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WESTERN DISTRICT OF TEXAS
BY: Jennifer Clark
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TOUCHSTREAM TECHNOLOGIES, INC., Plaintiff, v. GOOGLE LLC, Defendant.	Civil Case No. 6:21-cv-569-ADA JURY TRIAL DEMANDED U.S. District Judge Alan Albright

FINAL JURY INSTRUCTIONS

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JURY INSTRUCTION NO. 1: JURY CHARGE

MEMBERS OF THE JURY:

It is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any opinion that you might have as to what the law ought to be.

Each of you is going to have your own printed copy of these final jury instructions that I am giving you now, so there is really no need for you to take notes unless you want to.

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.

You should consider all of the instructions about the law as a whole and regard each instruction in light of the others, without isolating a particular statement or paragraph.

The testimony of the witnesses and other exhibits introduced by the parties constitute the evidence. The statements of counsel are not evidence; they are only arguments. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports the arguments. You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must apply the law as I instruct you.

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or sympathy you might have for Touchstream or Google in arriving at your verdict.

After the remainder of these instructions, you will hear closing arguments from the attorneys. Statements and arguments of the attorneys, I remind you, are not evidence, and they are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

A verdict form has been prepared for you. You are to take this verdict form with you to the jury room; and when you have reached a unanimous decision or agreement as to the verdict, you are to have your foreperson fill in the blanks in the verdict form, date it, and sign it.

Answer each question in the verdict form from the facts as you find them to be. Do not decide who you think should win the case and then answer the questions to reach that result. Again, your answers and your verdict must be unanimous.

JURY INSTRUCTION NO. 2: EVIDENCE

The evidence you are to consider consists of the testimony of the witnesses, the documents, and other exhibits admitted into evidence, the stipulations to which the lawyers agreed, and any fair inferences and reasonable conclusions you can draw from the facts and circumstances have been proven. Nothing else is evidence.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of eyewitnesses. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude another fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you determine the facts from all of the evidence that you heard in this case, whether direct, circumstantial or any combination.

As I instructed you before the trial began, in judging the facts, you must consider all the evidence, both direct and circumstantial. That does not mean you have to believe all of the evidence. It is entirely up to you to give the evidence you receive in this case whatever weight you individually believe it deserves. It will be up to you to decide which witnesses to believe, which witnesses not to believe, the weight you give any testimony you hear, and how much of any witness's testimony you choose to accept or reject.

Objections to questions are not evidence. The attorneys in this case may have objected if they thought that documents or testimony that were offered into evidence were improper under the rules of evidence. My legal rulings as to those objections are not evidence. My comments and questions are not evidence. If I sustained an objection, then just pretend the question was never asked. If there was an answer given, ignore it. If I overruled the objection, act like the objection was never made. If I gave you instructions that some item of evidence was received for a limited

purpose, you must follow my instruction. If I gave any limiting instruction during trial, you must follow it. Any testimony I told you to exclude or disregard is not evidence, may not be considered.

You must not conduct any independent research or investigation. You must make your decision based only on the evidence as I have defined it here, and nothing else.

JURY INSTRUCTION NO. 3: WITNESSES

You alone determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of witnesses, you may consider the witness's manner and demeanor on the witness stand, any feelings or interest in the case, any prejudice or bias about the case, and the consistency or inconsistency of the witness's testimony considered in the light of circumstances.

Has the witness been contradicted by other credible evidence? Has the witness made statements at other times that are contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.

Even though a witness may be a party to the action and therefore interested in the outcome, you may accept the testimony if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

You are not to decide this case by counting the number of witnesses who have testified for the opposing sides. Witness testimony is weighed. Witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testify to the contrary, if after you have considered all of the other evidence you choose to believe the single witness.

In determining the weight to give to the testimony of a witness, consider whether there was evidence that at some time the witness said or did something or failed to say or do something that was at odds with the testimony given at trial. A simple mistake by a witness does not necessarily mean that a witness did not tell the truth as he or she remembers it. We're people. We forget things. We remember things inaccurately. If a witness has made a misstatement, consider whether that was an intentional falsehood or simply an innocent mistake. The significance of that may depend

on whether it has to do with something important or unimportant. But again, this is exclusively in your province of whether or not you believe a witness is telling the truth.

