

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

XEROX CORPORATION,	)	
	)	
<i>Plaintiff-Counterclaim Defendant,</i>	)	
	)	
v.	)	C.A. No. 10-136-JJF-MPT
	)	
GOOGLE INC., YAHOO! INC., RIGHT	)	JURY TRIAL DEMANDED
MEDIA INC., RIGHT MEDIA LLC,	)	
YOUTUBE, INC., and YOUTUBE, LLC,	)	
	)	
<i>Defendants-Counterclaim Plaintiffs.</i>	)	

**PROPOSED SCHEDULING ORDER**

The Court having conducted an initial Rule 16 scheduling and planning conference pursuant to Local Rule 16.2(a) on April 26, 2010, and the parties having determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation or binding arbitration;

IT IS ORDERED that:

1. Rule 26(a)(1) Initial Disclosures and E-Discovery.

a. The parties shall make their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) by May 25, 2010.

b. The parties agree to produce electronically stored information in a format to be agreed upon and to share reasonable costs to have the stored information electronically searchable, e.g., costs for optical character recognition. E-discovery shall be produced by November 19, 2010. Electronically stored information shall be produced on suitable electronic media and transmitted to counsel with a load file in the format the counsel has requested for its document management software application. In accordance with Local Rules and the Federal Rules, including Federal Rule of Civil Procedure 26, the parties have agreed that no voice mails,

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instant messages or cell phone text messages will be preserved, searched for, or produced under any circumstances.

2. Joinder of Other Parties and Amendment of Pleadings. All motions to join other parties, and to amend or supplement the pleadings shall be filed on or before December 17, 2010.

3. Discovery.

a. Limitation on Hours for Fact Deposition Discovery. Each side is limited to a total of **[[Plaintiff proposes 220 hours; Defendants propose 150 hours]]** of taking fact depositions, with no more than **[[Plaintiff proposes: “(a) 110 hours of depositions of employees of Google Inc. and/or YouTube, LLC (including 30(b)(6) deposition hours) and (b) 110 hours of depositions of employees of Yahoo! Inc. and/or Right Media LLC (including 30(b)(6) deposition hours)”]; Defendants propose: “75 hours against each Defendant group”]]** **[[Defendants propose adding: “and not more than a total of thirty-five (35) 30(b)(6) deposition hours of each Defendant group”; Plaintiff opposes]].**<sup>1</sup> The parties further agree that expert depositions will not count toward these limits. The parties reserve the right to revisit the issue of the number and length of depositions as discovery progresses. If any party requests more than 7 hours for any individual witness or if any side seeks more total deposition time, the parties agree to meet and confer in good faith to attempt to resolve the issue without intervention by the Court. If any deposition lasts more than 7 hours, the parties shall meet and confer regarding whether the deposition should be divided over the course of two days.

b. Location of Depositions. Any party or representative (officer, director, or managing agent) of a party filing a civil action in this district court must ordinarily be required,

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<sup>1</sup> Google Inc. and YouTube, LLC (successor to YouTube Inc.) (together, “YouTube”) collectively, and Yahoo! Inc. and Right Media LLC (successor to Right Media Inc.) (together, “Right Media”) collectively are the two “Defendant groups” in this case.

upon request, to submit to a deposition at a place designated within this district. Exceptions to this general rule may be made by order of the Court or by agreement of the parties and deponent.

c. Document Production. The parties shall substantially complete the production of documents by November 19, 2010.

d. Discovery Cut Off. All fact discovery in this case shall be initiated so that it will be completed on or before August 12, 2011, and all expert discovery shall be initiated so that it will be completed on or before December 16, 2011.

Unless otherwise ordered by the Court, the limitations on discovery set forth in Local Rule 26.1 shall be strictly observed.

e. Interrogatories and Requests for Admissions. The Court encourages the parties to serve and respond to contention interrogatories early in the case. Interrogatories shall be limited to 35 interrogatories for Xerox Corporation (“Xerox”), 15 interrogatories for Google Inc. (“Google”) and YouTube, LLC (successor to YouTube Inc.) (together, “YouTube”) collectively, 15 interrogatories for Yahoo! Inc. (“Yahoo”) and Right Media LLC (successor to Right Media Inc.) (together, “Right Media”) collectively, and 15 joint interrogatories for all defendants. Requests for Admissions (“RFAs”) shall be limited to 40 for Xerox, 25 for Google and YouTube collectively and 25 for Yahoo and Right Media collectively. There is no limitation to RFAs on authentication.

The Court encourages the parties to serve and respond to contention interrogatories early in the case.

f. Disclosure of Expert Testimony. For the party who has the initial burden of proof on the subject matter, the initial Fed. R. Civ. P. 26(a)(2) disclosure of expert testimony is due on or before October 3, 2011. The supplemental disclosure to contradict or rebut evidence

on the same matter identified by another party is due on or before November 18, 2011. Along with the submissions of the expert reports, the parties shall advise of the dates and times of their experts' availability for deposition.

