Wrote Only 23% of Android

1 COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH



Authorship of Android Code (Donut)

The True Facts About Java in Mobile Phones Before Android

1 COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

Java was in mobile phones before the launch of Android:

- Sun **licensed Java SE** for use in **smartphones**
- Sun **licensed Java ME** for use in feature and **smartphones**
- Java was **in feature and smartphones** before the launch of Android
- Industry expectation for **desktop applications to go mobile**

Java Was in Over 85% of Market (Pre-Android)

1 COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

NEAL CIVJAN

Former VP Worldwide
OEM Software Sales

Sun microsystems

Q. And how successful, if at all, was Sun in licensing the Java platform into the mobile phone market?

A. Extremely successful. As I said, we were in over 85 percent of the market. We were pretty much ubiquitous.

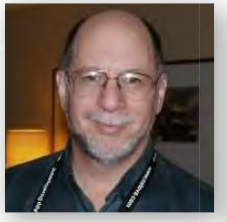
Tr. at 1624: 21-24

Android Substituted for Oracle's Java In the Phone Market

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

Mobile Phone Continuum

ALAN BRENNER:



Q. And looking, again, at that specific time frame in 2006, what percentage of smartphones were Java-powered at that time?

A. Nearly a hundred percent at that point.

Tr. at 1667:10-12

NEAL CIVJAN:

Q. Our jury has heard the phrase *smartphone*. Was Java in smartphones at this time period?

A. Absolutely, yes.

Tr. at 1622:9-12

TX 5397 - Expert Report of Adam Jaffe (2/8/16), Figure 15

Java Was in Smartphones

1 COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

RIM

DANGER

SavaJe

SavaJe Was a Full Stack Operating System With Java SE

1 COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

ALAN BRENNER

Senior VP,
Client Systems Group

Sun microsystems

Q. And what is the SavaJE phone?

A. SavaJE phone is – there were a couple I'm aware of. One from LG, I believe. And another was the Jasper S20. These phones were built on an operating system developed by SavaJE, that was based directly on Java SE, and was compatible with Java SE as well as Java ME.

Tr. at 1670:17-22

DOUG SCHMIDT

Oracle Expert

Q. On the left, what is this? SavaJe?

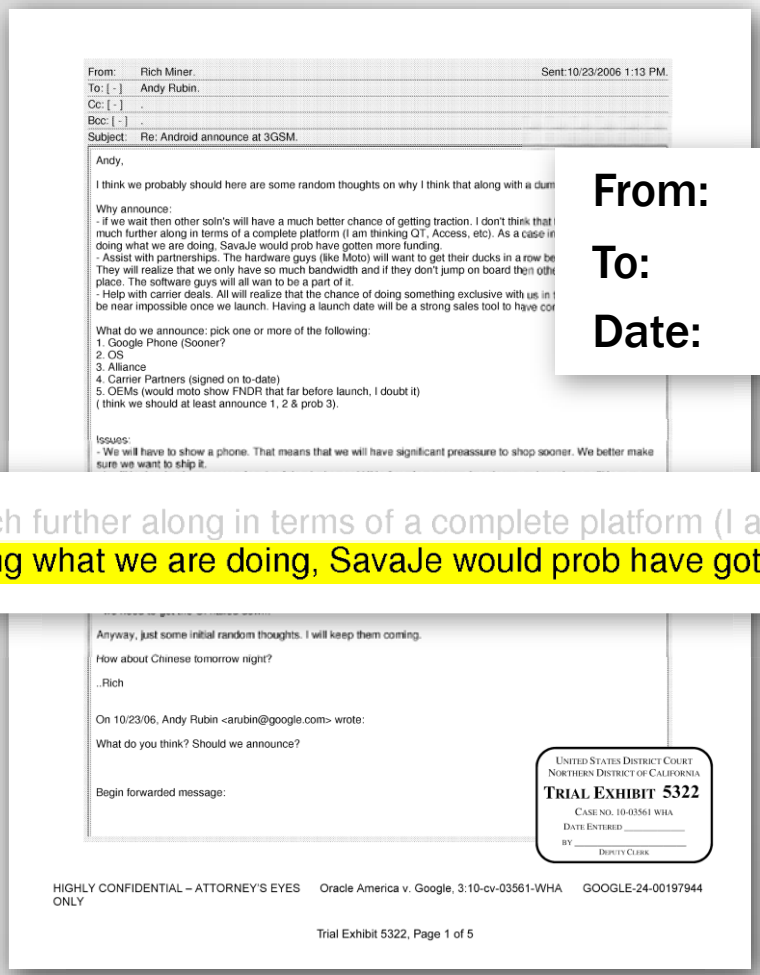
A. On the left is a full stack operating system called SavaJe. Kind of a funny name.

Tr. at 1540:16-18

SavaJe

Android Was a Substitute for SavaJe

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH



From: Rich Miner. Sent:10/23/2006 1:13 PM.
To: [-] Andy Rubin.
Cc: [-] .
Bcc: [-] .
Subject: Re: Android announce at 3GSM.

Andy,

I think we probably should here are some random thoughts on why I think that along with a dum

Why announce:
- if we wait then other soln's will have a much better chance of getting traction. I don't think that
much further along in terms of a complete platform (I am thinking QT, Access, etc). As a case in
doing what we are doing, SavaJe would prob have gotten more funding.
- Assist with partnerships. The hardware guys (like Moto) will want to get their ducks in a row be
They will realize that we only have so much bandwidth and if they don't jump on board then othe
place. The software guys will all wan to be a part of it.
- Help with carrier deals. All will realize that the chance of doing something exclusive with us in
be near impossible once we launch. Having a launch date will be a strong sales tool to have co

What do we announce: pick one or more of the following:
1. Google Phone (Sooner?
2. OS
3. Alliance
4. Carrier Partners (signed on to-date)
5. OEMs (would moto show FNDR that far before launch, I doubt it)
(think we should at least announce 1, 2 & prob 3).

Issues:
- We will have to show a phone. That means that we will have significant preassure to shop sooner. We better make sure we want to ship it.

Anyway, just some initial random thoughts. I will keep them coming.

How about Chinese tomorrow night?

..Rich

On 10/23/06, Andy Rubin <arubin@google.com> wrote:

What do you think? Should we announce?

Begin forwarded message:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
TRIAL EXHIBIT 5322
CASE NO. 10-03561 WHA
DATE ENTERED _____
BY _____
DEPUTY CLERK

HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-24-00197944

Trial Exhibit 5322, Page 1 of 5

From: Rich Miner
To: Andy Rubin
Date: 10/23/2006

much further along in terms of a complete platform (I am thinking QT, Access, etc). As a case in point, if we were not doing what we are doing, SavaJe would prob have gotten more funding.

TX 5322

Danger Used Java SE in a Smartphone

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

ANDY RUBIN
Head of Android

Google

At Danger: "We built, I think, what could be called one of the first smartphones."

Tr. at 619:11-12

Q. And you put Java 2 SE APIs in Hiptop; is that right?

A. Yes. We created our own implementation of the Java 2 SE APIs for Hiptop.

Tr. at 887:22-24

Clear Substitution

1 COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

HTC Touch Pro (2008)

LICENSED/
NO INFRINGEMENT

HTC Dream (2008)

NO LICENSE/
INFRINGEMENT

Android Was a Substitute

1 COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

ANDY RUBIN
Head of Android

Google

"…this was a space that Sun was already in. They were selling things to the mobile industry, and by not -- by basically, like, my failure to partner with them, turned them – turned us into a competitive nature. We were both targeting the same industry with similar products."

Tr. at 844:18-22

Android Was a Competitor to Sun

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

JONATHAN SCHWARTZ

Former CEO

Sun microsystems

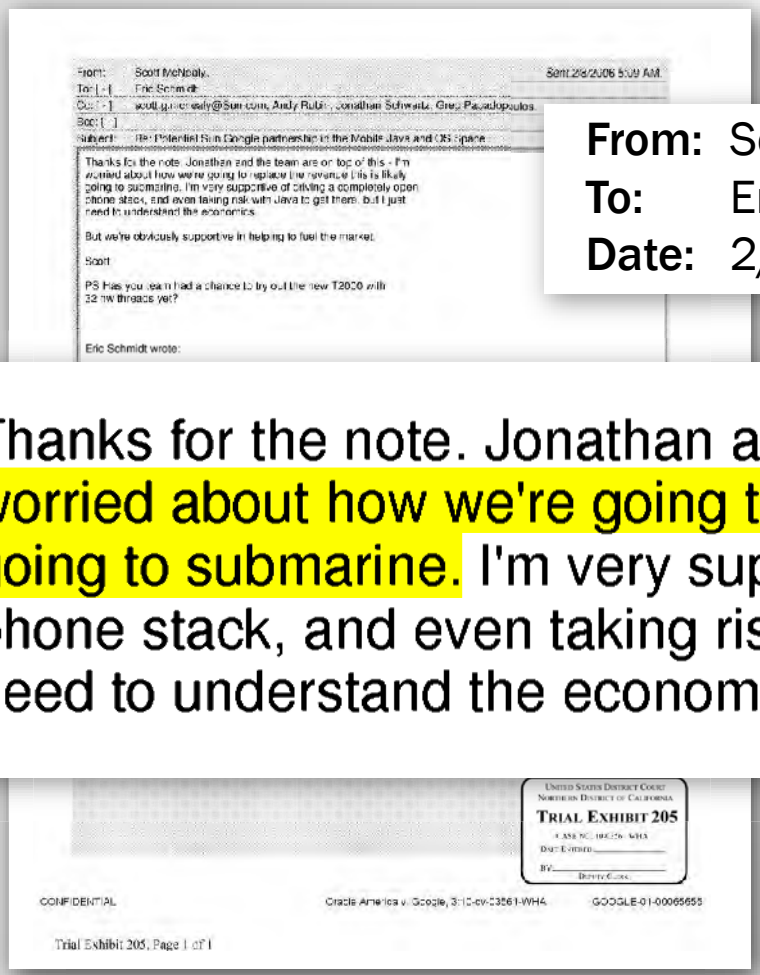
Q. Well, the fact of the matter is you were not, as these emails show -- and I'm going to show you some more. You were not exactly thrilled with what was going on; right?

A. I was certainly frustrated that we had a new competitor.

Tr. at 590:17-20

Submarining Revenue

1 COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH


From: Scott McNealy
Sent: 2/8/2005 5:09 AM
To: [-] Eric Schmidt
Cc: [-] scott.mcnealy@Sun.com, Andy Rubin, Jonathan Schwartz, Greg Papadopoulos
Bcc: [ ]
Subject: RE: Potential Sun (Google partnership in the Mobile Java and OS space

Thanks for the note. Jonathan and the team are on top of this - I'm worried about how we're going to replace the revenue this is likely going to submarine. I'm very supportive of driving a completely open phone stack, and even taking risk with Java to get there, but I just need to understand the economics.

But we're obviously supportive in helping to fuel the market.

Scott

PS Has you team had a chance to try out the new T2000 with 32 hw threads yet?

Eric Schmidt wrote:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
TRIAL EXHIBIT 205
CASE NO.: 10-CV-3561-WHA
DATE ENTERED: _____
BY: _____ DEPUTY CLERK

CONFIDENTIAL Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-01-00065655

Trial Exhibit 205, Page 1 of 1

From: Scott McNealy
To: Eric Schmidt
Date: 2/8/2005

Thanks for the note. Jonathan and the team are on top of this - I'm worried about how we're going to replace the revenue this is likely going to submarine. I'm very supportive of driving a completely open phone stack, and even taking risk with Java to get there, but I just need to understand the economics.

TX 205

Jaffe: Android Was a Substitute

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

ADAM JAFFE
Oracle Economics Expert

> [T]he phones that were based on Android were a substitute for the phones that could license and did license the Java APIs.