JURY INSTRUCTION NO. 4: DEPOSITION TESTIMONY

Certain testimony has been presented to you through a deposition. A deposition is the sworn, recorded answers to questions a witness was asked in advance of the trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, that witness's testimony may be presented, under oath, in the form of a deposition. Sometime before this trial, attorneys representing the parties in this case questioned this witness under oath. A court reporter was present and recorded the testimony. The questions and answers have been shown to you. This deposition testimony is entitled to the same consideration and is to be weighed and otherwise considered by you in the same way as if the witness had been present and had testified from the witness stand in court.

Some of the video recordings of witnesses you have seen may have been of lower quality because the witnesses testified from home. You should not hold the quality of the video or the location of the witness against either party.

Deposition testimony is entitled to the same consideration and is to be weighed and otherwise considered by you in the same way as if the witness had been present and had testified from the witness stand in court.

JURY INSTRUCTION NO. 5: EXPERT TESTIMONY

Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience.

In weighing expert testimony, you may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors I have previously mentioned for weighing testimony of any other witness. Expert testimony should receive whatever weight and credit you think appropriate, given all the other evidence in the case. You are not required to accept the opinion of any expert, rather, you are free to accept or reject the testimony of experts, just as with any other witness.

JURY INSTRUCTION NO. 6: INTERROGATORIES

Evidence has been presented to you in the form of answers of one or the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

JURY INSTRUCTION NO. 7: BIAS—NO INFERENCE FROM FILING SUIT OR DEFENDING THE SUIT

The fact that one side or the other brought this lawsuit and is in court seeking damages creates no inference on their behalf that they're entitled to judgment. The act of making a claim in a lawsuit, in this case claims of patent infringement, does not tend to establish the claim is true or not true and cannot be considered by you as evidence.

Also, the fact that Google has raised arguments against the claims and says they don't infringe creates no inference that they're entitled to a judgment.

Both of these actions, the offensive action of filing the suit and the defensive action of defending the suit must be disregarded by you, and neither of those actions should tend to establish judgment in either side's favor.

JURY INSTRUCTION NO. 8: STIPULATIONS OF FACT

A "stipulation" is an agreement. When there is no dispute about certain facts, the parties may agree or "stipulate" to those facts. You must accept a stipulated fact as evidence and treat that fact as having been proven here in court.

JURY INSTRUCTION NO. 9: LIMITING INSTRUCTION

When testimony or an exhibit is admitted for a limited purpose, you may consider that testimony or exhibit only for the specific limited purpose for which it was admitted.

JURY INSTRUCTION NO. 10: CHARTS AND SUMMARIES

Certain charts and summaries have been shown to you solely to help explain or summarize the facts disclosed by the books, records, and other documents that are in evidence. These charts and summaries are not evidence or proof of any facts. You should determine the facts from the evidence.

JURY INSTRUCTION NO. 11: DEMONSTRATIVE EXHIBITS

Certain exhibits shown to you, such as PowerPoint presentations, posters, or models, are illustrations of the evidence, but are not themselves evidence. Such exhibits are demonstrative exhibits. A demonstrative exhibit is a party's description, picture, or model used to describe something involved in this trial. If your recollection of the evidence differs from the exhibit, rely on your recollection.

JURY INSTRUCTION NO. 12: BIAS—CORPORATE PARTY INVOLVED

Do not let bias, prejudice, or sympathy play any part in your deliberations. Whether you are familiar with one party or the other should not play any part in your deliberations. A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.

JURY INSTRUCTION NO. 13: BURDENS OF PROOF

For each issue in this case, either Touchstream or Google bears the burden of proof, which means that it bears the burden of persuading you to find in its favor. In a patent case such as this, there are two different burdens of proof. The first is called "preponderance of the evidence." The second is called "clear and convincing evidence."

Here, Touchstream has the burden of proving by a preponderance of the evidence that Google has infringed the Asserted Claims of the Asserted Patents and the amount of damages Touchstream should receive to compensate it for any infringement. A preponderance of the evidence means evidence that persuades you that a claim is more probably true than not true. Sometimes this is talked about as being the greater weight and degree of credible testimony.

Google has the burden of proving patent invalidity and that an alleged product or publication is prior art by clear and convincing evidence. Clear and convincing evidence means evidence that produces in your mind a firm belief or conviction as to the truth of the matter sought to be established. It is evidence so clear, direct, weighty and convincing as to enable you to come to a clear conviction without hesitancy.