Depositions of expert witnesses shall be limited to 7 hours per witness, unless an expert's report addresses issues relating to both Defendant groups. If so, **[[Plaintiff proposes: "such expert may be deposed for up to an additional 3 hours"; Defendants propose: "such expert's deposition shall be limited to 14 hours"]]**. Additionally, any expert opining on both validity and infringement may be deposed for up to an additional 3 hours over the above limits. The parties reserve the right to revisit the issue of the number and length of expert depositions as discovery progresses.

Draft expert reports and communications between experts and litigation counsel are not discoverable.

To the extent any objection to expert testimony is made pursuant to the principles announced in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), as incorporated in Federal Rule of Evidence 702, it shall be made by motion no later than the deadline for dispositive motions set forth herein, unless otherwise ordered by the Court.

g. Fact Witnesses to Be Called at Trial. By April 9, 2012, each party shall serve on the other party a list of fact witnesses (including any expert expected to give fact testimony) with a summary of the facts on which each witness is expected to testify. The listed fact witnesses shall have been timely disclosed during discovery. Each party shall serve a list of rebuttal fact witnesses and a summary of the rebuttal facts on which each witness is expected to testify by April 23, 2012. The parties may depose any listed fact witnesses who have not

previously been deposed in this case. These additional fact depositions are limited to twenty (20) hours per side and shall be completed by May 18, 2012.

h. Discovery Matters. Should counsel find they are unable to resolve a discovery matter or those other matters covered by this paragraph, the parties involved shall contact chambers at (302) 573-6173 to schedule a telephone conference. Not less than forty-eight (48) hours prior to the conference, *excluding* weekends and holidays, the party seeking relief shall file with the Court a letter, not to exceed three (3) pages, in no less than 12-point font, outlining the issues in dispute and its position on those issues. (The Court does not seek extensive argument or authorities at this point; it seeks simply a statement of the issue to be addressed and a summary of the basis for the party's position on the issue.) Not less than twenty-four (24) hours prior to the conference, *excluding* weekends and holidays, any party opposing the application for relief may file a letter, not to exceed three (3) pages, in no less than 12 point font, outlining that party's reason for its opposition. Should any document(s) be filed under seal, a copy of the sealed document(s) must be provided to the Magistrate Judge within one (1) hour of e-filing the document(s). Should the Court find further briefing necessary upon conclusion of the telephone conference, the Court will order it. Disputes or issues covered by the provisions contained in paragraph 3 of this Order, regarding protective orders, or motions for extension of time for briefing case dispositive motions which are related to discovery matters are to be addressed in the first instance in accordance with this paragraph.

No motions to compel or motions for protective order shall be filed absent approval of the court. Absent expressed approval of the court following a discovery conference, no motions pursuant to Fed. R. Civ. P. 37 shall be filed.

4. Application to Court for Protective Order. Should counsel find it will be necessary to apply to the Court for a protective order specifying terms and conditions for the disclosure of confidential information, counsel should confer and attempt to reach an agreement on a proposed form of order and submit it to the Court by May 28, 2010. Should counsel be unable to reach an agreement on a proposed form of order, counsel must first follow the provisions of Paragraph 3(h) above.

Any proposed order should include the following paragraph:

Other Proceedings. By entering this order and limiting the disclosure of information in this case, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes subject to a motion to disclose another party's information designated "confidential" [the parties should list any other level of designation, such as "highly confidential," which may be provided for in the protective order] pursuant to this order shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

5. Papers Filed Under Seal. When filing papers under seal, counsel should deliver to the Clerk an original and one copy of the papers.

6. ADR Process. To be discussed during the Rule 16 conference.

7. Interim Status Report. On July 22, 2011, counsel shall submit a joint interim report to the Court on the nature of the matters in issue and the progress of discovery to date.

8. Status Conference. On December 16, 2011, the Court will hold a Rule 16(a), (b) and (c) conference by telephone with counsel beginning at 11 a.m. Plaintiff's counsel shall initiate the telephone call. At the time of this conference, counsel shall also be prepared to discuss the progress, if any, of settlement discussions and shall be prepared to discuss the possibility of setting up a settlement conference with the Court, counsel and their clients.

If all parties agree that there is nothing to report, nor anything to add to the interim status report or to this order, they shall notify the Court in writing before the conference is scheduled to occur, and the conference will be taken off of the Court's calendar.

9. Tutorial Describing the Technology and Matters in Issue. If the parties believe that a tutorial on the technology would be helpful, they may provide the Court by **[[Plaintiff proposes March 7, 2012; Defendants propose April 2, 2011]]**, with a tutorial on the technology at issue. In that regard, each party may submit a videotape/CD of not more than 30 minutes. The parties may choose to present the tutorial in person. In either event, the tutorial should focus on the technology in issue and should not be used to argue the parties' claim construction contentions. If the parties choose to file videotapes/CDs, they should be filed under seal as part of the Court's file, subject to any protective order in effect. Each party may comment, in writing (in no more than 5 pages), on the opposing party's videotape/CD tutorial. Any such comment shall be filed within five (5) days of submission of the videotapes/CDs. As to the format selected, the parties should confirm the Court's technical abilities to access the information contained in the tutorial.

