

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

FUNCTION MEDIA, L.L.C.

Plaintiff,

vs.

GOOGLE, INC. AND YAHOO, INC.

Defendants.

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Civil Action No. 2007-CV-279

JURY TRIAL DEMANDED

**PLAINTIFF’S RESPONSE TO GOOGLE’S MOTION IN *LIMINE*
NO. SIX: MOTION TO PRECLUDE EVIDENCE AND ARGUMENT
REGARDING CREDIT FOR INVENTION OF THE ACCUSED PRODUCTS**

Google’s Motion *in Limine* No. Six is aimed at preventing Function Media from introducing evidence suggesting that either Susan Wojcicki or Sergey Brin have claimed credit for developing the Accused Products. According to Google, FM lacks evidence that Ms. Wojcicki or Mr. Brin in fact did develop the Accused Products, and, in any event, the issue is supposedly confusing to the jury and prejudicial to Google.

Google, however, never precisely explains how it could “prejudice” Google for FM to establish that Ms. Wojcicki and/or Mr. Brin developed the Accused Products. Indeed, it is difficult to fathom how evidence regarding the development of the products accused of infringement would not be relevant to a whole host of issues, ranging from infringement (what was Google’s intent for how the Accused Products would operate?) to validity (did Google consider the Accused Products to be new, novel, and non-obvious?) to damages (how did Google prospectively value the Accused Products?).

The true reason Google does not want FM introducing evidence as to who developed the Accused Products is because Google has doggedly refused to produce Ms. Wojcicki or Mr. Brin

for deposition. So Google wants to exclude evidence relating to their role in developing the Accused Products, lest Google's own trial tactic of withholding its executives from discovery prejudice it in front of the jury. Were FM able to discuss who at Google developed the Accused Products, worries Google, then the jury might wonder why Google has not produced them as witnesses. But this gamesmanship is no basis for excluding relevant evidence regarding product development.

In the end, this Court substantially undercut the basis for this motion *in limine* in its discovery rulings on October 9, 2009, when it ordered Google to produce relevant documents from the files of multiple Google executives, including Ms. Wojcicki and Mr. Brin. The Court also held open, pending the document production, the issue of FM's deposing Mr. Wojcicki and Mr. Brin. Any discussion of what evidence should or should not be admitted regarding Google's executives, therefore, logically ought to wait until the completion of the discovery ordered by this Court.

For these reason, FM requests that this Court deny Google's Motion *in Limine* No. Six.

Respectfully submitted,

/s/ Joseph S. Grinstein

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2009, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

/s/ Joseph S. Grinstein
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