These standards are different from what you may have learned about in criminal proceedings where a fact is proven beyond a reasonable doubt. On a scale of the various standards of proof, as you move from the preponderance of the evidence, where the proof need only be sufficient to tip the scales in favor of the party proving the fact, to at the other end, beyond a reasonable doubt, where the fact must be proven to a very high degree of certainty, you may think of clear and convincing evidence as being between these two ends of the spectrum or those two standards.

JURY INSTRUCTION NO. 14: SUMMARY OF CONTENTIONS

As I did at the start of the case, I will first give you a summary of each side's contentions in this case. I will then provide you with detailed instructions on what each side must prove to win on each of its contentions.

As I previously told you, Touchstream asserts that Google has infringed claims 1 and 8 of the '251 patent; claims 1 and 14 of the '528 patent; and claims 1 and 2 of the '289 patent, and that Touchstream is entitled to money damages for Google's alleged infringement. Those patents and claims are referred to as the "Asserted Patents" and the "Asserted Claims."

Touchstream alleges that Google infringes the Asserted Claims of the Asserted Patents through the operation of Google devices that are "cast-enabled." Touchstream asserts those products include the following: (1) standalone Chromecast devices (e.g., Chromecast 1st Generation, Chromecast 2nd Generation, Chromecast 3rd Generation, Chromecast Audio, Chromecast Ultra, and Chromecast with Google TV); (2) the following devices that implement Chromecast built-in: (a) third-party devices running the Android TV operating system and with Google TV; and (b) third-party televisions and speakers with "Chromecast Built-In"; and (3) Google Home/Nest products capable of receiving cast content (e.g., Google Home, Google Home Mini, Google Home Max, Google Home Hub/Nest Hub, Google Home Hub/Nest Hub Max, Google Nest Hub Generation 2, Google Nest Audio, Google Nest Mini, and Google Nest Wifi Point (wifi extender with speaker)). These products are referred to as the "Accused Products."

Google denies that it has infringed the Asserted Claims of the Asserted Patents and argues that the Asserted Claims are invalid.

Google contends that:

- Claims 1 and 8 of the '251 patent are obvious in view of:
  - GTS

  - The combination of GTS and Muthukumarasamy

- Claims 1 and 14 of the '528 patent are obvious in view of:
  - The combination of GTS and Muthukumarasamy

- Claims 1 and 2 of the '289 patent are obvious in view of:
  - The combination of GTS and Muthukumarasamy

Your job is to decide whether Google has infringed the Asserted Claims of the Asserted Patents and whether any of the Asserted Claims of the Asserted Patents are invalid. If you decide that any Asserted Claim of the Asserted Patents has been infringed and is not invalid, you will then need to decide any money damages to be awarded to Touchstream to compensate it for the infringement.

JURY INSTRUCTION NO. 15: PATENT CLAIMS

Before you can decide many of the issues in this case, you'll need to understand the role of the patent "claims." The claims of a patent are the numbered sentences at the end of the patent. The claims are important because it is the words of the claims themselves that define what a patent covers. The figures and the text in the rest of the patent provide a description or examples of the claimed invention and provide a context for the claims, but it is the claims that define the breadth of the patent's coverage. Therefore, what a patent covers depends, in turn, on what each of its claims covers.

The requirements of a claim are often referred to as "claim elements," "claim steps," or "claim limitations." The coverage of a patent is assessed claim-by-claim. When a thing (such as a product or a process) meets all of the requirements of a claim, the claim is said to "cover" that thing, and that thing is said to "fall" within the scope of that claim. In other words, a claim covers a product or process where each of the claim elements or limitations is present in that product or process.

You will first need to understand what each claim covers in order to decide whether or not there is infringement of that claim and to decide whether or not the claim is invalid. The first step is to understand the meaning of the words used in the patent claim.

It is my role to define the terms of the claims and it is your role to apply my definitions of the terms I have construed to the issues that you are asked to decide in this case. I have determined that you are to use the plain and ordinary meaning of the words of the patent claims as understood by a person of ordinary skill in the art, which is to say, in the field of technology of the patent at the time of the invention. The meanings of the words of the patent claims must be the same when deciding both the issues of infringement and validity.