10. Case Dispositive Motions. All case dispositive motions, an opening brief, and affidavits, if any, in support of the motion shall be served and filed on or before January 13, 2012. Unless the Court directs otherwise, no case dispositive motions may be filed at a time before the date set forth in this paragraph. Briefing will be presented pursuant to the Court's Local Rules, except as modified during the scheduling conference. If the matter is scheduled for a bench trial, no case dispositive motions shall be filed without prior authorization of the Court.

Any reference to exhibits in the briefs must refer to the specific pages of the exhibit proffered in support of a party's argument. If the exhibit is a deposition, both the page and line numbers must be specified.<sup>2</sup>

11. Claim Construction Issue Identification. On **[[Plaintiff proposes June 3, 2011; Defendants propose October 22, 2010]]**, the parties shall exchange a list of those claim term(s)/phrase(s) that they believe need construction and their proposed claim construction of those term(s)/phrase(s). This document will not be filed with the Court. Subsequent to exchanging that list, the parties will meet and confer to prepare a Joint Claim Construction Chart to be submitted on **[[Plaintiff proposes September 2, 2011; Defendants propose December 3, 2010]]**. The parties' Joint Claim Construction Chart should identify for the Court the term(s)/phrase(s) of the claim(s) in issue, and should include each party's proposed construction of the disputed claim language with citation(s) only to the intrinsic evidence in support of their respective proposed constructions. A copy of the patent(s) in issue as well as those portions of the intrinsic record relied upon shall be submitted with this Joint Claim Construction Chart. In this joint submission, the parties shall not provide argument.

12. Claim Construction. **[[Plaintiff proposes the following language: "Counsel must identify during the claim construction phase of the case any claim language that will have a meaning to a person of ordinary skill in the art that differs from the ordinary meaning. Any language not so identified will be construed according to its ordinary dictionary meaning." Defendants propose the following language: "Counsel must identify**

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<sup>2</sup> For example, a reference to an exhibit that refers to the entire document will not be accepted and is not consistent with this provision.



**during the claim construction phase of the case any claim language that the parties believe in good faith at that time needs construction.”]]].**

The parties shall contemporaneously submit initial briefs on claim construction issues on **[[Plaintiff proposes January 13, 2012; Defendants propose February 18, 2011]]].** The parties’ answering/responsive briefs shall be contemporaneously submitted on **[[Plaintiff proposes February 6, 2012; Defendants propose March 18, 2011]]].**

13. Hearing on Claim Construction. Beginning at 9 a.m. on **[[Plaintiff proposes March 14, 2012; Defendants propose April 20, 2011]]],** the Court will hear evidence and argument on **[[Plaintiff proposes “claim construction and summary judgment”; Defendants propose “claim construction”]]].**

14. Applications by Motion. Except as otherwise specified herein, any application to the Court shall be by written motion filed with the Clerk. Unless otherwise requested by the Court, counsel shall not deliver copies of papers or correspondence to Chambers. Any non-dispositive motion should contain the statement required by Local Rule 7.1.1.

15. Pretrial Conference. On June 14, 2012, the Court will hold a Final Pretrial Conference in Chambers with counsel beginning at 9 a.m. Unless otherwise ordered by the Court, the parties should assume that filing the pretrial order satisfies the pretrial disclosure requirement of Fed. R. Civ. P. 26(a)(3). The parties shall file with the Court the joint proposed final pretrial order with the information required by the form of Final Pretrial Order which accompanies this Scheduling Order on or before June 7, 2012.

16. Motions in Limine. Motions *in limine* shall not be separately filed. All *in limine* requests and responses thereto shall be set forth in the proposed pretrial order. Each party shall be limited to five *in limine* requests, unless otherwise permitted by the Court. The *in limine*

request and any response shall contain the authorities relied upon; each *in limine* request may be supported by a maximum of three pages of argument and may be opposed by a maximum of three pages of argument. If more than one party is supporting or opposing an *in limine* request, such support or opposition shall be combined in a single three (3) page submission, unless otherwise ordered by the Court. No separate briefing shall be submitted on *in limine* requests, unless otherwise permitted by the Court.

17. Jury Instructions, Voir Dire, and Special Verdict Forms. Where a case is to be tried to a jury, pursuant to Local Rules 47 and 51 the parties should file joint proposed voir dire, instructions to the jury, and special verdict forms and jury interrogatories three full business days before the final pretrial conference. That submission shall be accompanied by a computer diskette (in WordPerfect format) which contains the instructions, proposed voir dire, special verdict forms, and jury interrogatories.

18. Trial. This matter is scheduled for a \_\_\_ day \_\_\_\_\_ trial beginning at 9:30 a.m. on July \_\_, 2012 with the subsequent trial days beginning at 9:00 a.m. For the purpose of completing pretrial preparations, counsel should plan on each side being allocated a total of 35 hours to present their case.

**[[Defendants propose adding the following provision: “19. Separation of Issues. The issues of infringement and invalidity shall be separated from the issues of inequitable conduct, willfulness and damages for purposes of discovery and trial.” Plaintiff opposes.]]**

Dated: April \_\_\_\_, 2010

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UNITED STATES MAGISTRATE JUDGE