Personalized User Model LLP v. Google Inc. Doc. 686

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

VIA ELECTRONIC FILING

Re: *Personalized User Model, L.L.P. v. Google, Inc.*
C.A. No. 09-525 (LPS)

Dear Judge Stark:

As the Court directed in its March 6, 2014, Order (D.I. 627), the parties have conferred and set forth below their proposals for the proposed instruction to be given to the jury regarding recent changes to the accused technologies and their views as to when the instruction should be given.

PUM's Proposal:

Pursuant to the Court's March 6, 2014 order, PUM proposes the following instruction be read to the jury:

> Ladies and gentlemen of the jury, the Google products and services accused by PUM of infringement are those versions of the products and services as they existed in June 2011. There may or may not have been changes to these products after that date. You will not be hearing evidence of any such changes that occurred after that date and I instruct you to disregard and not consider whether there have been changes. The attorneys will be asking questions addressed to the accused products and services as they existed on June 10, 2011, and the witnesses will be giving answers as to how those products and services existed as of that date to the best of their recollection.

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PUM proposes certain changes to the Court's proposed instruction that are consistent with the Court's Order:

PUM proposes that the relevant date for the instruction be June 2011, which is when fact discovery closed. *See* Stipulation Regarding Extension of Fact Discovery Deadline, D.I. 272. This is consistent with the Court's order. D.I. 627 at 2-3 ("The Court is not persuaded that PUM had a full and fair opportunity to take discovery into the changes in the Accused Technologies, ***particularly as the changes occurred after the close of fact discovery*** (and PUM could have reasonably believed that evidence of such changes would not be admissible at trial).") (emphasis added).[1] This is not an "arbitrary date cutoff" as Google suggests, but rather is the date the Court referenced in its Order and is the date as of which PUM had discovery on the accused products.

PUM proposes the instruction avoid inadvertently suggesting to the jury that any changes have been made to the accused technologies by also including the phrase "or may not" in the second sentence because some of the changes (*e.g.*, the "proposed" removal of the ignored domains from Search Ads) have yet to occur. Also, as the Court has ruled, the significance of certain alleged changes is unknown because there has not been an adequate opportunity for discovery.

PUM also proposes that the instruction make clear to the jury that it is not to give any weight to, and should disregard, whether or not any changes have been made to the accused technologies. Such an instruction is consistent with the Court's order excluding evidence of such changes.

Finally, PUM proposes that the final sentence of Google's proposed instruction be deleted and replaced by the addition of the phrase "to the best of their recollection" to the preceding sentence. This change will avoid any connotations that may be associated with the term "struggle"—such as that these changes occurred long ago when, in fact, they are relatively recent (i.e., allegedly no later than January 2012) or in some instances have not yet occurred. This will accomplish the purpose of excusing any difficulty witnesses may encounter recalling facts without unnecessarily emphasizing or suggesting changes to the accused technologies.

PUM suggests the instruction be given in the Court's preliminary instructions to the jury because it relates to trial presentation. To repeat the same instruction later would give undue emphasis to the alleged changes and would risk the very prejudice highlighted in PUM's motion and recognized by the Court.

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[1] [REDACTED]. Discovery closed on all of the products at issue for this trial in June 2011.

PUM also requests that for the same reason that counsel shall be required to ask precise questions focusing on the time frame as issue, Google's witnesses should be instructed to so confine their testimony and not testify about actual or planned changes.

In contrast, Google's proposed instruction (set forth below) is an attempt to reargue and/or circumvent the Court's Order by disclosing to the jury the information that the Court excluded.

First, Google's proposal contradicts the Court's Order by informing the jury that the technology *has changed.* Specifically, Google's proposed instruction unnecessarily indicates to the jury that the Google Search product has changed. Indeed, Google admits this in its section below, but argues that "[t]here is no harm in the jury knowing this," purportedly because the jury will not hear evidence of those alleged changes. This instruction makes no sense in light of the Court's Order that the jury is ***not*** to be told of post-discovery technology changes to any of the products, and the Court's finding that it would be prejudicial to PUM to do so. There also is no proper reason to single out the Search product in this manner.[2] Nor is there any proper reason to refer to the date of the alleged change, which again only serves to advise the jury that such changes have in fact taken place, and when they allegedly took place, contrary to this Court's ruling.

Google also proposes that the date for the instruction be January 2012, which is six months ***after*** fact discovery closed. Because the Court's Order expressly excludes changes that "occurred after the close of fact discovery," Google's date selection makes no sense unless it is Google's intent to nevertheless seek to introduce changes that occurred after discovery closed, but before its strategically chosen date. Given that PUM has not had the opportunity to take discovery on these changes, it is impossible for PUM or the Court to know which changes Google's proposed date would encompass.

Google's Proposal:

Pursuant to the Court's March 6, 2014 order, Google proposes that the following instruction be read to the jury:

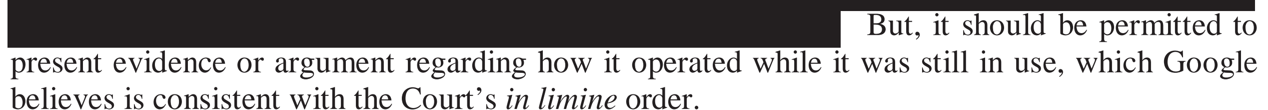
Ladies and gentlemen of the jury, the Google search products and services accused by PUM of infringement are those versions of the products and services as they existed in or before January 2012. There may have been changes to these products and services after that date. You will not be hearing evidence of any such changes that occurred after January 2012. Necessarily, then, the attorneys will be asking questions addressed to the accused Google search products and services as they existed in or before January 2012, and the witnesses will be giving answers as to how

[2] Google argues that "to avoid juror confusion, the instruction should be limited to Google Search." But there is no reason for the jurors to be confused, because they are not going to be hearing about any changes, actual or planned.

those products and services existed on that same date. You may see witnesses who are testifying about the Google search products and services accused by PUM struggle to answer these questions because they may need to put themselves back in the time frame at issue and may need to put out of their mind any changes that occurred after January 2012.

