

1 **ISSUES ON THE LICENSE DEFENSE**

2 To prove a license defense, Defendants BindView and Symantec must show that they had
3 valid licenses to Netbula RPC software. Since Netbula did not even know BindView existed
4 until September 2005 and since BindView admitted that whatever licenses Netect had on
5 Netbula RPC were not transferred to BindView when BindView acquired Netect LTD in 1999
6 (See Ex. B, BV00677-691, attached to Declaration of Vonnah Brillet), to prove a license
7 defense, BindView must overcome the following three hurdles:
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- 9
- 10 1) Netect LTD had both development and distribution licenses for Netbula RPC;
 - 11 2) Netect LTD continue to hold the licenses it had after it sold its stock to BindView in
12 1999 – in other words, Netect LTD’s change of ownership did not trigger transfer of
13 licenses;
 - 14 3) BindView lawfully acquired the Netect LTD licenses without any transfer;
- 15

16 In the cases analyzed in the court Order, the question was whether a company continued
17 to have copyright or patent licenses after it sold its stock to another company³. Applying those
18 cases to the instant case, the inquiry is whether Netect LTD continued to lawfully possess its
19 licenses (without triggering an impermissible transfer) after it sold its stock to BindView.
20

21 Defendants contended that the stock sale by Netect did not violate license agreements,
22 because “[t]he sale of all the stock in a company to an unrelated third party did not constitute a
23 ‘sale, transfer, or assignment’ of assets to that third party, and thus a right of first refusal held by
24 the prior owner of the assets was not triggered”. Defendants’ Motion for Summary Judgment as
25 to the Copyright Claim, p.15:7-9. Plaintiff contended that Netect LTD’s sale of its stock
26

27 ³ For instance, in *SQL Solutions, Inc. v. Oracle Corp.*, No. C-91-1079, 1991 U.S. Dist. LEXIS 21097, 1991 WL
28 626458, at *3 (N.D. Cal. Dec. 18, 1991), the question is whether SQL continue to lawfully own the copyright
licenses after it became a subsidiary of Sybase, Inc.

1 constituted a transfer under federal law or policy. Because the parties were unable to locate the
2 1998 Netect license agreement to establish the controlling state law, the Court found that
3 Plaintiff could not prove that the Netect's sale of its stock constituted a transfer or assignment of
4 Netect's license rights.
5

6 However, this analysis only means that Netect LTD continued to possess whatever
7 license rights it had after it became a subsidiary of BindView in 1999, without triggering a
8 transfer from the old Netect LTD to the new Netect LTD owned by BindView. In other words,
9 Defendants only proved that the Netect licenses lawfully stayed with Netect.
10

11 BindView did not prove that Netect LTD had a distribution license to start with -- only
12 Netect Inc, the Delaware subsidiary of Netect LTD, had a distribution license. There was no
13 evidence that Netect Inc's distribution license was lawfully transferred to its Israeli parent,
14 Netect LTD. Moreover, even assuming that Netect LTD had a license, BindView did not show
15 how it lawfully obtained the license from Netect LTD **without a transfer**. BindView and Netect
16 LTD did not merge, they remained separate entities.
17