The beginning portion of a claim, also known as the preamble, often uses the word "comprising." The word "comprising," when used in the preamble, means "including but not limited to" or "containing but not limited to." When "comprising" is used in the preamble of a claim, if you decide that an accused product or process includes all of the requirements of that claim, the claim is infringed. This is true even if the accused product or process contains additional elements. For example, a claim to "a table comprising a tabletop, legs, and glue" would cover a table that includes a tabletop, legs, and glue, even if the table also includes wheels on the table's legs.

JURY INSTRUCTION NO. 16: INDEPENDENT AND DEPENDENT CLAIMS

This case involves two types of Asserted Claims: independent claims and dependent claims.

An "independent claim" sets forth all of the requirements that must be met in order to be covered by that claim. Thus, it is not necessary to look at any other claim to determine what an independent claim covers. In this case, asserted claim 1 of the '251 patent, asserted claim 1 of the '528 patent, and asserted claims 1 and 6 of the '289 patent are each independent claims.

The remainder of the Asserted Claims in the Asserted Patents are "dependent claims." A dependent claim does not itself recite all of the requirements of the claim but refers to another claim for some of its requirements. In this way, the claim "depends" on another claim. A dependent claim incorporates all of the requirements of the claim(s) to which it refers. The dependent claim then adds its own additional requirements. To determine what a dependent claim covers, it is necessary to look at both the dependent claim and any other claim(s) to which it refers. A product or process that meets all of the requirements of both the dependent claim and the claim(s) to which the dependent claim refers is covered by that dependent claim.

If any requirement of a dependent claim is not met, or if any requirement of the independent claim from which the dependent claim depends is not met, then the product or process is not covered by that dependent claim.

On the other hand, if the requirements of an independent claim are met by a product or process, but a requirement of a dependent claim is not met, the independent claim is still infringed.

JURY INSTRUCTION NO. 17: INFRINGEMENT—GENERALLY

I will now instruct you as to the rules you must follow when deciding whether Touchstream has proven that Google infringed any of the Asserted Claims of the Asserted Patents.

Patent law gives the owner of a valid patent the right to exclude others from importing, making, using, offering to sell, or selling a claimed invention within the United States during the term of the patent. Any person or business entity that has engaged in any of those acts without the patent owner's permission infringes the patent.

Infringement is assessed on a claim-by-claim basis by comparing the operation of Google's accused products to the elements or steps of each claim. There may be infringement as to one claim but no infringement as to another claim.

To prove infringement of a claim, Touchstream must prove infringement by a preponderance of the evidence, that is, that it is more likely than not that infringement has been proven.

JURY INSTRUCTION NO. 18: OTHER PATENTS

You have heard certain arguments and evidence regarding Google's patents. The fact that Google has patents does not mean that it has a right to use Touchstream's patented technology and has no impact on whether Google has or has not infringed the Asserted Patents.

JURY INSTRUCTION NO. 19: DIRECT INFRINGEMENT—KNOWLEDGE OF THE PATENT AND INFRINGEMENT ARE IMMATERIAL

In this case, Touchstream asserts that Google has directly infringed the Asserted Patents. You must compare the accused product or process with each and every one of the requirements of a claim to determine whether all of the requirements of that claim are met. A party can directly infringe a patent without knowing of the patent or without knowing that what the party is doing is patent infringement. There is no intent element to direct infringement. Evidence of independent development is not relevant to an infringement determination. Copying is not a required element of infringement. Even if the party independently creates the accused product, it can still infringe.

JURY INSTRUCTION NO. 20: INFRINGEMENT BY LITERAL INFRINGEMENT

In order to prove infringement by literal infringement, Touchstream must prove by a preponderance of the evidence, i.e., that it is more likely than not, that Google made, used, sold, or offered for sale within the United States, or imported into the United States, a product or process that meets all of the requirements of a claim and did so without the permission of Touchstream. You must compare the product or process with each and every one of the requirements of a claim to determine whether all of the requirements of that claim are met.

A claim element is literally present if it exists in an Accused Product or was performed by an Accused Product as it is described in the claim language. For a method claim to be infringed, Touchstream must prove by a preponderance of the evidence that Google performed each and every step of the claimed method in the United States. If an Accused Product omits any requirement recited in one of the Asserted Claims, then that product or process does not infringe that claim.