Tr. at 1768:17-19

Barr's Use of the Word "Transformative"

1 ✓ COMMERCIALITY ▪ **TRANSFORMATIVE** ▪ GOOD FAITH

TERRENCE BARR'S TESTIMONY:

Q. Is Apple's IOS operating system transformative?

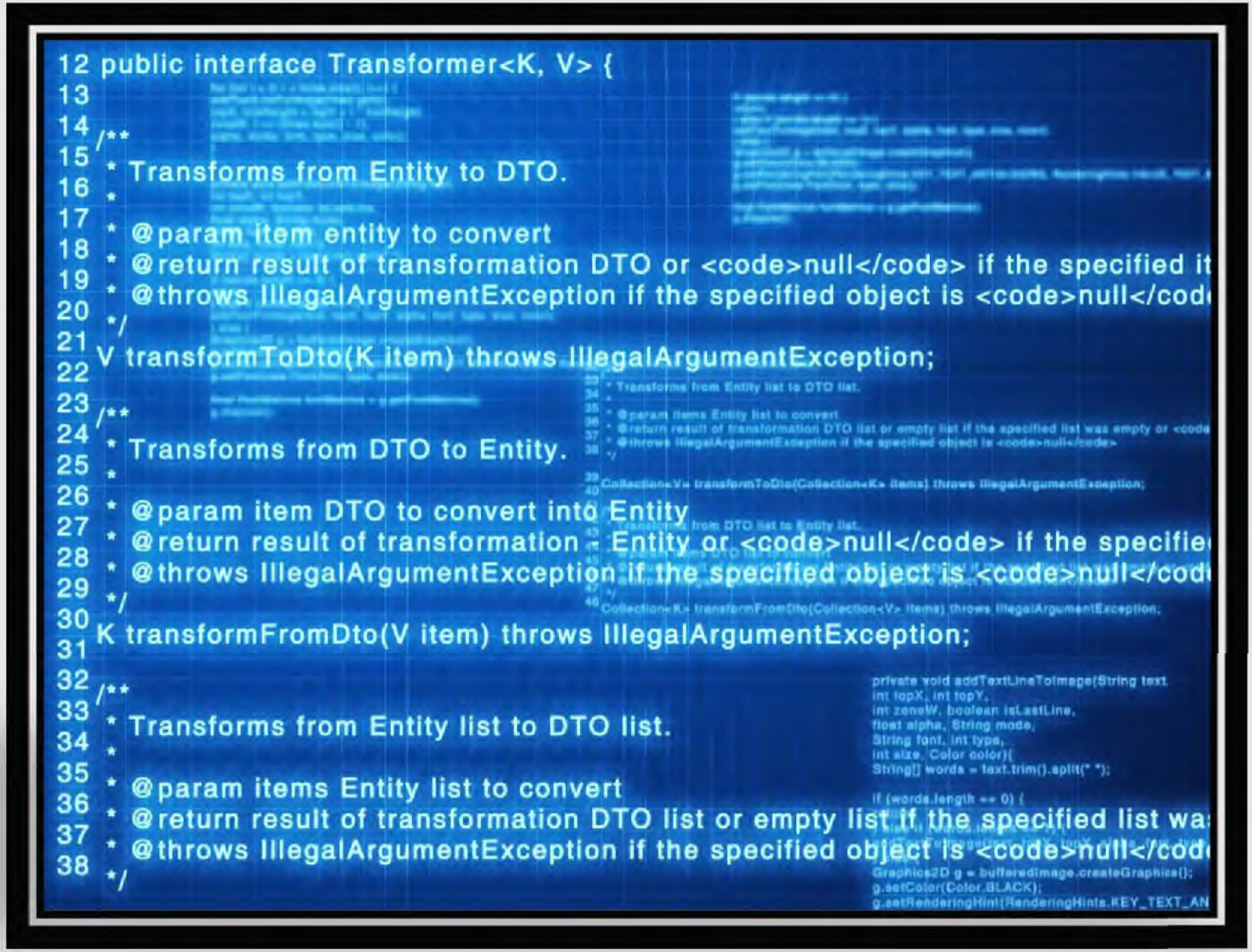
A. "Transformative" is a really vague term, so I'm not sure if I can answer that."

BUT...

Q. In other words, did it change the status quo in a very significant way when it came out?

A. The status quo of the mobile industry, yes.

Depo. at 137:25-138:10


public interface Transformer<K, V> {
/**
* Transforms from Entity to DTO.
*
* @param item entity to convert
* @return result of transformation DTO or <code>null</code> if the specified it
* @throws IllegalArgumentException if the specified object is <code>null</cod
*/
V transformToDto(K item) throws IllegalArgumentException;
/**
* Transforms from DTO to Entity.
*
* @param item DTO to convert into Entity
* @return result of transformation - Entity or <code>null</code> if the specifie
* @throws IllegalArgumentException if the specified object is <code>null</cod
*/
K transformFromDto(V item) throws IllegalArgumentException;
/**
* Transforms from Entity list to DTO list.
*
* @param items Entity list to convert
* @return result of transformation DTO list or empty list if the specified list wa
* @throws IllegalArgumentException if the specified object is <code>null</cod
*/

Factor 1: Google's Use of the Java API Packages Was Not Transformative

1

COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"…the less transformative the accused work, the more other factors like commercialism will dominate."

Jury Instruction 26 at p. 14

Factor 1: Google Acted in Bad Faith

1

COMMERCIALITY ▪ TRANSFORMATIVE ▪ **GOOD FAITH**

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

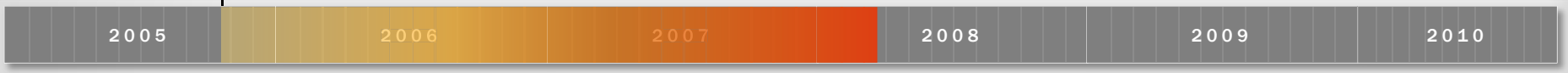
"Also relevant to the first statutory factor is the propriety of the accused infringer's conduct because fair use presupposes good faith and fair dealing."

Jury Instruction 27 at p. 14

Google Acted in Bad Faith

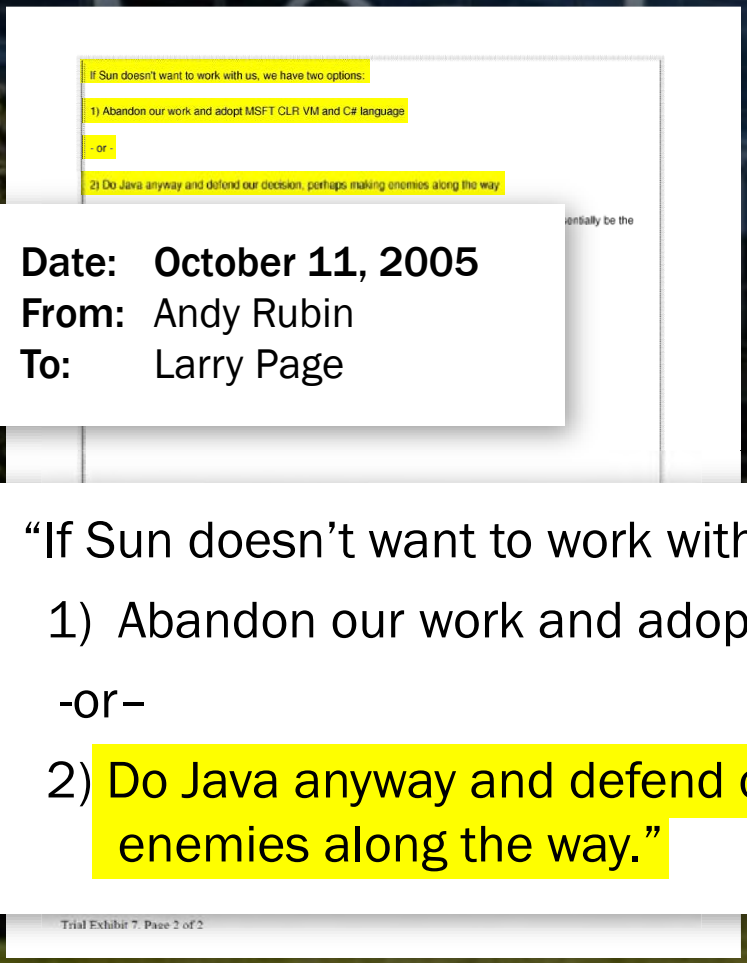
10/11/05
"We'll pay Sun for the license"

"Do Java anyway …perhaps making enemies along the way."
(TX 7)



Google Chose to Make "Enemies" Rather Than Take a License

1 ✓ COMMERCIALITY ▪ TRANS✗RMATIVE ▪ GOOD FAITH


If Sun doesn't want to work with us, we have two options:

1) Abandon our work and adopt MSFT CLR VM and C# language

- or -

2) Do Java anyway and defend our decision, perhaps making enemies along the way

...entially be the

Trial Exhibit 7, Page 2 of 2

Date: **October 11, 2005**
From: Andy Rubin
To: Larry Page

"If Sun doesn't want to work with us, we have two options:

1) Abandon our work and adopt MSFT CLR VM and C# language

-or–

2) Do Java anyway and defend our decision, perhaps making enemies along the way."

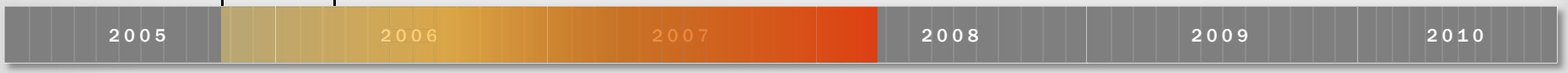
TX 7 at 2

Google Acted in Bad Faith

3/24/06
APIs "are copyrighted"
(TX 18)

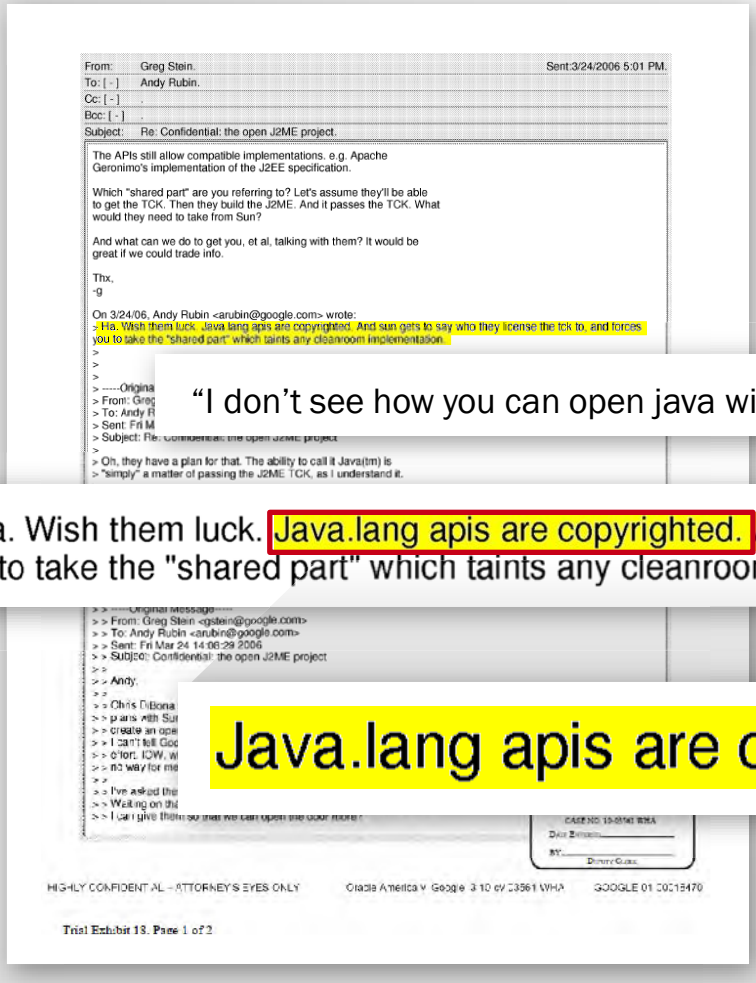
10/11/05
"We'll pay Sun for the license"

"Do Java anyway …perhaps making enemies along the way."
(TX 7)



Google Knew Java API Packages Were Copyrighted

1 ✓ COMMERCIALITY ▪ TRANSFORMATIVE ✗ ▪ GOOD FAITH



From: Greg Stein. Sent:3/24/2006 5:01 PM.
To: [-] Andy Rubin.
Cc: [-]
Bcc: [-]
Subject: Re: Confidential: the open J2ME project.

The APIs still allow compatible implementations. e.g. Apache Geronimo's implementation of the J2EE specification.

Which "shared part" are you referring to? Let's assume they'll be able to get the TCK. Then they build the J2ME. And it passes the TCK. What would they need to take from Sun?

And what can we do to get you, et al, talking with them? It would be great if we could trade info.

Thx,
-g

On 3/24/06, Andy Rubin <arubin@google.com> wrote:
> Ha. Wish them luck. Java.lang apis are copyrighted. And sun gets to say who they license the tck to, and forces you to take the "shared part" which taints any cleanroom implementation.

HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY Oracle America v. Google 3:10-cv-03561-WHA GOOGLE 01 20218470

Trial Exhibit 18. Page 1 of 2

From: Andy Rubin
To: Greg Stein
Date: 3/24/2006

"I don't see how you can open java without sun, since they own the brand and ip."

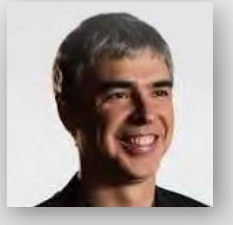
> Ha. Wish them luck. Java.lang apis are copyrighted. And sun gets to say who they license the tck to, and forces you to take the "shared part" which taints any cleanroom implementation.

Java.lang apis are copyrighted.

TX 18 at 1

Google Knew Java API Packages Were Copyrighted

1 ✓ COMMERCIALITY ▪ TRANSFORMATIVE ✗ ▪ GOOD FAITH



LARRY PAGE
Google CEO

Q. And did [Mr. Rubin] share with you information where he stated that the java.lang APIs are copyrighted. Did he share that with you?
A. Java.lang APIs?
Q. Yes. Did he share that information with you.
A. Yes. I believe he did share that information with me.

Tr. at 1829:12-17

BRIAN SWETLAND
Google Sr. Staff Engineer

I had heard in passing in the Danger time frame that Sun had at one point made some claim about owning copyright on the API method signatures.

