IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PERSONALIZED USER MODEL, L.L.P., Plaintiff, v. GOOGLE INC., Defendant.	)	C.A. No. 09-525-LPS **JURY TRIAL DEMANDED**
GOOGLE, INC. Counterclaimant, v. PERSONALIZED USER MODEL, LLP and YOCHAI KONIG Counterdefendants.	)	**PUBLIC VERSION**

LETTER TO THE HONORABLE LEONARD P. STARK
FROM RICHARD L. HORWITZ

Personalized User Model LLP v. Google Inc. Doc. 388

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Dated: August 29, 2012
Public Version Dated: September 5, 2012
1073598/34638

Dockets.Justia.com

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August 29, 2012; Public Version Dated: September 5, 2012

VIA ELECTRONIC FILING
The Honorable Leonard P. Stark
United States District Court
District of Delaware
844 North King Street
Wilmington, DE 19801

PUBLIC VERSION

Re: *Personalized User Model LLP v. Google Inc.*, C.A. No. 09-525-LPS

Dear Judge Stark:

Defendant Google Inc. ("Google") respectfully files this letter regarding the issues to be discussed at the upcoming August 31, 2012 teleconference. (D.I. 379.)

PUM's Supplemental Expert Report Should be Stricken. PUM's supplemental infringement report should be stricken because it accuses two new products of infringement. The parties stipulated to reopen discovery concerning Google's [redacted] project. (D.I. 367.) That stipulation permitted PUM to serve a supplemental infringement report "relating solely to [redacted] functionality." (*Id. (emphasis added).*) [redacted] Google stipulated to providing discovery on [redacted] because there are current plans to run experiments using [redacted] as part of Google's personalized search efforts, and Google's Personalized Search is accused of infringing PUM's patents. Currently, however, only two offerings at Google actively use [redacted]: limited aspects of YouTube (unrelated to ad-serving) and the "What's Hot" section of Google+.

Despite the parties' agreement, PUM's August 10 supplemental report was not limited "solely" to [redacted] functionality. Rather, PUM added two completely new accused products, : Google+ and YouTube Videos. (*See* D.I. 374.) PUM does not deny that the report is not related "solely" to [redacted]. (*See* D.I. 377.) Indeed, PUM's expert's , Dr. Pazzani's, report addresses things that have not been the subject of prior discovery, are not specific to [redacted] functionality, and thus have not yet been investigated by Google and its expert in the context of PUM's claims. For example, Dr. Pazzani states that in Google YouTube a "document" is a video, and in Google+ it is a post. (Ex. A, ¶14.) What constitutes a video or post in the context of these products goes beyond [redacted] functionality. Similarly, Dr. Pazzani discusses the [redacted] in Google+ to personalize what posts a user may see in his What's Hot stream. (*Id.* ¶48.) How the "What's Hot" stream or the [redacted] operates goes beyond [redacted]. And, as for YouTube Videos, Dr. Pazzani asserts that Google uses [redacted] to identify videos that are estimated to be of interest to the user. (*Id.* ¶52.) [redacted] is not the same thing as [redacted] and, thus also goes beyond [redacted] functionality.

PUM's late accusation of these two products causes severe prejudice to Google. Google's rebuttal report is due September 7, only four business days after the Court's teleconference.[1] Neither Google + nor YouTube Videos was previously accused of infringement in this case, neither has been the subject of any discovery, and neither have been the subject of prior expert reports or of investigation by Google counsel or its experts. To rebut Dr. Pazzani's opinions, Google now needs to locate and interview relevant witnesses, analyze relevant documents, and review source code regarding these products, including the functionalities identified above. And its experts need to get up to speed on all of the above. It is unfair to require Google to do so this late in the litigation and in such a short period of time.

PUM's arguments to the contrary are incorrect. First, PUM argues that Google can use the [redacted] discovery already produced. (D.I. 376.) Not so. Pursuant to the parties' stipulation, Google produced documents relating to the [redacted] functionality generally. Google did not produce any documents, witnesses, or source code relating to Google+ or YouTube specifically.

PUM also argues that its infringement theory is the "same" as before. (*Id.*) Initially, if that is true, then there is no need for it to supplement at all. In any event, Google still needs to investigate these new products to rebut the infringement theory as to these new products, and there may be non-infringement arguments unique to those new products that Google is not presently aware of and would not be aware if not provided ample time to investigate them. Once Google conducts that investigation, it may need to identify and/or produce relevant witnesses, documents, and source code. PUM will likely want to take further discovery based on those disclosures, continuing the never-ending fact discovery that has already plagued this case.