You must determine, separately for each asserted claim, whether or not there is infringement. For dependent claims, if you find that a claim to which a dependent claim refers is not infringed, there cannot be infringement of that dependent claim. On the other hand, if you find that an independent claim has been infringed, you must still decide, separately, whether the product or process meets the additional requirement(s) of any claims that depend from the independent claim to determine whether those dependent claims have also been infringed. A dependent claim includes all the requirements of any of the claims to which it refers plus additional requirement(s) of its own.

JURY INSTRUCTION NO. 21: DIRECT INFRINGEMENT: ACTS OF MULTIPLE PARTIES MUST BE COMBINED TO MEET ALL METHOD CLAIM LIMITATIONS

Direct infringement occurs where all steps of a claimed method are performed by or are attributable to a single party. Where more than one party is involved in practicing the steps, you must determine whether the acts of one are attributable to the other such that a single party is responsible for the infringement. One situation where there may be direct infringement even if no single party performs all of the steps is where one party directs or controls another party's performance of some or all of the claim steps of the claimed method.

Touchstream alleges that Google performs each step of the Asserted Claims, and that if third parties are involved in performing any steps, Google directs or controls the third parties. For infringement to be proved under this theory, Touchstream must prove by a preponderance of the evidence (1) that all the steps of the claimed process were performed in the United States and (2) that the acts of the third parties are attributable to Google because Google directs or controls the acts of the third parties.

To prove that Google directed or controlled the acts of others, Touchstream must prove either that (1) those other parties are the agent of Google or are contractually obligated to Google to carry out the claimed steps, or (2) those other parties performed the claim step(s) in order to receive a benefit from Google and that Google established how or when the claim step(s) were performed.

JURY INSTRUCTION NO. 22: PATENT INVALIDITY—GENERALLY

I will now instruct you on the rules you must follow in deciding whether or not Google has proven that the Asserted Claims of the Asserted Patents are invalid. A patent is presumed valid. The burden of establishing invalidity of a patent or any claim rests solely on Google as the party asserting invalidity.

To prove that any claim of a patent is invalid, Google must persuade you by clear and convincing evidence, that is, you must be left with a clear conviction that the claim is invalid. Even though the Patent Office examiners have allowed the Asserted Claims as valid, you have the responsibility for deciding whether Google has met its burden of proving by clear and convincing evidence that the claims of the patent are invalid.

When a party challenging the validity of a patent presents evidence that was not considered by the Patent Office examiners during the prosecution of the application and not cumulative of other evidence that was considered which resulted in the issued patent, such new evidence may be given more weight and may make it easier to satisfy the party's clear-and-convincing evidence burden.

JURY INSTRUCTION NO. 23: INVALIDITY—PRIOR ART

Google contends the following are prior art to the Asserted Patents:

- YouTube Remote and Leanback with Google TV System ("GTS")
- U.S. Patent Application Publication No. 2010/0241699 ("Muthukumarasamy")

You must determine whether each of the above is prior art that can be considered in determining whether the Asserted Claims of the Asserted Patents are obvious.

Google contends that GTS is prior art because it was publicly known or publicly used by others in the United States before the claimed invention was invented. Google contends that the YouTube Leanback and Google TV (including Fling and remote control features) aspects of GTS and Muthukumarasamy are prior art because they were known to or used by others in the United States or patented or described in a printed publication anywhere in the world before October 8, 2010. Google contends that the YouTube Remote aspects of GTS are prior art because they were known to or used by others in the United States anywhere in the world before November 9, 2010, and because the Asserted Patents are not entitled to an invention date before November 9, 2010.

To prove that GTS and Muthukumarasamy are prior art, Google must prove that the references were known to or used by others in the United States or patented or described in a printed publication anywhere in the world before the date of the claimed invention. An invention is known when the information about it was reasonably accessible to the public on that date. A description is a "printed publication" only if it was publicly accessible.

However, the YouTube Remote aspects of GTS are not prior art if you determine that the Asserted Claims of the Asserted Patents are entitled to an invention date before November 9, 2010. Specifically, Touchstream contends that the invention date is October 8, 2010, because the inventor conceived of the invention on that date and the inventor was diligent in reducing the invention to practice. Google contends that the invention of the Asserted Patents was conceived

no earlier than November 9, 2010, and that the invention was not reduced to practice.

While Google bears the burden of persuasion to show by clear and convincing evidence that each of GTS and Muthukumarasamy are prior art to the Asserted Patents, Touchstream nevertheless must meet its burden of coming forward with evidence to demonstrate an earlier invention date of October 8, 2010.