Depo. at 181:1-3

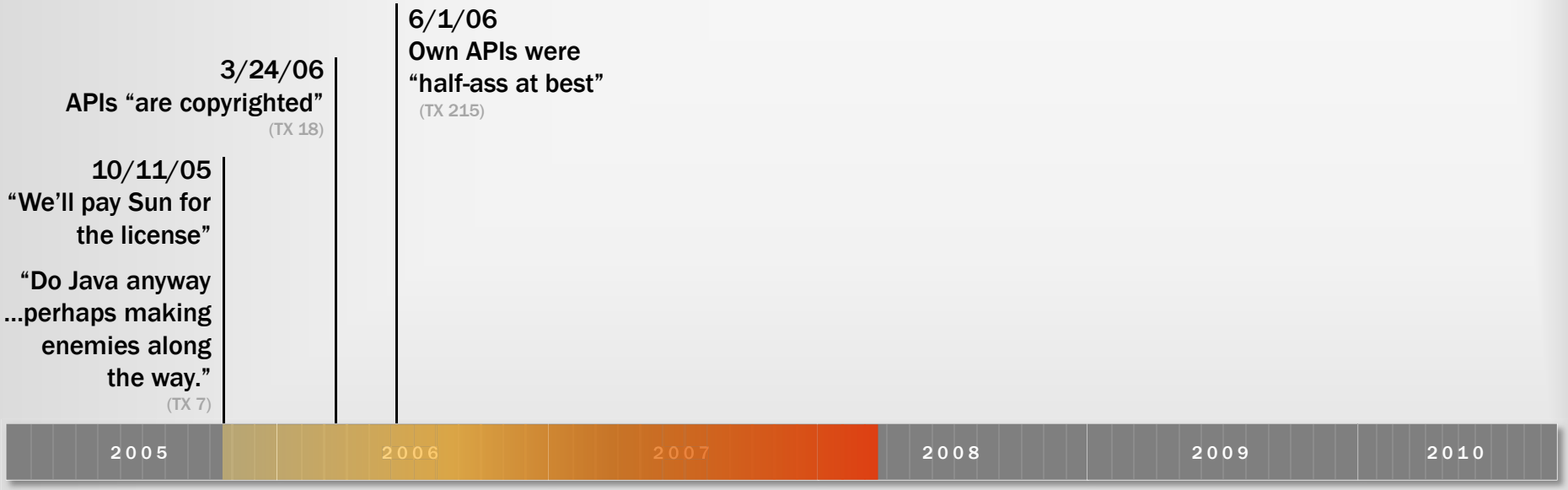
BOB LEE
Java Architect

Q. Did you observe any copyright notices on the specifications?

A. Yes.

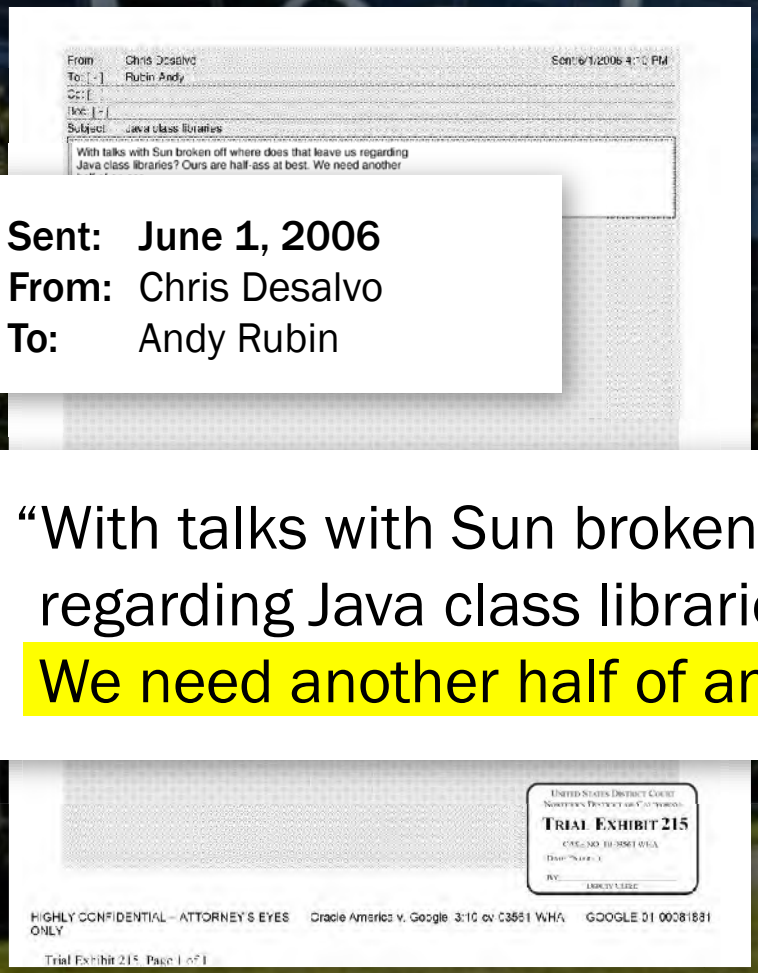
Depo. at 66:17-19

Google Acted in Bad Faith



Google Had No Alternatives

1 ✓ COMMERCIALITY ▪ TRANS✗RMATIVE ▪ GOOD FAITH

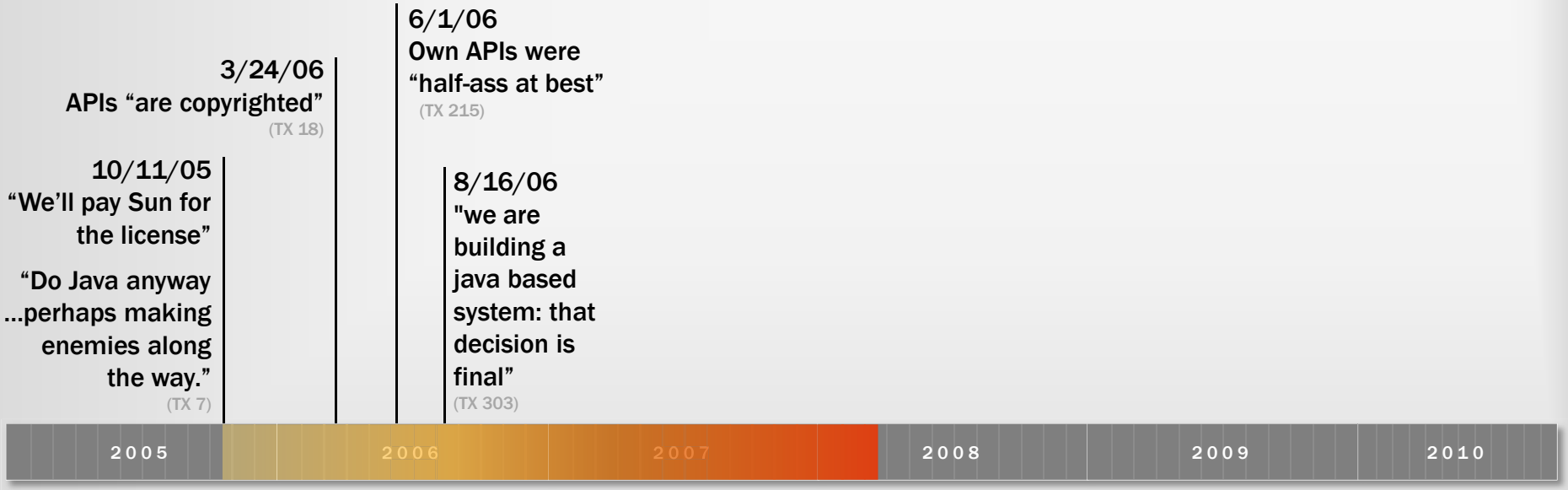


Sent: **June 1, 2006**
From: Chris Desalvo
To: Andy Rubin

"With talks with Sun broken off where does that leave us regarding Java class libraries? Ours are half-ass at best. We need another half of an ass."

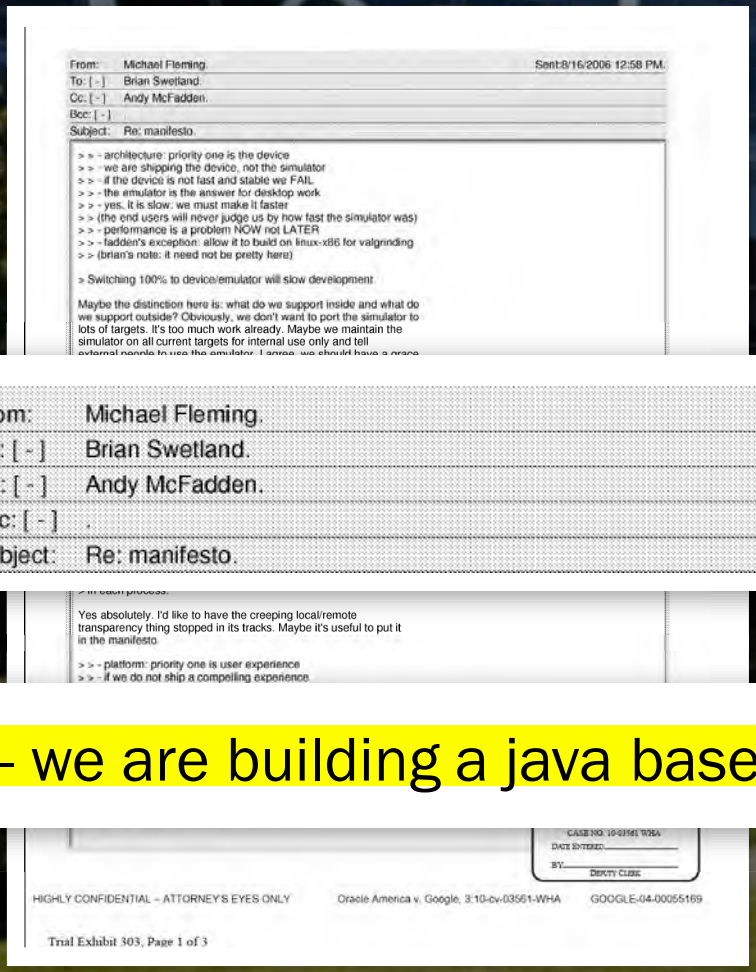
TX 215

Google Acted in Bad Faith



Google Chose to Move Forward Without a License

1 ✓ COMMERCIALITY ▪ TRANS✗RMATIVE ▪ GOOD FAITH



From: Michael Fleming. Sent:8/16/2006 12:58 PM.
To: [-] Brian Swetland.
Cc: [-] Andy McFadden.
Bcc: [-]
Subject: Re: manifesto.

> > - architecture: priority one is the device
> > - we are shipping the device, not the simulator
> > - if the device is not fast and stable we FAIL
> > - the emulator is the answer for desktop work
> > - yes, it is slow: we must make it faster
> > (the end users will never judge us by how fast the simulator was)
> > - performance is a problem NOW not LATER
> > - fadden's exception: allow it to build on linux-x86 for valgrinding
> > (brian's note: it need not be pretty here)

> Switching 100% to device/emulator will slow development

Maybe the distinction here is: what do we support inside and what do we support outside? Obviously, we don't want to port the simulator to lots of targets. It's too much work already. Maybe we maintain the simulator on all current targets for internal use only and tell

Yes absolutely. I'd like to have the creeping local/remote transparency thing stopped in its tracks. Maybe it's useful to put it in the manifesto.

> > - platform: priority one is user experience
> > - if we do not ship a compelling experience

HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-04-00055169

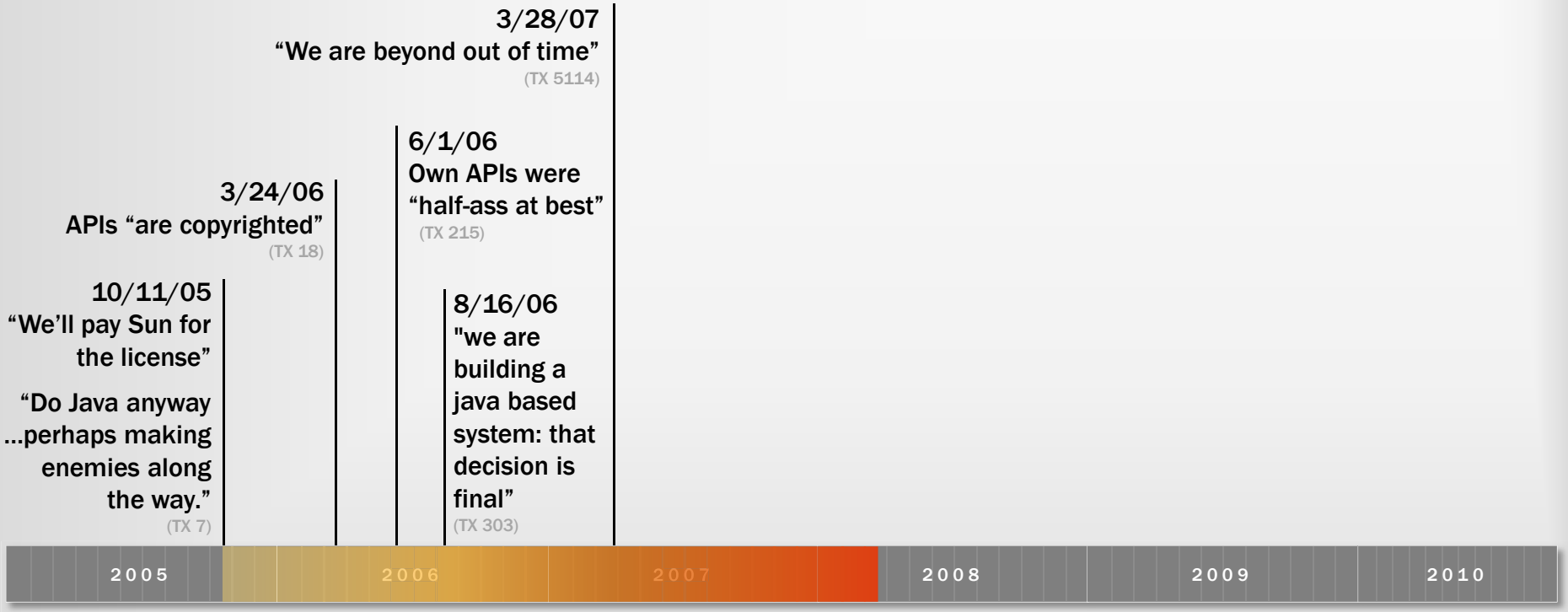
Trial Exhibit 303, Page 1 of 3

From: Michael Fleming. Sent:8/16/2006 12:58 PM.
To: [-] Brian Swetland.
Cc: [-] Andy McFadden.
Bcc: [-]
Subject: Re: manifesto.

