

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

BRIGHT RESPONSE, LLC  
F/K/A POLARIS IP, LLC

v.

GOOGLE INC., et al.

NO. 2:07-CV-371-CE

**DEFENDANTS' JOINT MOTION *IN LIMINE* NO. 12: MOTION TO PRECLUDE  
PLAINTIFF FROM OFFERING ANY EVIDENCE OR ARGUMENT THAT  
DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE '947 PATENT**

Defendants Google Inc. (“Google”), America Online, Inc., AOL, LLC, and Yahoo! Inc. (“Yahoo”) (collectively, “Defendants”) move to preclude Plaintiff from offering any evidence or argument that Defendants had constructive notice of the ‘947 Patent.

Plaintiff cannot support a constructive notice theory because Plaintiff’s discovery responses, 30(b)(6) witness, and experts do not offer any evidence that Plaintiff has any products or, if they did, that Plaintiff marked its products with the ‘947 patent number.

Constructive notice requires the patentee, or its licensee, to mark its own products embodying the patented technology with the patent number. *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994) (“The correct approach to determining notice under section 287 must focus on the action of the patentee, not the knowledge or understanding of the infringer.”). The patentee bears the burden of showing compliance with the marking statute, which gives rise to constructive notice. *Id.* In this case, the patentee is unable to marshal any evidence showing that it marked its own products or services, or that any marking was “substantially consistent and continuous.” *Id.*

Accordingly, Defendants respectfully request that the Court preclude Plaintiff from offering any evidence or argument that Defendants have constructive notice of the ‘947 patent.

DATED: July 22, 2010

Respectfully submitted,

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*/s/ Amy H. Candido*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served today with a copy of this document via electronic mail.

By           /s/ Amy Candido            
Amy Candido