For the Asserted Patents to be entitled to an invention date of October 8, 2010, Touchstream has the burden of providing evidence that the claimed invention of the Asserted Patents was conceived by October 8, 2010, and that the inventor was diligent in reducing the invention to practice after the conception date. Diligence means working continuously, though not necessarily every day. Conception is the mental part of an inventive act, i.e., the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice, even if the inventor did not know at the time that the invention would work. Conception of an invention is complete when the idea is so clearly defined in the inventor's mind that, if the idea were communicated to a person having ordinary skill in the field of the technology, he or she would be able to reduce the invention to practice without undue research or experimentation. This requirement does not mean that the inventor has to have a prototype built or have actually explained her or his invention to another person. But there must be some evidence beyond the inventor's own testimony that confirms the date on which the inventor had the complete idea. Conception may be proven when the invention is shown in its complete form by drawings, disclosure to another person, or other forms of evidence presented at trial. A claimed invention is "reduced to practice" when it has been constructed, used, or tested sufficiently to show that it will work for its intended purpose or when the inventor files a patent application that fully describes the invention.

JURY INSTRUCTION NO. 24: LEVEL OF ORDINARY SKILL

In deciding what the level of ordinary skill in the field of the invention is, you should consider all the evidence introduced at trial, including but not limited to: (1) the levels of education and experience of the inventor and other persons actively working in the field; (2) the types of problems encountered in the field; (3) prior art solutions to those problems; (4) the rapidity with which innovations are made; and (5) the sophistication of the technology.

JURY INSTRUCTION NO. 25: OBVIOUSNESS

Even though an invention may not have been identically disclosed or described before it was made by an inventor, in order to be patentable, the invention must also not have been obvious to a person of ordinary skill in the field of technology of the patent at the time the invention was made.

Google may establish that a patent claim is invalid by proving, by clear and convincing evidence, that the claimed invention would have been obvious to persons having ordinary skill in the art at the time of the invention of the Asserted Patents.

In determining whether a claimed invention is obvious, you must consider the level of ordinary skill in the field of the invention that someone would have had at the time of the invention of the Asserted Patents, the scope and content of the prior art, any differences between the prior art and the claimed invention, and, if present, so-called objective evidence or secondary considerations, which I will describe shortly. Do not use hindsight; consider only what was known at the time of the invention of the Asserted Patents.

Keep in mind that the existence of each and every element of the claimed invention in the prior art does not necessarily prove obviousness. Most, if not all, inventions rely on building blocks of prior art. In considering whether a claimed invention is obvious, you should consider whether, at the time of the invention of the Touchstream Patents, there was a reason that would have prompted a person having ordinary skill in the field of the invention to combine the known elements in the prior art in a way the claimed invention does, taking into account such factors as (1) whether the claimed invention was merely the predictable result of using prior art elements according to their known function(s); (2) whether the claimed invention provides an obvious solution to a known problem in the relevant field; (3) whether the prior art teaches or suggests the desirability of combining elements claimed in the invention; (4) whether the prior art teaches away

from combining elements in the claimed invention; (5) whether it would have been obvious to try the combinations of elements, such as when there is a design incentive or market pressure to solve a problem and there are a finite number of identified, predictable solutions; and (6) whether the change resulted more from design incentives or other market forces.

To find it rendered the claimed invention obvious, you must find that the prior art provided a reasonable expectation of success. Obvious to try is not sufficient in unpredictable technologies.

In determining whether the claimed invention is obvious, you should take into account any objective evidence (sometimes called "secondary considerations") that may shed light on whether or not the claimed invention is obvious, such as:

a. Whether the claimed invention was commercially successful as a result of the merits of the claimed invention (rather than the result of design needs or market-pressure advertising or similar activities);

b. Whether the claimed invention satisfied a long-felt need;

c. Whether others had tried and failed to make the claimed invention;

d. Whether others invented the claimed invention at roughly the same time;

e. Whether others copied the claimed invention;

f. Whether there were changes or related technologies or market needs contemporaneous with the claimed invention;

g. Whether the claimed invention achieved unexpected results;

h. Whether others in the field praised the claimed invention;

i. Whether persons having ordinary skill in the art of the invention expressed surprise or disbelief regarding the claimed invention;

j. Whether others sought or obtained rights to the patent from the patent holder; and

k. Whether the inventor proceeded contrary to accepted wisdom in the field.