"- we are building a java based system: that decision is final"

TX 303 at 2

Google Acted in Bad Faith

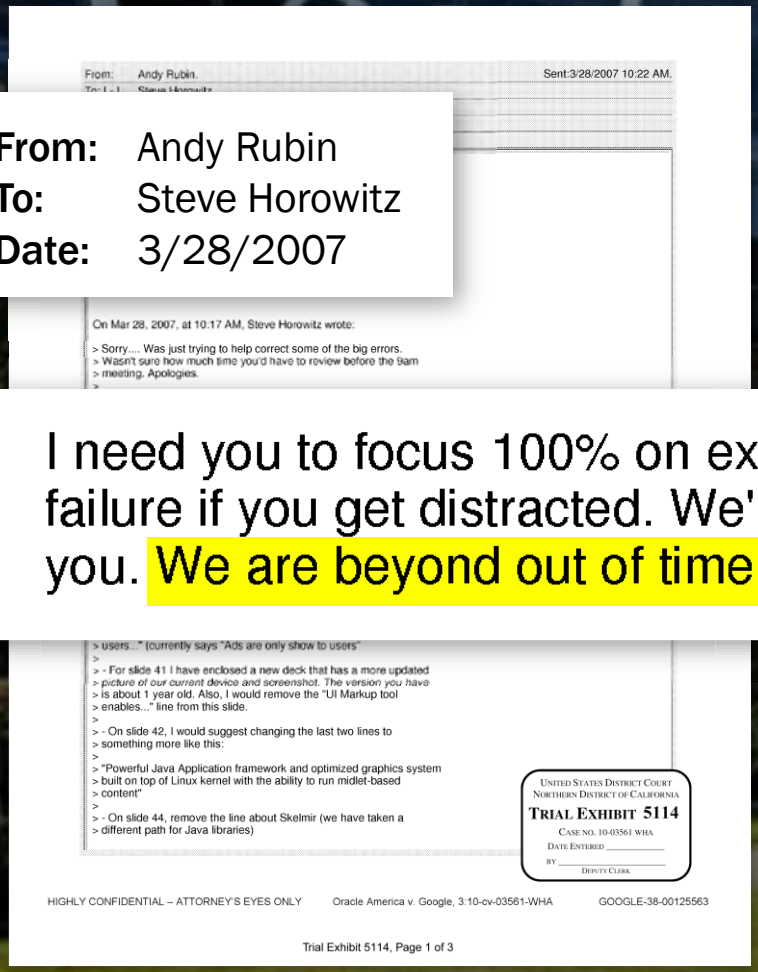


Running Out of Time

1 ✓ COMMERCIALITY ▪ TRANS✗RMATIVE ▪ GOOD FAITH

From: Andy Rubin
To: Steve Horowitz
Date: 3/28/2007

I need you to focus 100% on execution of the handset. We risk failure if you get distracted. We'll talk later about how I can help you. We are beyond out of time.


From: Andy Rubin. Sent:3/28/2007 10:22 AM.

On Mar 28, 2007, at 10:17 AM, Steve Horowitz wrote:

> Sorry.... Was just trying to help correct some of the big errors.
> Wasn't sure how much time you'd have to review before the 9am
> meeting. Apologies.

> users..." (currently says "Ads are only show to users"
>
> - For slide 41 I have enclosed a new deck that has a more updated
> picture of our current device and screenshot. The version you have
> is about 1 year old. Also, I would remove the "UI Markup tool
> enables..." line from this slide.
>
> - On slide 42, I would suggest changing the last two lines to
> something more like this:
>
> "Powerful Java Application framework and optimized graphics system
> built on top of Linux kernel with the ability to run midlet-based
> content"
>
> - On slide 44, remove the line about Skelmir (we have taken a
> different path for Java libraries)

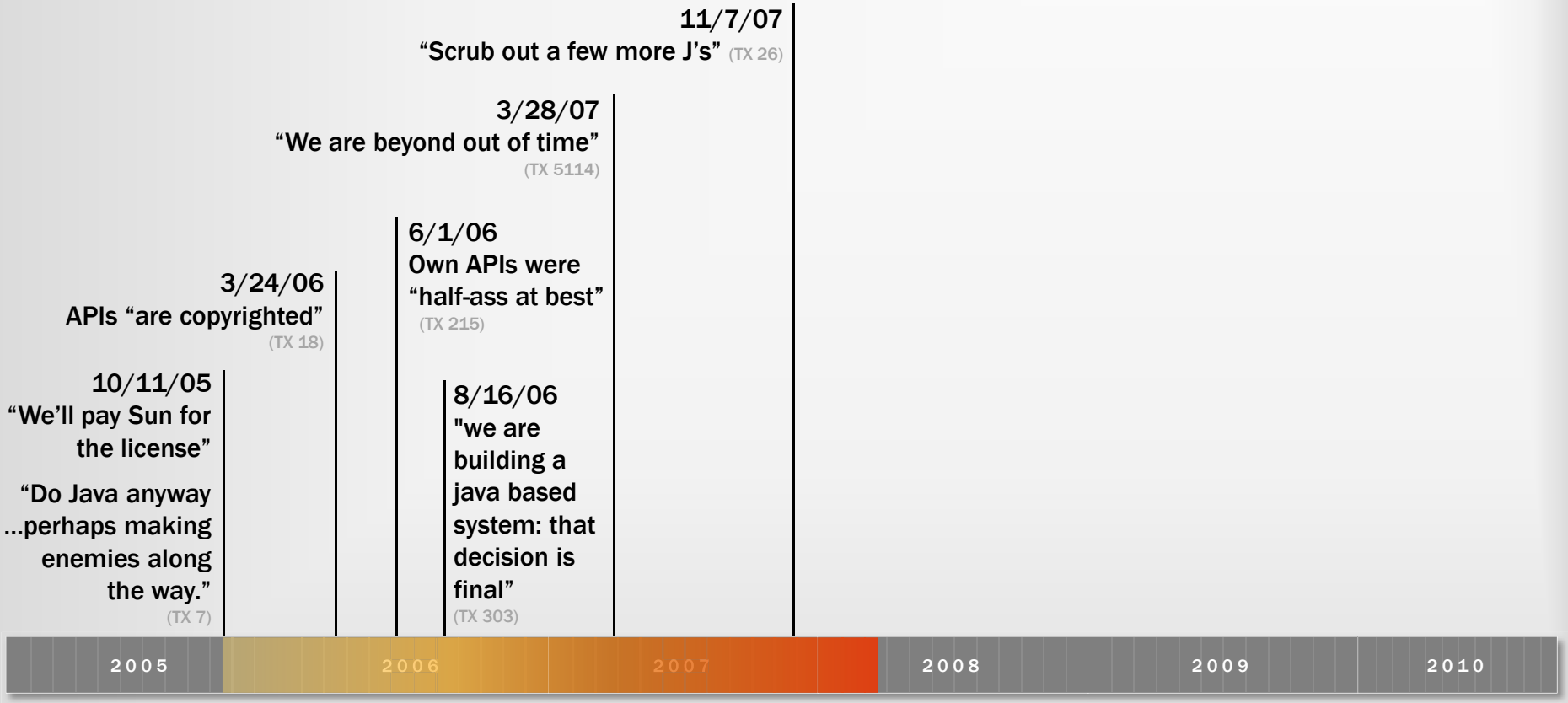
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
TRIAL EXHIBIT 5114
CASE NO. 10-03561 WHA
DATE ENTERED _____
BY _____ DEPUTY CLERK

HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-38-00125563

Trial Exhibit 5114, Page 1 of 3

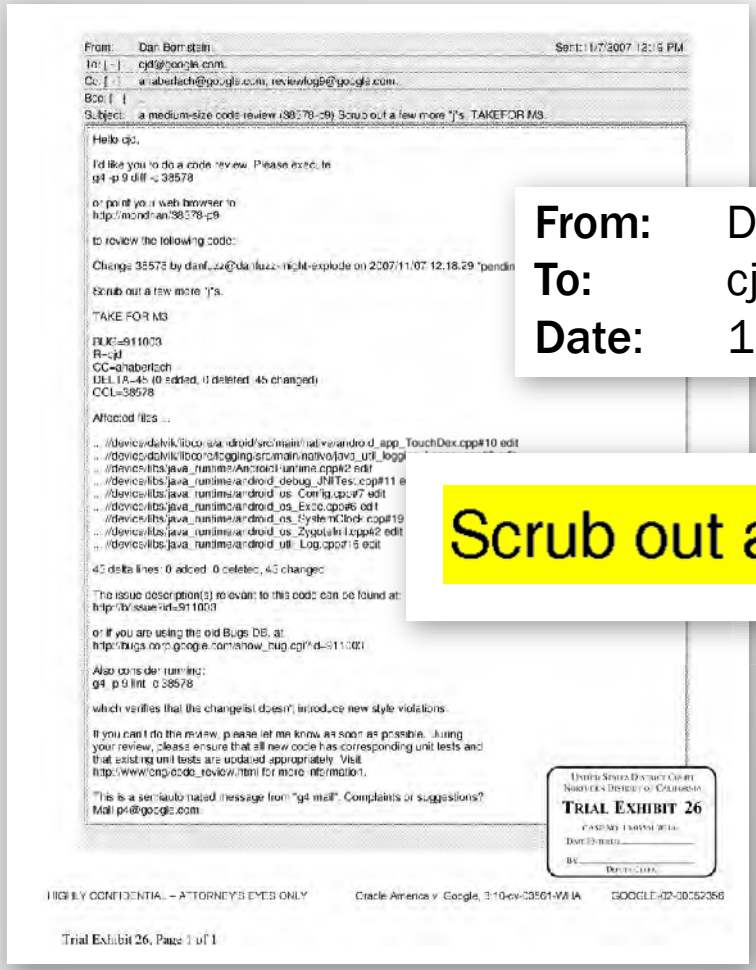
TX 5114 at 1

Google Acted in Bad Faith



Google: “Scrub the J word”

1 ✓ COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH

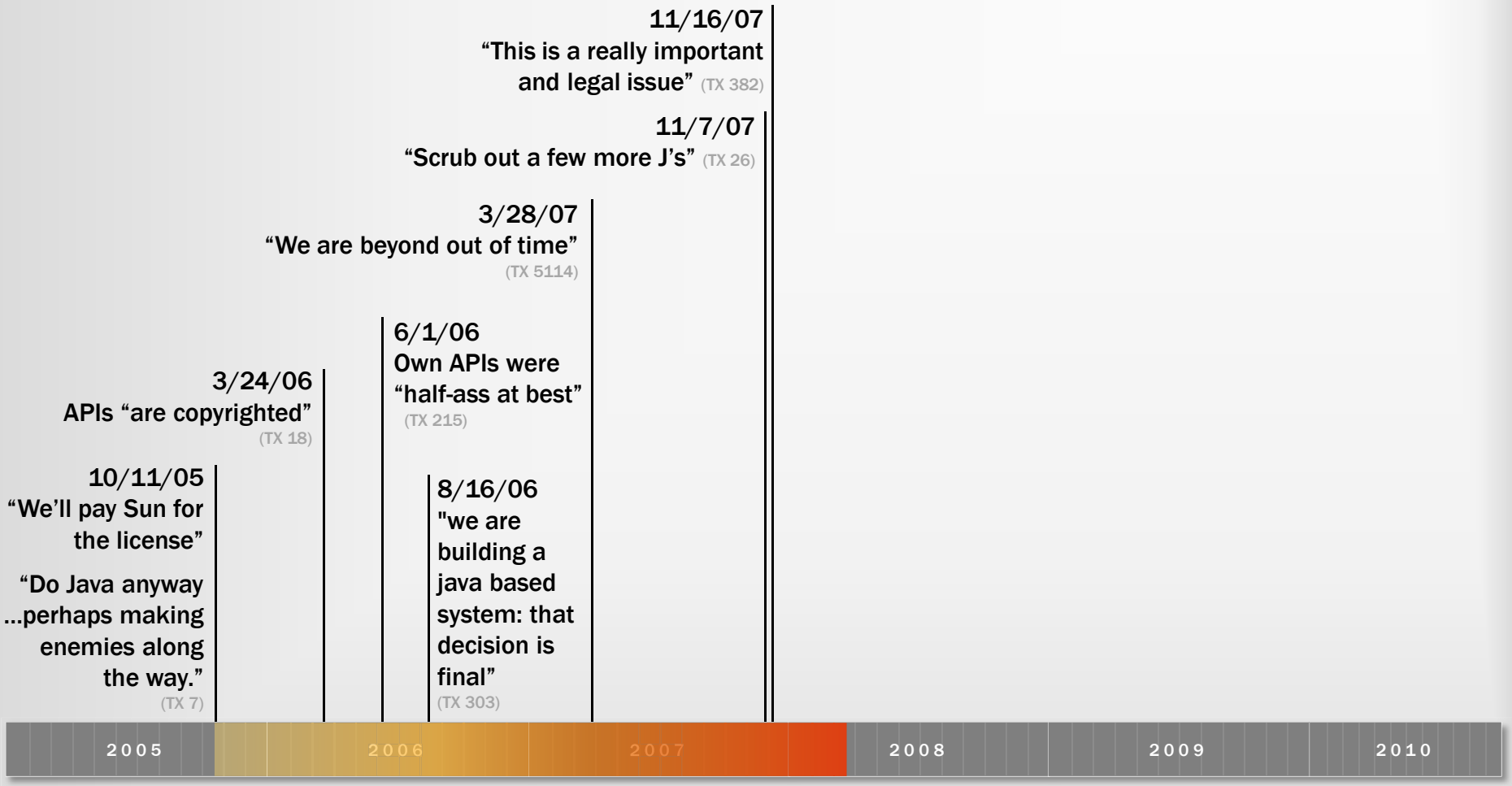


From: Dan Bornstein
To: cjd@google.com
Date: 11/7/2007

Scrub out a few more "j"s.