Google's proposal closely tracks the Court's suggested jury instruction in the March 6, 2014 order. To illustrate this, below is a redline reflecting the changes Google made to the Court's suggested jury instruction.

> Ladies and gentlemen of the jury, the Google search products and services accused by PUM of infringement are those versions of the products and services as they existed ~~on [date].~~ in or before January 2012. There may have been changes to these products and services after that date. You will not be hearing evidence of any such changes that occurred after ~~that date.~~ January 2012. Necessarily, then, the attorneys will be asking questions addressed to the accused Google search products and services as they existed ~~on [date],~~ in or before January 2012, and the witnesses will be giving answers as to how those products and services existed on that same date. You may see witnesses who are testifying about the Google search products and services accused by PUM struggle to answer these questions because they may need to put themselves back in the time frame at issue and may need to put out of their mind any changes that occurred after ~~[date].~~ January 2012.

The changes Google made to the Court's suggested jury instruction were minimal. The only accused product that is implicated by the March 6 order regarding discontinued products is Google Search. The accused functionalities in Google's Search Ads and Content Ads—the other remaining accused products—have not been discontinued and thus are not implicated by this instruction.[3] Accordingly, to avoid juror confusion, the instruction should be limited to Google Search.  But, it should be permitted to present evidence or argument regarding how it operated while it was still in use, which Google believes is consistent with the Court's *in limine* order.

In contrast, PUM's proposed instruction differs greatly from the Court's suggested instruction. Below is a redline comparison of PUM's proposed instruction to the Court's suggested instruction:

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Ladies and gentlemen of the jury, the Google products and services accused by PUM of infringement are those versions of the products and services as they existed ~~on [date].~~ in June 2011. There may or may not have been changes to these products after that date.~~ ~~ You will not be hearing evidence of any such changes that occurred after that date~~. Necessarily, then, the~~ and I instruct you to disregard and not consider whether there have been changes. The attorneys will be asking questions addressed to the accused products and services as they existed on ~~[date],~~June 10, 2011, and the witnesses will be giving answers as to how those products and services existed ~~on~~as of that ~~same date. You may see witnesses struggle~~date to ~~answer these questions because they may need to put themselves back in~~ the ~~time frame at issue and may need to put out~~best of their ~~mind any changes that occurred after [date].~~ recollection.

In its March 6 order, the Court expressly recognized Google's concern that the Court's ruling "may put certain witnesses in an awkward position, in which potentially they may have to testify in a manner not fully truthful in order not to reveal to the jury recent changes in the Accused Technologies." The Court addressed that concern by including the language "You may see witnesses struggle to answer these questions because they may need to put themselves back in the time frame at issue and may need to put out of their mind any changes that occurred after that [date]" in its suggested instruction to address this issue. PUM's proposal, however, disregards the Court's finding and strikes the Court's proposed language on this issue entirely. PUM argues that the term "struggle" should be removed because it suggests that "these changes occurred long ago when, in fact, they are recent or in some instances have not yet occurred." But the only product in which witnesses will need to struggle is Search, and these changes did occur long ago.[4]

PUM's addition that "I instruct you to disregard and not consider whether there have been changes" is confusing given that the Court's instruction indicates to the jurors there will be no evidence of those changes. In other words, the jurors will be left wondering what it is they are supposed to be disregarding and considering. There is no legal basis for such an instruction. Indeed, the jurors might wonder whether changes even before the cut off date should be considered or disregarded. The Court's language on this point needs nothing more.

PUM justifies its proposal by pointing to the Court's finding that it was "not persuaded that PUM had a full and fair opportunity to take discovery into the changes in the Accused Technologies, particularly as the changes occurred after the close of fact discovery." The changes to the Accused Technologies at issue were those that were the subject of PUM's motion *in limine*: Thus, Search is the only product to which the Court's order has relevance. Thus, in its proposed jury instruction, Google is not trying to circumvent anything. It is merely focused on the Court's ruling. There is no reason to apply an

[4] Indeed, PUM has been aware of this change since August 2012.

arbitrary date cut off for the other accused products that remain in the case, and PUM does not provide one.

PUM also raises the concern that Google's proposal informs the jury that changes have been made to Google Search. There is no harm in the jury knowing this, however, because the Court will instruct the jury that it will not hear evidence of those changes. The point of the proposed instruction is to cure potential prejudice to Google if the jury draws negative conclusions from a Google witness' "struggle" to recall how the system used to work. Google's proposal is tailored to addressing that concern. PUM's is not.

Lastly, Google believes that the instruction should be read before the first witness to whom it is pertinent takes the stand. Google has no objection to the instruction being read during the preliminary jury instructions as well.

Respectfully,

/s/ Karen Jacobs

Karen Jacobs (#2881)

KJ/lm
cc: Clerk of the Court (by hand)
All Counsel of Record (by e-mail)
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