In determining whether the claimed invention was obvious, consider each claim separately, but understand that if a dependent claim is obvious, then the claims from which it depends are necessarily obvious as well.

JURY INSTRUCTION NO. 26: DAMAGES—INTRODUCTION

If you find that Google infringed any valid claim of the Asserted Patents, you must then consider what amount of damages to award to Touchstream. I will now instruct you about the measure of damages. By instructing you on damages, I am not suggesting which party should win this case, on any issue. If you find that Google has not infringed any valid claim of the Asserted Patents, then Touchstream is not entitled to any damages.

The damages you award, if any, must be adequate to compensate Touchstream for the infringement. Damages are not meant to punish an infringer. Your damages award, if you reach this issue, should put Touchstream in approximately the same financial position that it would have been in had the infringement not occurred.

Touchstream has the burden to establish the amount of damages by a preponderance of the evidence. In other words, you should award only those damages that Touchstream establishes that it more likely than not has suffered. While Touchstream is not required to prove the amount of damages with mathematical precision, it must prove them with reasonable certainty. You may not award damages that are speculative, damages that are only possible, or damages that are based on guesswork.

In this case, Touchstream seeks a reasonable royalty. A reasonable royalty is defined as the money amount Touchstream and Google would have agreed upon as a fee for use of the invention at the time just prior to when infringement began. You must be careful to ensure that award is no more and no less than the value of the patented invention.

I will give more detailed instructions regarding damages shortly. Note, however, that Touchstream is entitled to recover no less than a reasonable royalty for each infringing act.

JURY INSTRUCTION NO. 27: DATE OF COMMENCEMENT OF DAMAGES—PRODUCTS

In determining the amount of damages, the parties agree that damages period begins on June 4, 2015.

JURY INSTRUCTION NO. 28: DAMAGES—REASONABLE ROYALTY

A reasonable royalty is defined as the money amount that the patent owner and the alleged infringer would have agreed to if a hypothetical negotiation had taken place at the time just prior to when any infringement first began. Touchstream bears the burden of proving the appropriate amount of a reasonable royalty by a preponderance of the evidence.

In considering this hypothetical negotiation to determine a reasonable royalty in this case, you should focus on what the expectations of Touchstream and Google would have been had they acted reasonably in their negotiations and had they entered into an agreement just before any infringement began. In determining this, you must assume that both parties believed the Asserted Patents were valid and would be infringed and that Touchstream and Google were willing to enter into an agreement. The reasonable royalty you determine must be a royalty that would have resulted from the hypothetical negotiation, and not simply a royalty either party would have preferred.

Evidence of things that happened after the infringement first began can be considered in evaluating the reasonable royalty only to the extent that the evidence aids in assessing what royalty would have resulted from a hypothetical negotiation just prior to the first infringement.

JURY INSTRUCTION NO. 29: DAMAGES—APPORTIONMENT REQUIRED

Any amount of damages must be based on the value attributable to the patented invention, as distinct from unpatented features of the accused products or other factors such as marketing or advertising. A royalty compensating the patent owner for damages must reflect the value attributable to the infringing features of the product, and no more. The process of separating the value of the allegedly infringing features from the value of all other features is called apportionment.

Apportionment can be addressed in a variety of ways, including by careful selection of the royalty base to reflect the value added by the patented feature or by adjustment of the royalty so as to discount the value of a product's non-patented features; or by a combination thereof.

When the products accused of infringement have both patented and unpatented features, your award must be apportioned so that it is based only on the value of the patented features, and no more.

JURY INSTRUCTION NO. 30: REASONABLE ROYALTY—RELEVANT FACTORS

In determining the amount of a reasonable royalty you may consider evidence on any of the following factors, in addition to any other evidence presented by the parties on the economic value of the patent:

- Any royalties received by Touchstream for licensing of the patent-in-suit, proving or tending to prove an established royalty.
- The rates paid by Google to license other patents comparable to the Touchstream Patents.
- The nature and scope of the license, as exclusive or nonexclusive, or as restricted or non-restricted in terms of its territory or with respect to whom the manufactured product may be sold.
- The licensor's established policy and marketing program to maintain his or her patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly.
- The commercial relationship between the licensor and the licensee, such as whether or not they are competitors in the same territory in the same line of business.
- The effect of selling the patented products in promoting other sales of the licensee (Google); the existing value of the claimed invention to the licensor as a generator of sales of its non-patented items; and the extent of such collateral sales.
- The duration of the Touchstream Patents and the term of the license.
- The established profitability of the products made under the Touchstream Patents; their commercial success; and their popularity.