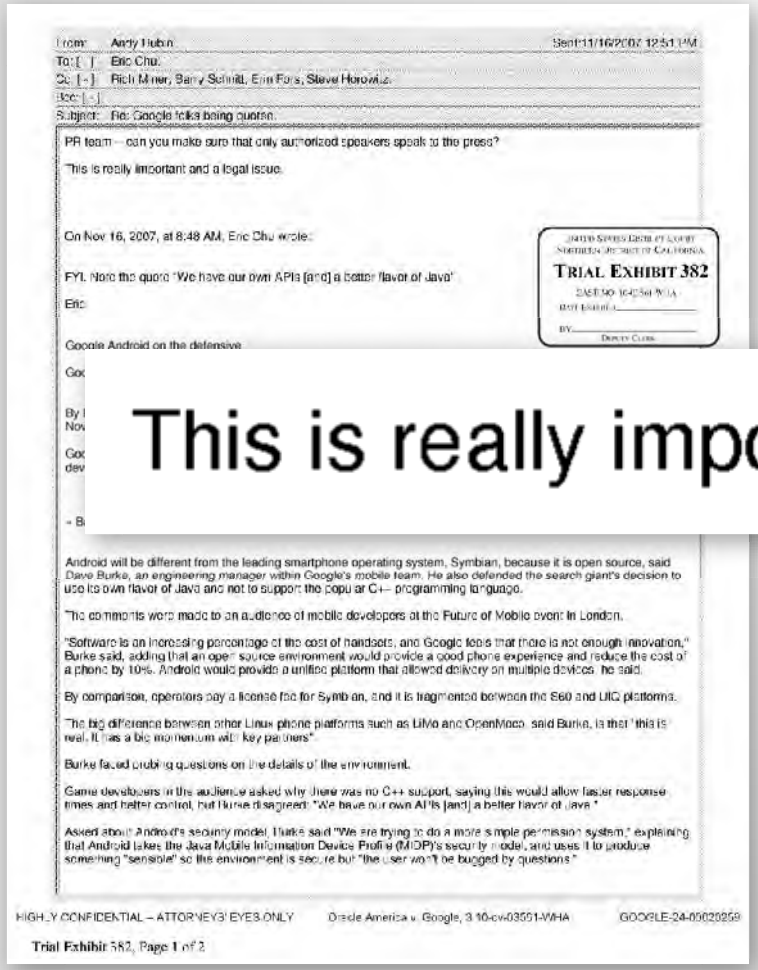
TX 26

Google Acted in Bad Faith



Google: Use of Java is a “Legal Issue”

1 ✓ COMMERCIALITY ▪ TRANSFORMATIVE ▪ GOOD FAITH



From: Andy Rubin Sent: 11/16/2007 12:51 PM
To: [ ] Eric Chu;
Cc: [+] Rich Miner, Barry Schnitt, Erin Fors, Steve Horowitz;
Bcc: [ ]
Subject: Re: Google folks being quoted...

PR team -- can you make sure that only authorized speakers speak to the press?

"This is really important and a legal issue.

On Nov 16, 2007, at 8:48 AM, Eric Chu wrote:

FYI. Note the quote "We have our own APIs [and] a better flavor of Java"

Eric

Google Android on the defensive

TRIAL EXHIBIT 382

Android will be different from the leading smartphone operating system, Symbian, because it is open source, said Dave Burke, an engineering manager within Google's mobile team. He also defended the search giant's decision to use its own flavor of Java and not to support the popular C++ programming language.

The comments were made to an audience of mobile developers at the Future of Mobile event in London.

"Software is an increasing percentage of the cost of handsets, and Google feels that there is not enough innovation," Burke said, adding that an open source environment would provide a good phone experience and reduce the cost of a phone by 10%. Android would provide a unified platform that allowed delivery on multiple devices, he said.

By comparison, operators pay a license fee for Symbian, and it is fragmented between the S60 and UIQ platforms.

The big difference between other Linux phone platforms such as LiMo and OpenMoco, said Burke, is that "this is real. It has a big momentum with key partners."

Burke faced probing questions on the details of the environment.

Game developers in the audience asked why there was no C++ support, saying this would allow faster response times and better control, but Burke disagreed: "We have our own APIs [and] a better flavor of Java."

Asked about Android's security model, Burke said "We are trying to do a more simple permission system," explaining that Android takes the Java Mobile Information Device Profile (MIDP)'s security model, and uses it to produce something "sensible" so the environment is secure but "the user won't be bugged by questions."

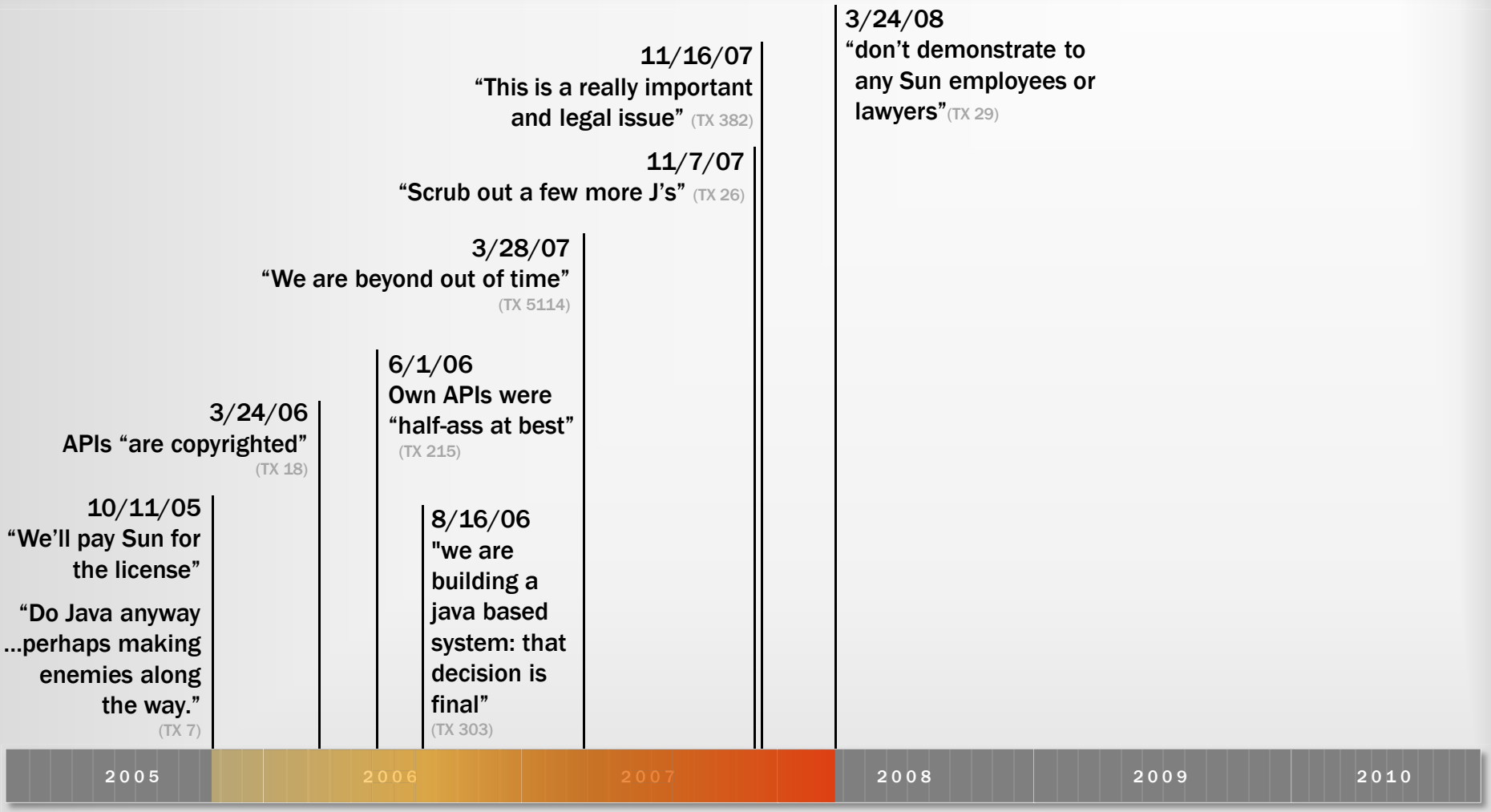
HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-24-00020259

Trial Exhibit 382, Page 1 of 2

This is really important and a legal issue.

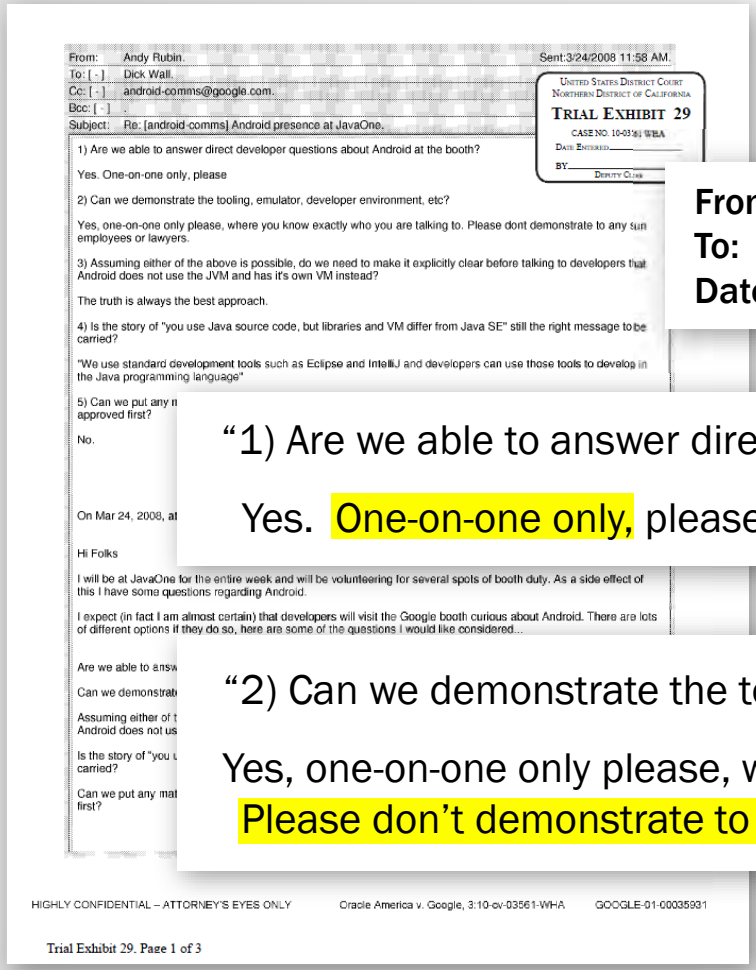
TX 382

Google Acted in Bad Faith



Google: “Please Don’t Demonstrate”

1 ✓ COMMERCIALITY ▪ TRANS✗RMATIVE ▪ GOOD FAITH



From: Andy Rubin. Sent:3/24/2008 11:58 AM.
To: [-] Dick Wall.
Cc: [-] android-comms@google.com.
Bcc: [-]
Subject: Re: [android-comms] Android presence at JavaOne.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
TRIAL EXHIBIT 29
CASE NO. 10-03561 WHA
DATE ENTERED
BY
DEPUTY CLERK

1) Are we able to answer direct developer questions about Android at the booth?

Yes. One-on-one only, please

2) Can we demonstrate the tooling, emulator, developer environment, etc?

Yes, one-on-one only please, where you know exactly who you are talking to. Please dont demonstrate to any sun employees or lawyers.

3) Assuming either of the above is possible, do we need to make it explicitly clear before talking to developers that Android does not use the JVM and has it's own VM instead?

The truth is always the best approach.

4) Is the story of "you use Java source code, but libraries and VM differ from Java SE" still the right message to be carried?

"We use standard development tools such as Eclipse and IntelliJ and developers can use those tools to develop in the Java programming language"

5) Can we put any m
approved first?

No.

On Mar 24, 2008, at

Hi Folks

I will be at JavaOne for the entire week and will be volunteering for several spots of booth duty. As a side effect of this I have some questions regarding Android.

I expect (in fact I am almost certain) that developers will visit the Google booth curious about Android. There are lots of different options if they do so, here are some of the questions I would like considered...

Are we able to answ
Can we demonstrat
Assuming either of t
Android does not us
Is the story of "you u
carried?
Can we put any mat
first?

HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-01-00035931

Trial Exhibit 29. Page 1 of 3

From: Andy Rubin
To: Dick Wall
Date: **March 24, 2008**

“1) Are we able to answer direct developer questions about Android at the booth?