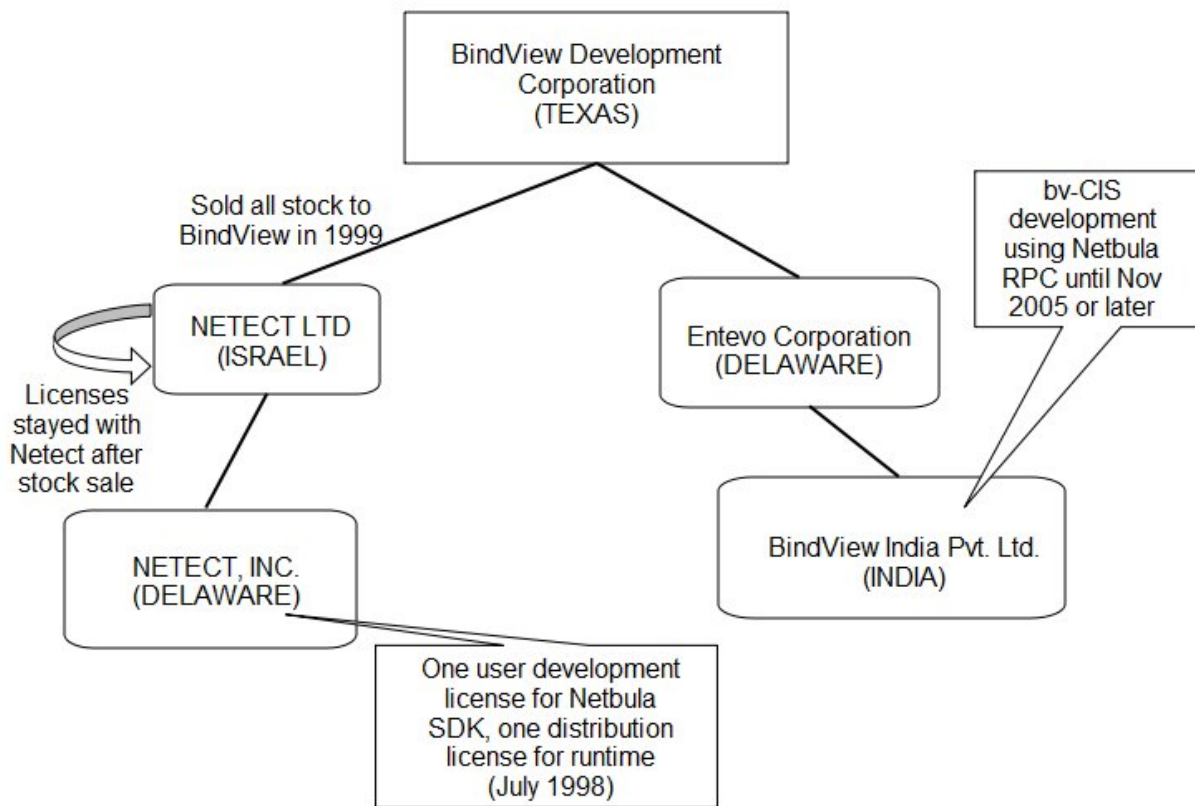
18 **Issue 2: Whether BindView's development of the bv-Control for Internet Security ("bv-**
19 **CIS"), which was developed with Netbula ONC RPC SDK, constituted a transfer of the**
20 **Netect, Inc. license from Netect, Inc. to BindView**

21 It is undisputed that BindView, instead of Netect LTD or Netect, Inc., developed the bv-
22 Control for Internet Security software using Netbula RPC.
23

24 BindView continued to develop and sell HackerShield after its
25 acquisition of Netect, and sold the product as bv-Control for Internet
26 Security or "bv-CIS." Netect's offices were closed after the BindView
27 acquisition.
28

JSUF at ¶ 15.

1 Based on the information in BindView’s October 2, 2005 disclosure letter (Brillet Decl,
 2 Ex. B, BV00678), the following diagram shows the relationship of relevant entities in October
 3 2005 and the movement of Netbula RPC software.
 4



19 Figure 1: BindView and the related subsidiaries as of October 2, 2005 (See BV00678)
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21 As explained above, the “operation of law” theory only leads to the conclusion that the
 22 Netect licenses stayed with Netect. BindView’s development of bv-Control for Internet Security
 23 with Netbula RPC was thus done with a transfer of the Netbula ONC RPC development license
 24 from Netect, Inc.. to BindView. By moving development of bv-CIS to India, BindView’s further
 25 impermissibly transferred the Netect, Inc. license to the Indian company⁴.
 26
 27

28 ⁴ According to BindView’s documents, the name of the Indian company was BindView India Private Limited, which was 99% owned by Entevo Corporation as of October 2005.