1   IN THE UNITED STATES DISTRICT COURT

2   FOR THE NORTHERN DISTRICT OF CALIFORNIA

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4   DIGITAL REG OF TEXAS, LLC,   No. C 12-1971 CW

5   Plaintiff,   ORDER DENYING
                                                  ADOBE'S MOTION FOR
6   v.   RECONSIDERATION
                                                  (Docket No. 583)
7   ADOBE SYSTEMS, INC., et al.,

8   Defendants.

9   _____/

10   In this patent infringement case, Defendant Adobe Systems,

11 Inc. is the only Defendant remaining, with trial set to begin on

12 August 25, 2014. On July 14, 2014, Adobe asked for leave to file

13 a motion for "partial reconsideration" of the Court's order on the

14 motions for summary judgment. Because all three of the arguments

15 raised by Adobe lack merit, the Court DENIES the motion.

16   Under this Court's Civil Local Rules, a motion for

17 reconsideration may be permitted upon a showing of: (1) a material

18 difference in fact or law from what was presented to the Court

19 before entry of the order, (2) new material facts or law emerging

20 after the order, (3) a manifest failure by the Court to consider

21 material facts or dispositive legal arguments. Civ. L.R. 7-9(b).

22   Adobe first argues that the Court should have awarded Adobe

23 summary judgment based on the construction of the term "based on

24 the results of the attempted transmission," which is present in

25 all claims of the '670 patent. The Court construed this term as

26 "based on whether or not notification information was sent," which

27 was Defendants' proposed construction. MSJ Order at 13-14. Adobe

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1 takes issue with the fact that the Court granted summary judgment

2 based on this term for Ubisoft, but not for Adobe.

3   In moving for summary judgment, Adobe claimed that

4 Plaintiff's infringement analysis was faulty because it was based

5 on an "application-level response," which contradicted its

6 invalidity analysis based on a "network-level response."

7 Defendants' MSJ Brief at 19. But the Court's construction did not

8 revolve around whether there was a network-level response or an

9 application-level response. Adobe never explained how either a

10 "network-level response or an application-level response would be

11 inconsistent with the Court's constructions of this term" and

12 therefore failed to satisfy "its initial burden of informing the

13 Court of the grounds of the summary judgment motion." MSJ Order

14 at 37; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). By

15 contrast, Ubisoft explained that Plaintiff's own expert testified

16 that "access to Ubisoft's products depends on the server

17 authenticating the login information and 'sending a message

18 back.'" MSJ Order at 42 (citations omitted). Because Ubisoft

19 showed that Plaintiff could not prove that Ubisoft's products

20 practiced the limitation as construed by the Court, summary

21 judgment in its favor was warranted.

22   Now, Adobe presents deposition excerpts and other evidence

23 that it argues establishes that its products, too, do not practice

24 the required limitation. Notably, Adobe cites directly to the

25 evidence rather than to its briefs. Adobe did not present these

26 arguments to the Court at summary judgment. Adobe must explain

27 its summary judgment arguments and cannot rely on the Court to

28 sift through the countless exhibits to manufacture a summary

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judgment argument. McKinzy v. IRS, 367 F. App'x 896, 897 (10th

Cir. 2010). "The reason for this requirement is obvious: 'Judges

are not like pigs, hunting for truffles buried in briefs.'" Id.

Adobe next argues that the Court erred in denying summary

judgment based on its construction of the term "token." The Court

adopted the construction the parties agreed upon, that is "a file

indicating whether the transaction has been approved and access

should be granted." MSJ Order at 6. The Court noted that "a

token does not indicate simply that access should be granted, but

also contains a yes/no indication." Id. Put a different way, the

token must be capable of indicating either approval or rejection.

Id. In its summary judgment brief, Adobe stated that Plaintiff's

expert "did not opine on infringement under Adobe's proposed

construction," and thus there was no material dispute "[u]nder

Adobe's proposed construction" and summary judgment was warranted.

Defendants' MSJ Brief at 13. Adobe's analysis was at best

conclusory. Moreover, as noted by the Court in its order,

Plaintiff's expert identified and described a token for each

product, asserting the token complied with the Court's claim

construction. MSJ Order at 33. Adobe failed to satisfy its

initial burden of showing Plaintiff's identified tokens do not

exhibit either approval or rejection.

Adobe finally contends that it was entitled to summary

judgment because there was no evidence of specific intent. Adobe

asserted a good-faith belief of non-infringement, which

"eviscerates any claim of intent." Defendants' MSJ Brief at 10

(citing Commil USA, LLC v. Cisco Sys., Inc., 720 F.3d 1361, 1367-

68 (Fed. Cir. 2013). Adobe pointed to Plaintiff's expert's

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1 acknowledgement that "Adobe's expert has determined for a number

2 of reasons that Adobe does not infringe." Defendants' MSJ at 10

3 (citing Devanbu Depo. at 506:5-12, 507:3-13).[1] But good faith is

4 assessed based on an expert's opinion sought at the time of

5 infringement, not one retained years later solely for the purpose

6 of testifying at trial. See Commil USA, LLC, 720 F.3d at 1367-68

7 (discussing Cisco's good-faith belief of invalidity at the time of

8 infringement and holding that "the jury must merely decide whether

9 Cisco possessed that belief in good-faith") (emphasis added); DSU

10 Med. Corp. v. JMS Co., Ltd., 471 F.3d 1293, 1307 (Fed. Cir. 2006)

11 (upholding jury decision that defendant in good faith believed it

12 did not infringe because, around the time infringement began,

13 defendant obtained several opinions of counsel that the product

14 did not infringe). To accept Adobe's assertion during litigation

15 of "good-faith belief" would require granting summary judgment on

16 the same point in nearly every case.

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19 [1] In its examination of Plaintiff's expert, Adobe made clear
20 it was asking about its own expert's present-day opinion:

21 Q: [. . .] You don't know today whether or not Adobe believes
    it infringes?
22 A: I don't know what they believe.
    [. . .]
23 Q: You know that Adobe has hired an -- an expert to testify
    and opine as to whether or not the products infringe the
24 patents; right?
    A: Yes.
25 Q: And you understand that Adobe's expert has determined for
26 a number of reasons that Adobe does not infringe; right?
    A: Yes.

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Devanbu Depo. at 506:9-12, 506:24-507:6.
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1   Moreover, as the Court discussed in its order, there is

2 evidence in the record to create an inference that Adobe

3 instructed its users in the operation of the product, which in

4 combination with its software, would cause its users to infringe.

5 See Plaintiff's Reply Brief at 10; MSJ Order at 29-31 (citing to

6 Adobe's license agreements, user manuals, and Defendants' expert's

7 opinion discussing Adobe's use of licensing-related code to

8 maintain control over the user's operation of the product). It is

9 enough that this evidence shows Adobe specifically intended users

10 to go through the patented digital rights management process; it

11 need not show that Adobe specifically intended users to undergo

12 the antecedent decision to attempt to circumvent the system. DSU

13 Med. Corp., 471 F.3d at 1306 (discussing whether defendant

14 encouraged another's infringement and specifically intended

15 infringing acts to occur). The patents do not describe methods

16 for attempting to circumvent digital rights management, but

17 processes for maintaining it.

18   IT IS SO ORDERED.

19 Dated: 8/6/2014

                                    CLAUDIA WILKEN
20   United States District Judge

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