PUM's argument that Google has been on notice that PUM intended to make [redacted] a part of the case since March 2012 (*id.*), is a misleading non-sequitor. This did not put Google on notice that PUM intended to add new products to the case. Had Google known of PUM's intention to do so, Google never would have agreed to reopen discovery.

In light of the extreme prejudice to Google created by PUM's improper supplemental expert report, Google requests that the Court strike the report in its entirety. In the alternative, if not stricken entirely, Google requests that the Court order the parties to meet and confer within two weeks on a new schedule for Google's rebuttal report and subsequent dates. This will give Google adequate time to investigate the newly-accused products and determine how long it needs to do the full investigation to which it is entitled. One thing is certain, and that is that Google cannot complete its investigation by the current September 7 deadline.

It Would Be Wasteful and Inefficient to Set a Trial Date at This Time. As detailed in Google's July 26, 2011 Motion to Dismiss, the Court lacks subject matter jurisdiction over this action because the asserted patents were purportedly transferred to PUM before PUM came into corporate existence. (D.I. 301 and 302). It is inefficient to set a trial date in a case in which there is no subject matter jurisdiction, or at least before this threshold issue is resolved. PUM's alternative request that Levino be substituted as plaintiff if the Court grants Google's motion does not make setting a trial date any more practical because Google has been denied basic discovery regarding Levino. (D.I. 320.)

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[1] Google raised this issue with PUM on August 10, but the earliest hearing date was August 31.

Moreover, the case should not be set for trial because all asserted claims have been rejected numerous times in the ongoing *inter partes* re-examinations. As will be detailed in Defendants' Motion to Stay, on August 17, 2012, the PTO issued a Final Office Action rejecting every asserted claim of the '276 patent on seven grounds. (*See* D.I. 378.) The PTO issued an Action Closing Prosecution finding every asserted claim of the '040 patent invalid on four grounds. A Final Office Action is expected soon.

Third, PUM's proposed trial date of March 2013 is impractical. First, the Court will not have sufficient time to adjudicate dispositive motions. Under the current schedule, dispositive motions will not be fully briefed until, at the earliest (if there is no movement in the schedule in relation to PUM's improper supplemental report or for any other reason), November 28, 2012. Given the breadth of PUM's claims, dispositive motions may not be adjudicated until shortly before trial. It is impractical for both parties to prepare for trial without knowing which products and claims, if any, will survive summary judgment and need to be tried. PUM's response is that the Court can simply vacate or move the trial dates. (D.I. 372.) But, that is no solution at all. Setting a trial date affects the calendars of the Court, the parties, their counsel, and their experts. That PUM simply wants to get a trial date, even if it does not work practically and would need to be moved anyway, raises questions as to the true motivation behind PUM's request.

Further, several of Google's counsel at Quinn Emanuel (David Perlson, Charles Verhoeven, Antonio Sistos and Andrea Pallios Roberts) currently have another matter scheduled for trial in the Eastern District of Texas in March 2013 and, thus, are not available. PUM's response is that this is no reason not to set a trial date in this case. (D.I. 372.) PUM's disregard for Google's desire to have as trial counsel the attorneys it has worked with for years not just on this case but others should be rejected.

Notably, there is no prejudice to PUM in waiting to set a trial date. PUM is not a competitor of Google's and does not practice the asserted patents. PUM itself waited almost two years after it purportedly acquired the patents before bringing suit. Waiting to set a trial date until the issues above are resolved will not harm PUM.

The Court Should Allow 60 pages for Summary Judgment Briefing. Google's motion for summary judgment of non-infringement alone will require a significant number of pages. PUM has accused five products (plus the two improperly added in its supplemental report) of infringing twelve claims in two patents, several of which have many limitations. Google will need to separately explain how the relevant aspects of each of the accused products operates and then explain how each accused product fails to practice one or more of the limitations of the asserted claims. This will take many pages. Google expects to file additional motions, including one regarding the invalidity of the asserted patents, including on bases on which the PTO has already rejected all the claims in the pending reexamination, and one regarding PUM's lack of ownership of the patents in suit. (*See* D.I. 196.) As PUM will almost certainly not make all of them at issue at trial, Google asked PUM to reduce the number of asserted claims and/or products. PUM refused, making it necessary for Google to address all of them in its dispositive motions. Accordingly, Google will need 60 pages to brief its three summary judgment motions. Google notes that 60 pages would be the total under the Local Rules for three motions (20 each), but Google may need to reallocate those pages among the briefs.

Respectfully,

/s/ Richard L. Horwitz

Richard L. Horwitz

RLH/nmt/1072842/34638

Enclosures
cc: Clerk of the Court (via hand delivery)
Counsel of Record (via electronic mail)