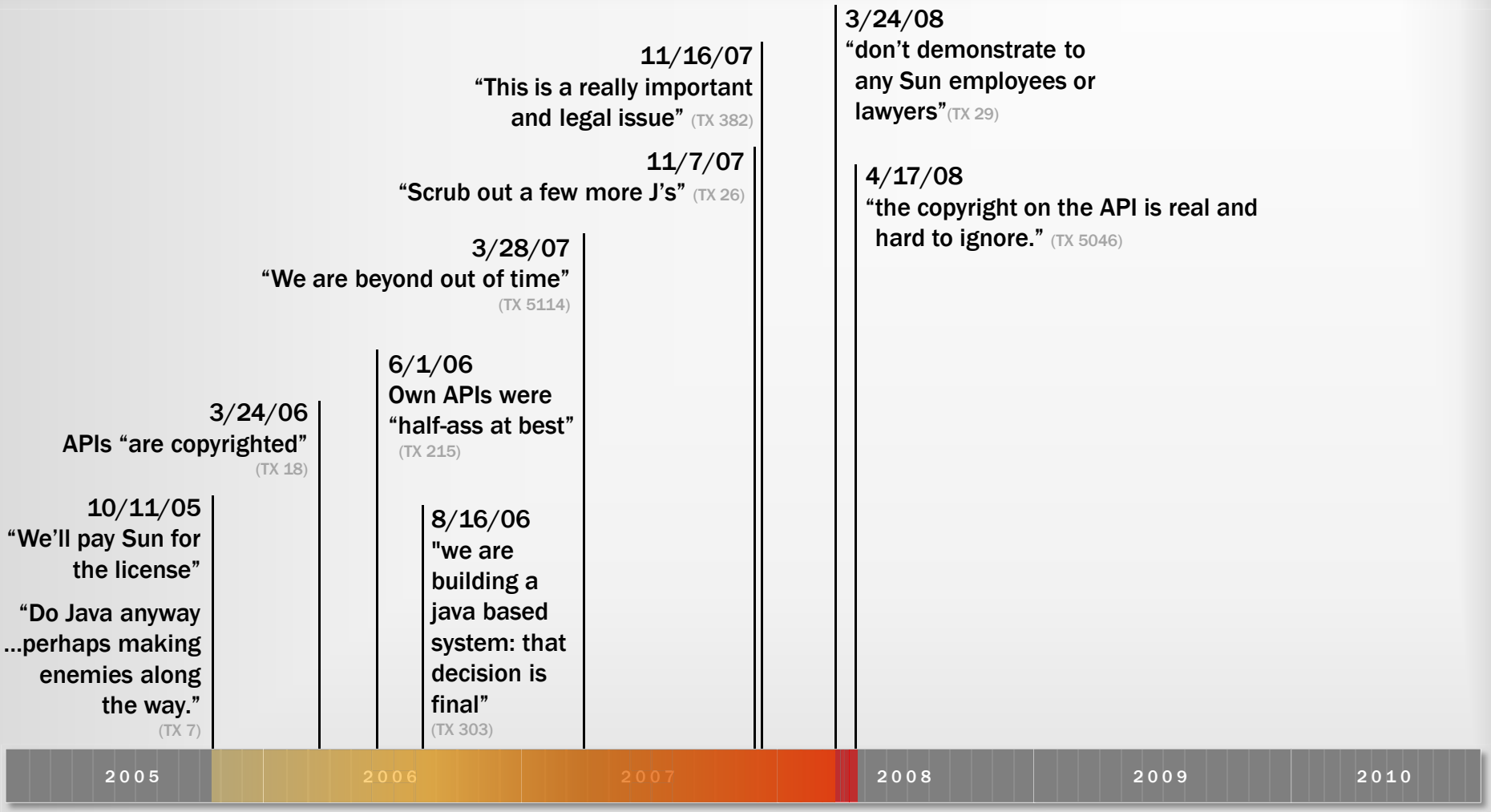
Yes. One-on-one only, please.”

“2) Can we demonstrate the tooling, emulator, developer environment, etc?

Yes, one-on-one only please, where you know exactly who you are talking to. Please don’t demonstrate to any sun employees or lawyers.”

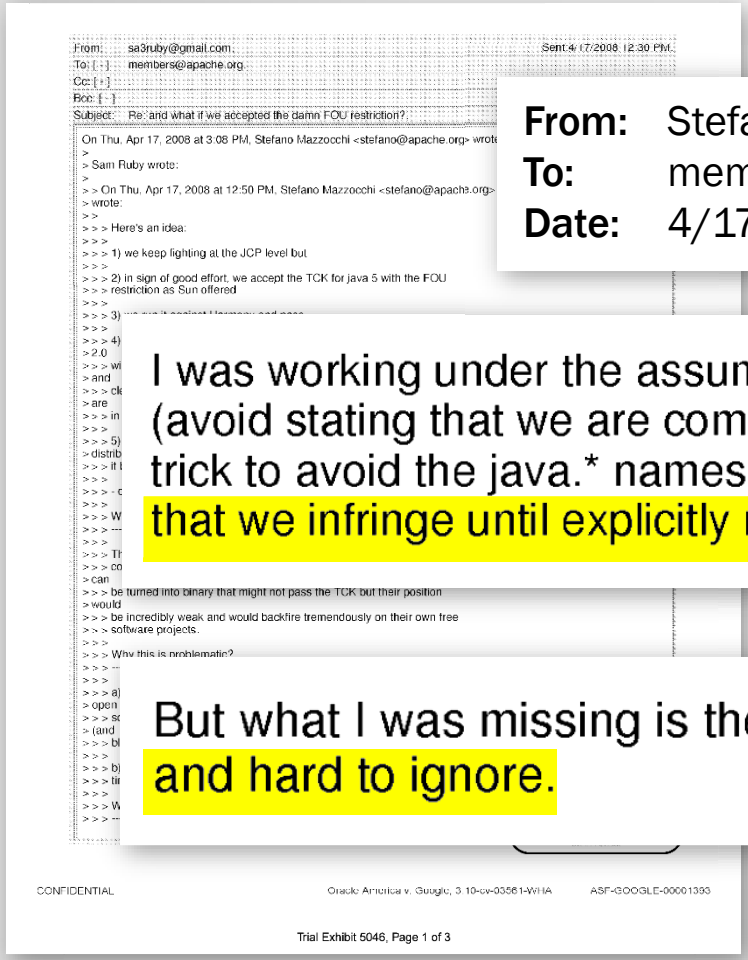
TX 29 at 1

Google Acted in Bad Faith



Mazzocchi: No Custom

1 ✓ COMMERCIALITY ▪ TRANSFORMATIVE ✗ ▪ GOOD FAITH



From: sa3ruby@gmail.com Sent: 4/17/2008 12:30 PM
To: [-] members@apache.org
Cc: [-]
Bcc: [-]
Subject: Re: and what if we accepted the damn FOU restriction?

On Thu, Apr 17, 2008 at 3:08 PM, Stefano Mazzocchi <stefano@apache.org> wrote:
>
> Sam Ruby wrote:
>
> > On Thu, Apr 17, 2008 at 12:50 PM, Stefano Mazzocchi <stefano@apache.org>
> wrote:
> >
> > > Here's an idea:
> > >
> > > 1) we keep fighting at the JCP level but
> > >
> > > 2) in sign of good effort, we accept the TCK for java 5 with the FOU
> > > restriction as Sun offered
> > >
> > > 3)
> > >
> > > 4)
> 2.0
> wi
> and
> cl
> are
> in
>
> 5)
> distrib
> it
>
> -
>
> W
> ---
>
> Th
> co
> can
> be turned into binary that might not pass the TCK but their position
> would
> be incredibly weak and would backfire tremendously on their own free
> software projects.
>
> Why this is problematic?
>
> --
>
> a)
> open
> sc
> (and
> bl
>
> b)
> tir
>
> W
> ---

CONFIDENTIAL Oracle America v. Google, 3:10-cv-03561-WHA ASF-GOOGLE-00001393

Trial Exhibit 5046, Page 1 of 3

From: Stefano Mazzocchi
To: members@apache.org
Date: 4/17/2008

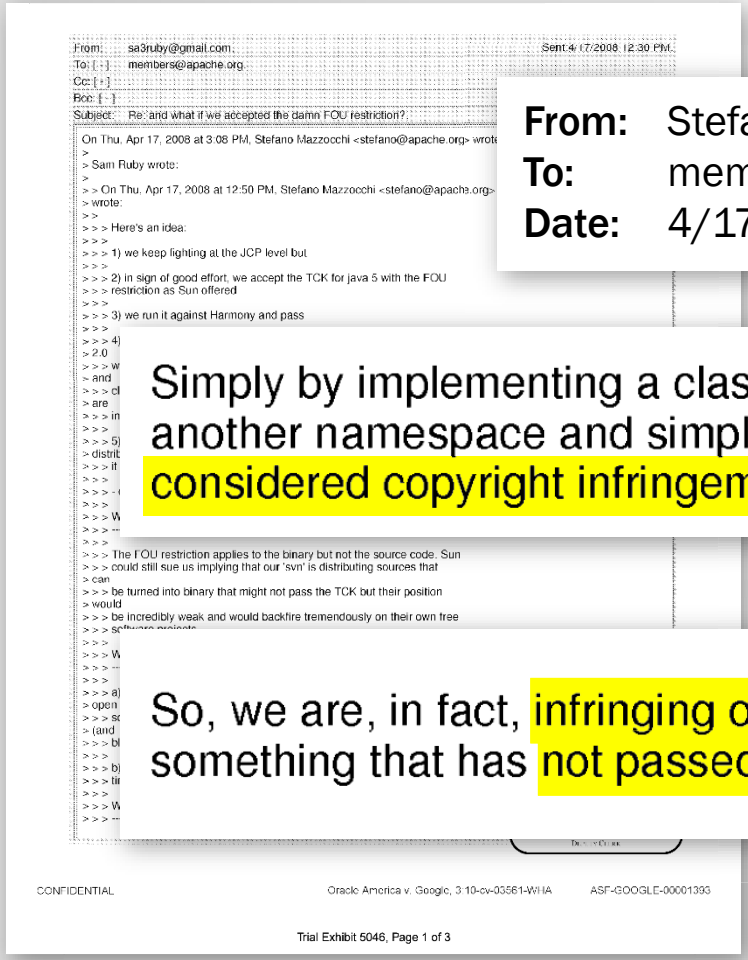
I was working under the assumption that we could ignore the trademarks (avoid stating that we are compatible), use the org.apache.java + classload trick to avoid the java.* namespace and pretend that we don't know of any IP that we infringe until explicitly mentioned.

But what I was missing is the fact that the copyright on the API is real and hard to ignore.

TX 5046 at 2

Mazzocchi: No Custom

1 ✓ COMMERCIALITY ▪ TRANS✗RMATIVE ▪ GOOD FAITH


From: sa3ruby@gmail.com Sent: 4/17/2008 12:30 PM
To: [-] members@apache.org
Cc: [-]
Bcc: [-]
Subject: Re: and what if we accepted the damn FOU restriction?

On Thu, Apr 17, 2008 at 3:08 PM, Stefano Mazzocchi <stefano@apache.org> wrote:
>
> Sam Ruby wrote:
>
> > On Thu, Apr 17, 2008 at 12:50 PM, Stefano Mazzocchi <stefano@apache.org>
> wrote:
> >
> > > Here's an idea:
> > >
> > > 1) we keep fighting at the JCP level but
> > >
> > > 2) in sign of good effort, we accept the TCK for java 5 with the FOU
> > > restriction as Sun offered
> > >
> > > 3) we run it against Harmony and pass
> > >
> > > 4)
> > > 2.0
> > > w
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> > > cl
> > > are
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> > >
> > > 5)
> > > distrib
> > > it
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> > >
> > > W
> > > --
> > >
> > > The FOU restriction applies to the binary but not the source code. Sun
> > > could still sue us implying that our 'svn' is distributing sources that
> > > can
> > > be turned into binary that might not pass the TCK but their position
> > > would
> > > be incredibly weak and would backfire tremendously on their own free
> > > software projects.
> > >
> > > W
> > > --
> > >
> > > a)
> > > open
> > > so
> > > (and
> > > bl
> > >
> > > b)
> > > tir
> > >
> > > W
> > > --

CONFIDENTIAL Oracle America v. Google, 3:10-cv-03561-WHA ASF-GOOGLE-00001393

Trial Exhibit 5046, Page 1 of 3

From: Stefano Mazzocchi
To: members@apache.org
Date: 4/17/2008

Simply by implementing a class with the same signature of another, in another namespace and simply by looking at available javadocs could be considered copyright infringement, even if the implementation is clean room.

So, we are, in fact, infringing on the spec lead copyright if we distribute something that has not passed the TCK and *we know that*.

TX 5046 at 2

The Link Between Apache and Google

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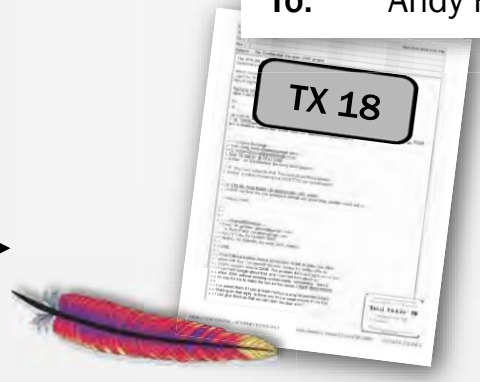
From: Stefano Mazzocchi
To: members@apache.org

STEFANO MAZZOCCHI
Director at Apache Software Foundation
Mentor of Harmony Project
Member of Harmony PMC

