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)
GOOGLE, INC. Counterclaimant, v. PERSONALIZED USER MODEL, L.L.P. and YOCHAI KONIG, Counterclaim-Defendants.	)	REDACTED -- PUBLIC VERSION

PUM'S MOTION IN LIMINE TO PRECLUDE GOOGLE FROM REFERRING TO RECENT CHANGES IN THE ACCUSED TECHNOLOGY

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PUM moves in limine to preclude Google from introducing newly-produced documents, source code, and supplemental interrogatory responses relating to alleged changes or possible future changes to the accused Search, Search Ads and [redacted] technology. This evidence should be excluded because (i) these productions were all made in the last few weeks or days, despite that the alleged changes occurred months and in some cases years ago, (ii) any planned changes for the future are entirely irrelevant, unsubstantiated and speculative; and (iii) any relevance of long past or planned changes is substantially outweighed by unfair prejudice.

ARGUMENT

A. Google's New Evidence Should Be Excluded As Untimely

This case is nearly five years old. Fact discovery closed two and one-half years ago, on June 10, 2011, expert discovery closed in November 2012, and trial begins in a week. PUM currently accuses Google Search, Search Ads, Content Ads, YouTube Content Ads, and YouTube Video Recommendations[1] of infringing the patents-in-suit. Less than six weeks before trial Google began to dump on PUM a series of documents and supplemental discovery responses maintaining that it either ceased using the accused technology or that it plans to stop using it sometime in the future. For example (emphasis added):

- On January 16, 2014, Google produced documents related to [redacted]
- On February 14, 2014, Google produced documents related to [redacted]

[redacted] PUM dropped Google News and Google+ for the accused products in the last two weeks in effort to narrow the case for trial

- On February 24, 2014, Google served supplemental discovery responses, stating in part, [redacted]

- On February 25, 2014, on the eve of the pretrial conference, Google produced source code likely relating to [redacted]

There is a time in every case for the record to come to a close. This is particularly so in this five year old case, where technology is constantly evolving. Here, trial is a week away and the changes Google seeks to document either occurred years ago or—in many instances—are nothing more than unsubstantiated future "plans." Further, as described below, Google refused discovery on Google Search during discovery, only to spring its hand-picked information on PUM on the eve of trial. Google's steady stream of last-minute productions clearly violates the Court's Scheduling Orders, and Google's duty to seasonably update its discovery responses as required by Fed. R. Civ. P. 26(e).[2]

B. Any Evidence Of Changes To The Accused Technology Is Unsubstantiated and Prejudicial And Will Confuse The Jury

This newly-produced "evidence" is irrelevant. But if it has any relevance at all, it is outweighed by its unfairly prejudicial effect and should be excluded under F.R.E. 403. Google seeks to introduce this evidence so that it can argue that the patented technology is not important to its business (to blunt PUM's evidence of secondary considerations).

But these purported changes or future plans are irrelevant to the issues in this

[2] As the Advisory Committee's Note to Rule 26(e) states, "[t]he duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate".

case. Damages have been bifurcated. PUM's commercial success argument is based on increased revenues relating to the date the technology was implemented in 2009 and shortly thereafter, not the date of its alleged removal (and certainly not alleged plans to remove it). Furthermore, any argument that Google's alleged replacement systems do not infringe is speculative at best. PUM has not had the opportunity to take any discovery on what replaced (or will replace) the allegedly no-longer-used technology. Google, in fact, refused to provide discovery in 2012 regarding the alleged changes to Search.[3] As a result, this evidence should be excluded because the probative value is low and risk of the unfair prejudice and jury confusion is very high. The prejudice to PUM is especially acute because if the newly-produced evidence is permitted, the jury will be left with a misleading impression that Google no longer practices the patents, when PUM has not had the opportunity to discover any facts relating to the new functionality Google uses and whether it continues to infringe. Without such pretrial discovery, PUM will not be able to cure this prejudice by cross-examination. The risk of unfair prejudice, and that the jury will be confused if not outright misled, outweighs any probative value and is a compelling reason why the evidence should be excluded under Fed. R. Evid. 403.

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[3] Google announced changes to its privacy policy on March 1, 2012 ([redacted]). PUM pushed Google for discovery for months regarding [redacted]. Exs. 1-4. On April 24, 2012, Google finally agreed to some additional discovery provided that PUM also push back the deadline for rebuttal expert reports given [redacted]. Ex. 5. After Google produced only 83 pages, PUM pushed again for documents, including [redacted]. Exs. 6-7. In late July, Google responded, [redacted] Ex. 8. Google also asserted that [redacted] but only agreed to produce documents if PUM agreed to further modify the case schedule. Id. PUM refused to further extend the case schedule. Google never supplemented its production but instead waited until this month to produce its hand-picked documents that purport to show that the functionality is not used, but provide no evidence about the current products. Id.

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March 2, 2014
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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2014, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered participants.

Additionally, I hereby certify that true and correct copies of the foregoing were caused to be served on March 2, 2014, upon the following individuals in the manner indicated:

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