- The utility and advantages of the patented inventions over the old modes or devices, if any, that had been used for achieving similar results.
- The nature of the patented inventions; the character of any commercial embodiment of it as owned and produced by or for the licensor; and the benefits, if any, to those who have used the claimed invention.
- The extent, if any, to which Google has made use of the claimed invention; and any evidence that shows the value of that use.
- The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the inventions or analogous inventions.
- The portion of the profit that arises from the patented inventions themselves as opposed to profit arising from unpatented features, such as the manufacturing process, business risks, or significant features or improvements added by the accused infringer.
- The opinion testimony of qualified experts.
- The amount that a licensor and a licensee would have agreed upon (at the time the infringement began) if both sides had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee—who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention—would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a patentee who was willing to grant a license.
- Any other economic factor that a normally prudent business person would, under similar circumstances, take into consideration in negotiating the hypothetical license.

No one factor is dispositive, and you can and should consider the evidence that has been presented to you in this case on each of these factors. You may also consider any other factors which in your mind would have increased or decreased the royalty the alleged infringer would have been willing to pay and the patent owner would have been willing to accept, acting as normally prudent business people.

JURY INSTRUCTION NO. 31: DAMAGES—COMPARABLE AGREEMENTS

Comparable license agreements are one factor that may inform your decision as to the proper amount and form of the reasonable royalty award, similar to the way in which the value of a house is determined relative to comparable houses sold in the same neighborhood.

Whether a license agreement is comparable to the license under the hypothetical negotiation scenario depends on many factors, such as whether they involve comparable technologies, comparable economic circumstances, comparable structures, and comparable scope. If there are differences between a license agreement and the hypothetical license, you must take into account when you make your reasonable royalty determination.

The hypothetical license is deemed to be a voluntary agreement. When determining if a license is a comparable to the hypothetical license, you may consider whether the license agreement is between the parties to a lawsuit and whether the license agreement was a settlement influenced by a desire to avoid further litigation.

JURY INSTRUCTION NO. 32: DAMAGES-RUNNING ROYALTY VS. LUMP SUM

Reasonable royalty awards may take the form of a running royalty based on the number of activations of the licensed products. A running royalty can be calculated, for example, by multiplying a royalty base by a royalty rate, or by multiplying the number of infringing products or product units sold by a royalty amount per unit.

Reasonable royalty awards can also take the form of a lump sum payment. A lump sum payment is equal to an amount that the alleged infringer would have paid at the time of a hypothetical negotiation for a license covering all the sales of the licensed product, both past and future. When a lump sum is paid, the infringer pays a single price for a license covering both past and future infringing sales.

It is up to you, based on the evidence, to decide what type of royalty, if any, is appropriate in this case.

JURY INSTRUCTION NO. 33: JUROR NOTEBOOKS

To assist in your deliberations, I have provided you with a notebook that contains the following:

- Paper
- A copy of the Touchstream Patents
- Witness photographs

These materials have been jointly submitted by the parties.

JURY INSTRUCTION NO. 34: DUTY TO DELIBERATE

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

Remember at all times, you are the judges of the facts. You have been allowed to take notes during this trial. Any notes that you took during this trial are only aids to memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you did not take notes, rely on your independent recollection of the evidence and do not be unduly influenced by the notes of other jurors. Notes are not entitled to greater weight than the recollection or impression of each juror about the testimony.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes. You must select a jury foreperson to guide you in your deliberations and to speak for you here in the courtroom.

Your verdict must be unanimous. After you have reached a unanimous verdict, your jury foreperson must fill out the answers to the written questions on the verdict form and sign and date it. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the jury foreperson should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

JURY INSTRUCTION NO. 35: SOCIAL MEDIA INSTRUCTION

During your deliberations, you may not communicate any information about this case to anyone by any means. For example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell phone, smartphone, PDA, tablet or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog or website such as Facebook, LinkedIn, YouTube, Snapchat, Instagram or Twitter, or any other way to communicate. You may not communicate to anyone any information about this case or conduct any research about this case until this case is over, and I accept your verdict.

In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations.

You may now proceed to the jury room to begin your deliberations.