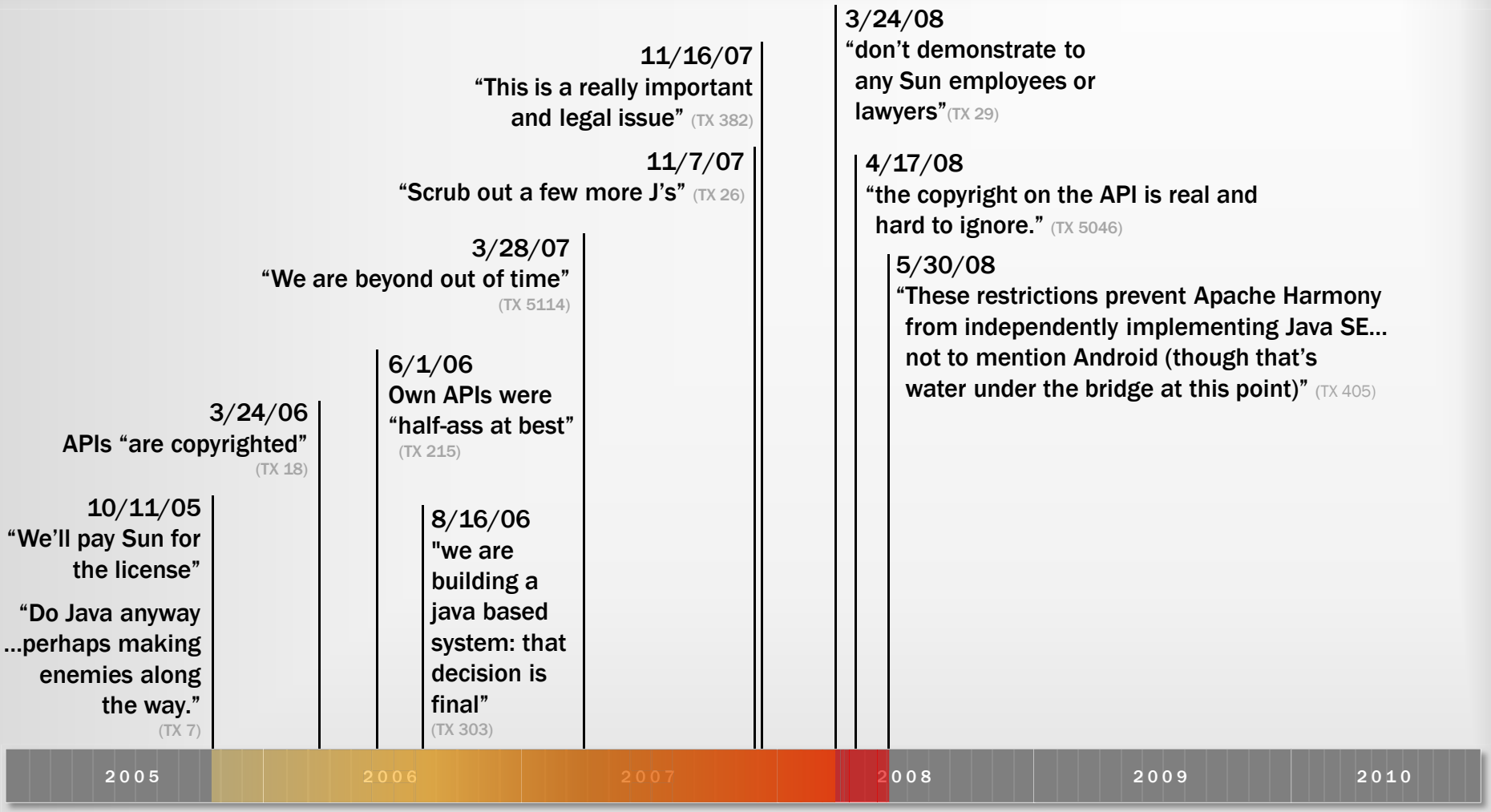
From: Greg Stein
To: Andy Rubin



GREG STEIN
Chairman, Apache Foundation
Google Employee
Google

ANDY RUBIN
Head
of Android
Google

Google Acted in Bad Faith



Android: “water under the bridge”

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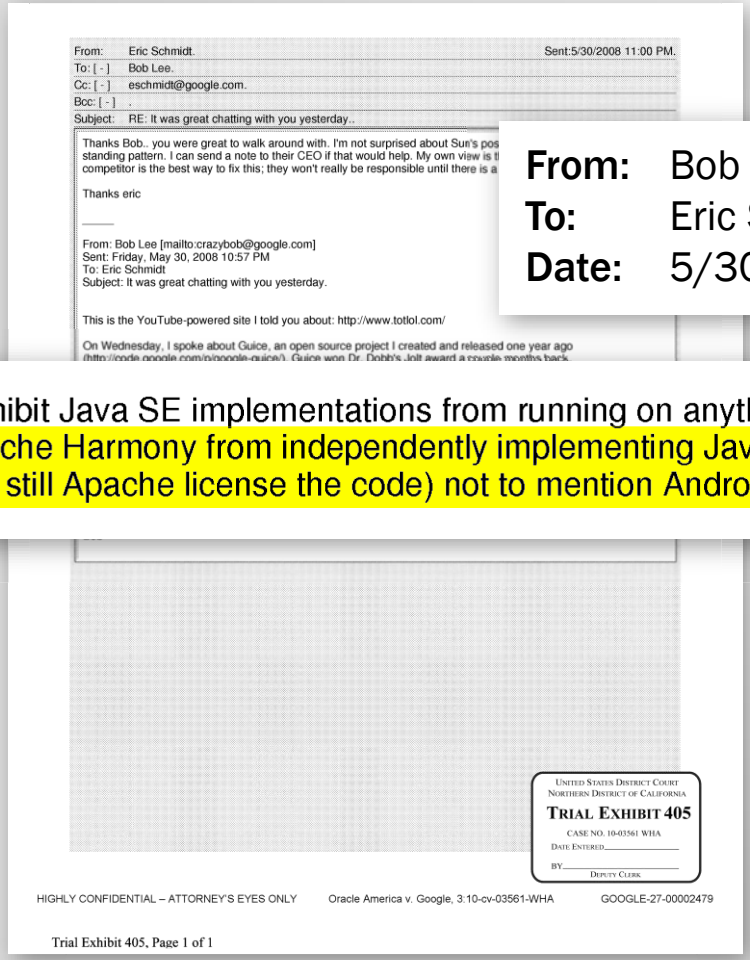

From: Eric Schmidt. Sent:5/30/2008 11:00 PM.
To: [-] Bob Lee.
Cc: [-] eschmidt@google.com.
Bcc: [-] .
Subject: RE: It was great chatting with you yesterday..

Thanks Bob.. you were great to walk around with. I'm not surprised about Sun's pos
standing pattern. I can send a note to their CEO if that would help. My own view is t
competitor is the best way to fix this; they won't really be responsible until there is a

Thanks eric

From: Bob Lee [mailto:crazybob@google.com]
Sent: Friday, May 30, 2008 10:57 PM
To: Eric Schmidt
Subject: It was great chatting with you yesterday.

This is the YouTube-powered site I told you about: http://www.totlol.com/

On Wednesday, I spoke about Guice, an open source project I created and released one year ago

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
TRIAL EXHIBIT 405
CASE NO. 10-03561 WHA
DATE ENTERED
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HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-27-00002479

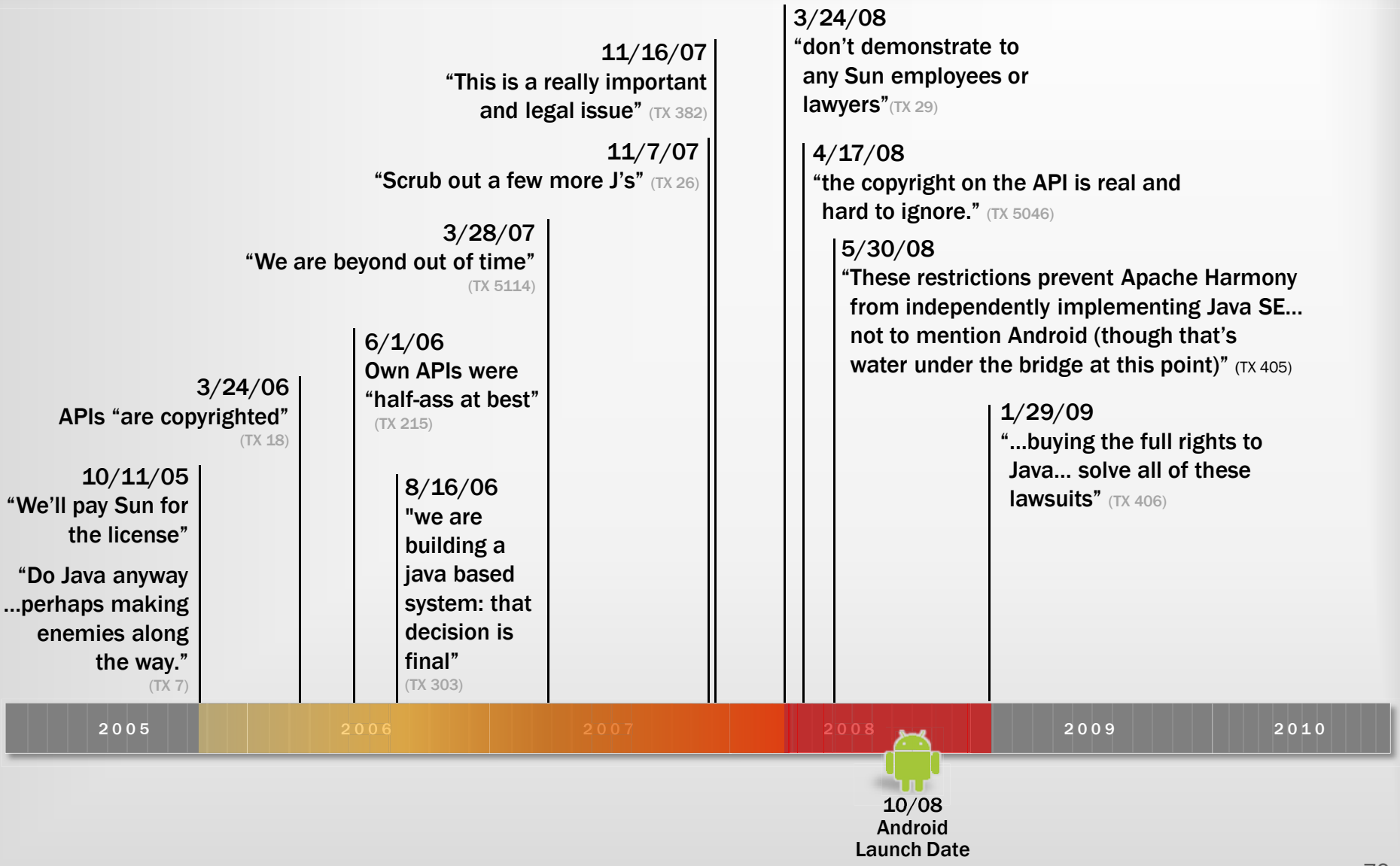
Trial Exhibit 405, Page 1 of 1

From: Bob Lee
To: Eric Schmidt
Date: 5/30/2008

prohibit Java SE implementations from running on anything but a desktop or server. These restrictions prevent Apache Harmony from independently implementing Java SE (Harmony can't put those restrictions on their own users and still Apache license the code) not to mention Android (though that's water under the bridge at this point).

TX 405

Google Acted in Bad Faith



Schmidt: Buy Rights to Java and Solve Lawsuit Problem

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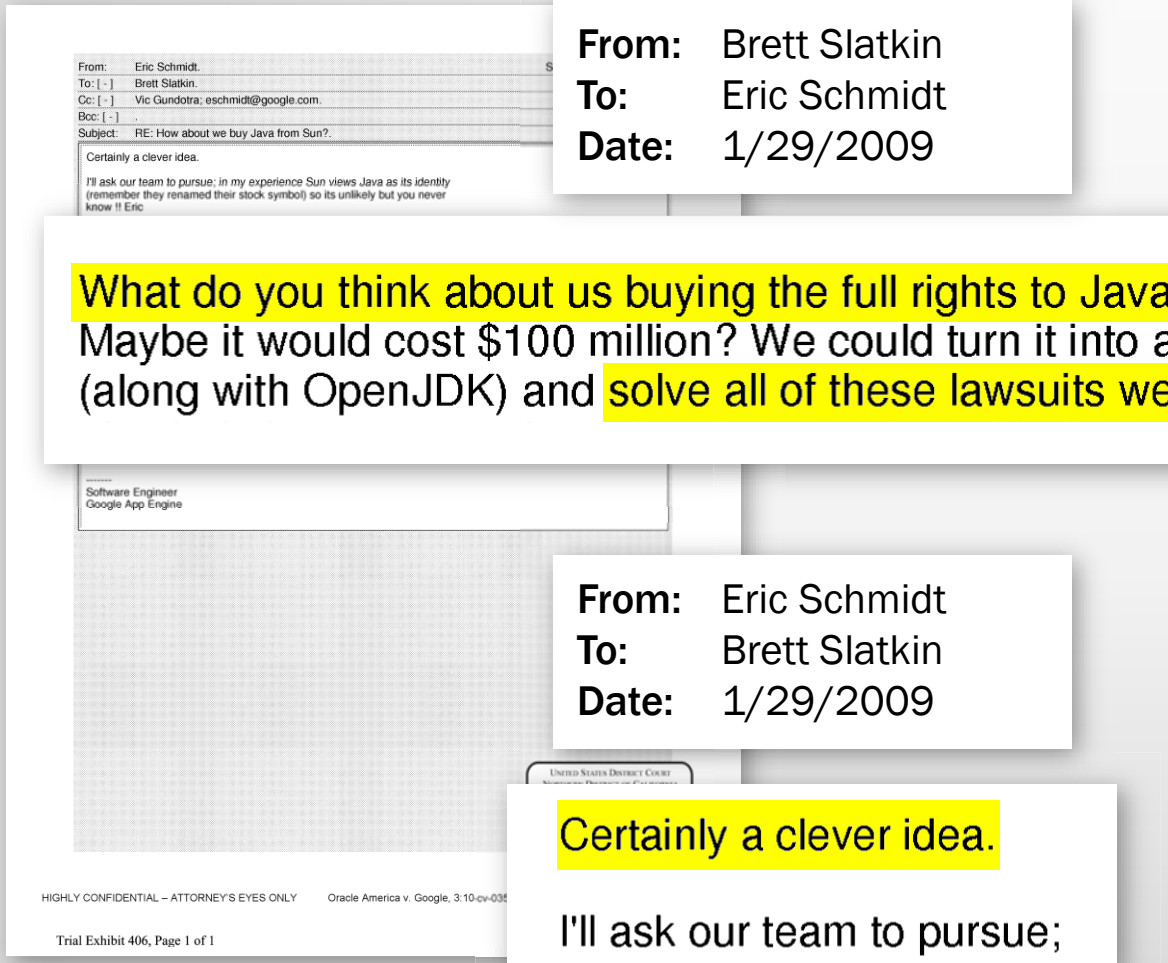


From: Brett Slatkin
To: Eric Schmidt
Date: 1/29/2009

What do you think about us buying the full rights to Java from Sun? Maybe it would cost $100 million? We could turn it into an open foundation (along with OpenJDK) and solve all of these lawsuits we're facing.

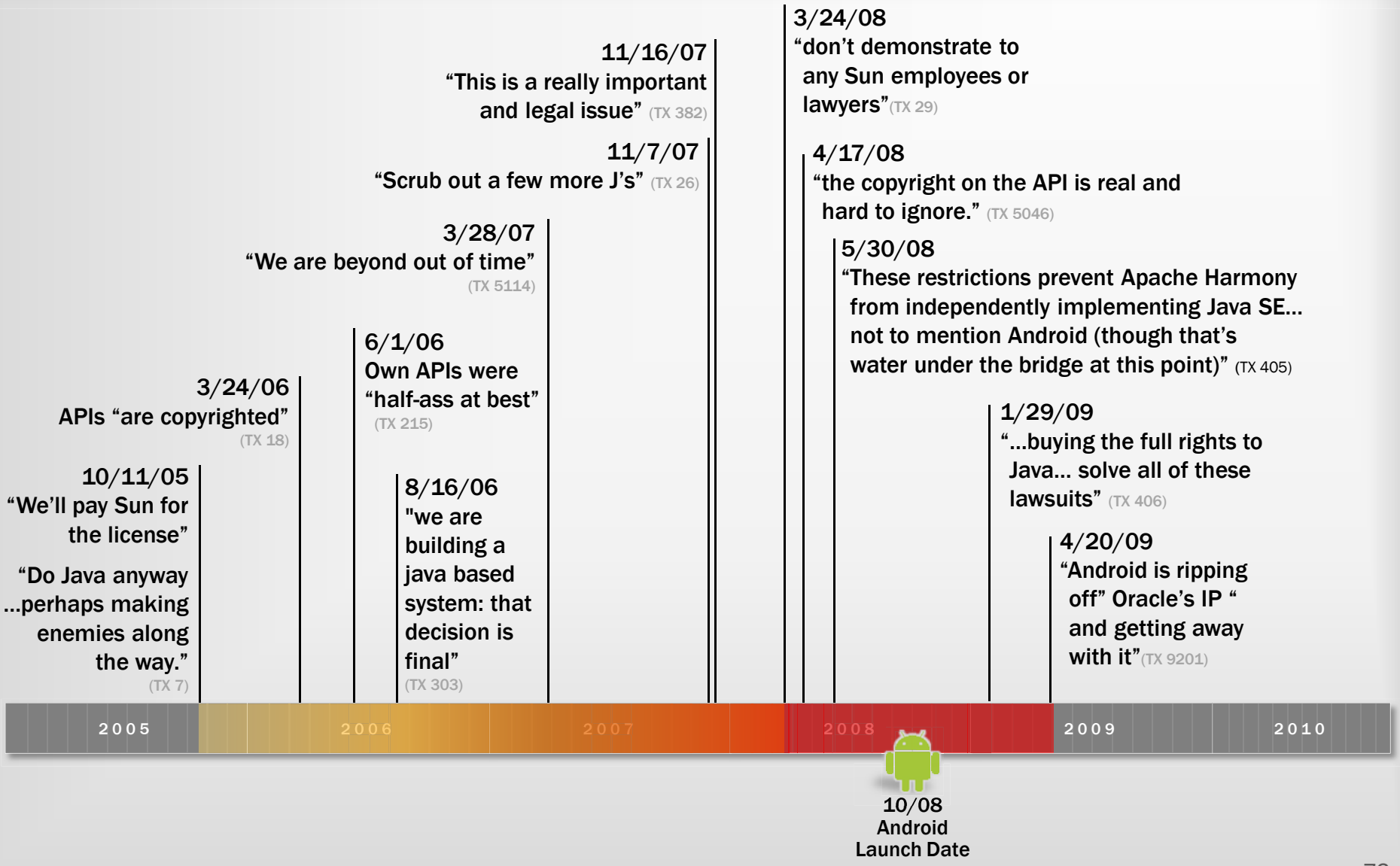
From: Eric Schmidt
To: Brett Slatkin
Date: 1/29/2009

Certainly a clever idea.

I'll ask our team to pursue;

TX 406

Google Acted in Bad Faith



Mazzocchi: No Custom

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From: Stefano Mazzocchi <stefano@apache.org>
Sent: Monday, April 20, 2009 1:01 PM
To: members@apache.org
Subject: Re: Oracle buys Sun

Bill Stoddard wrote:

> Just imagine the challenge th
> lies ahead of Oracle with lear
> throat, low margin, capital int

Unless they sell it.

The bigger question in my mind
going to do with 500 million ja
going to do about Android's rip
getting away with it?

But one thing I want to say out
invested in a platform (java) th
come along and lock it down. N
fits the same profile.

This is why I wanted an OSI-lic

We forced Sun into OpenJDK as a defensive move against Harmony. If we didn't do Harmony, and OpenJDK didn't happen, all of our (and yours!) java code would feel a lot differ

But while the 'java trap' might b
not over about other IP, and we
realize that soon enough the hat

Sun had but was afraid to exerc
knew it was a nuclear option. W
up in the air? (with Sun and Bc
freaks, who's left that even shov

Java on the desktop is dead.

Java on the phone is dying rapi
phones (on one side) and moore

Java on the server is alive and w
enterprise legacy. It's the new C
strong there. Fiercefully strong.

The difference is that IBM knev
communities, Oracle does not (
something open they acquire is
Sleepycat).

Oracle MySQL, Oracle OpenOffice, Oracle NetBeans... scary.

Today is the day our (collective, painful, mostly considered foolish and laughable) investment in Harmony finally pays off.

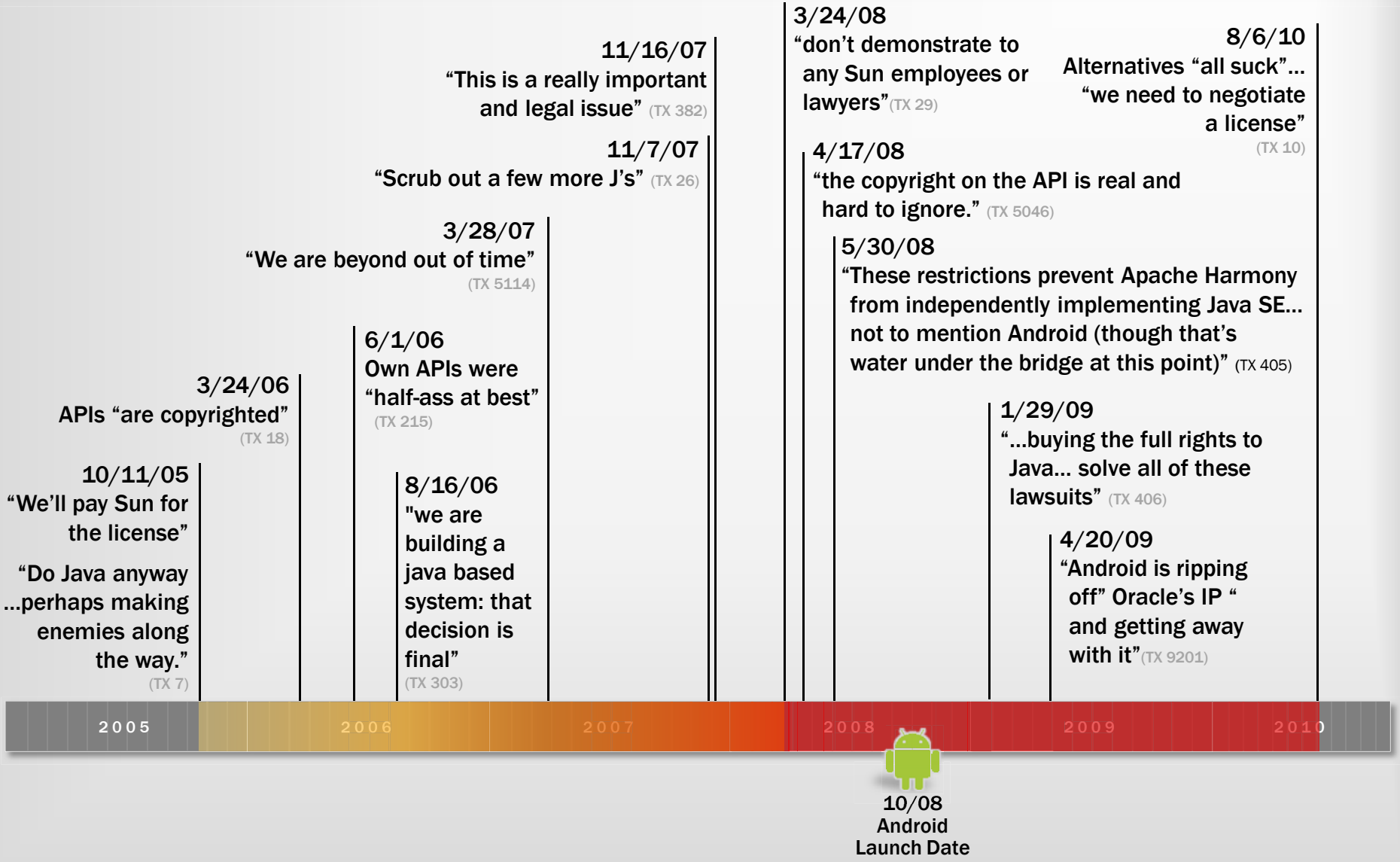
--
Stefano.

CONFIDENTIAL ASF00002959

From: Stefano Mazzocchi <stefano@apache.org>
Sent: Monday, April 20, 2009 1:01 PM
To: members@apache.org
Subject: Re: Oracle buys Sun

The bigger question in my mind is not about hardware: what is Oracle's [sic] going to do with 500 million java-powered cell phones? What is Oracle going to do about Android's ripping off some of (now) their IP and getting away with it?

Google Acted in Bad Faith



Google: Java Alternatives “all suck”

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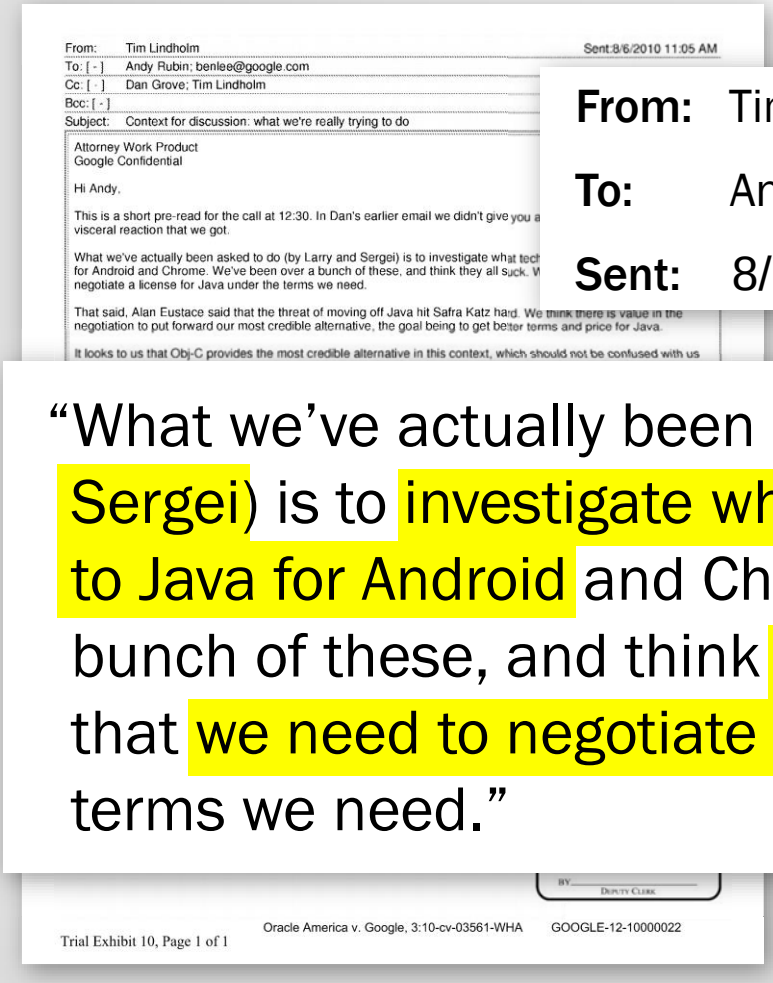

From: Tim Lindholm Sent:8/6/2010 11:05 AM
To: [-] Andy Rubin; benlee@google.com
Cc: [-] Dan Grove; Tim Lindholm
Bcc: [-]
Subject: Context for discussion: what we're really trying to do

Attorney Work Product
Google Confidential

Hi Andy,

This is a short pre-read for the call at 12:30. In Dan's earlier email we didn't give you a visceral reaction that we got.

What we've actually been asked to do (by Larry and Sergei) is to investigate what tech for Android and Chrome. We've been over a bunch of these, and think they all suck. W negotiate a license for Java under the terms we need.

That said, Alan Eustace said that the threat of moving off Java hit Safra Katz hard. We think there is value in the negotiation to put forward our most credible alternative, the goal being to get better terms and price for Java.

It looks to us that Obj-C provides the most credible alternative in this context, which should not be confused with us

BY: DEPUTY CLERK

Trial Exhibit 10, Page 1 of 1 Oracle America v. Google, 3:10-cv-03561-WHA GOOGLE-12-10000022

From: Tim Lindholm

To: Andy Rubin

Sent: 8/6/2010

“What we’ve actually been asked to do (by Larry and Sergei) is to investigate what technical alternatives exist to Java for Android and Chrome. We’ve been over a bunch of these, and think they all suck. We conclude that we need to negotiate a license for Java under the terms we need.”

“I Wanted to Win”

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ANDY RUBIN
Head of Android

Google

Q. Now, it's true that after you joined Google and agreed to those milestones, you were under incredible schedule pressure. That's what we just saw on the video; right?

A. I wanted to ship something as soon as possible.

Q. And you were under incredible schedule pressure, using your own words. Wasn't that what we just saw there?

And you stand by that testimony? You were under incredible schedule pressure; isn't that true?

A. Yes. I wanted to win.

Tr. at 761:3-12