

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

BRIGHT RESPONSE, LLC,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 2:07-cv-371-CE
	§	
GOOGLE INC., et al.,	§	
	§	JURY TRIAL DEMANDED
Defendants.	§	
	§	

**BRIGHT RESPONSE, LLC'S MOTION FOR JUDGMENT AS A MATTER OF LAW  
ON INFRINGEMENT AS TO DEFENDANT YAHOO INC.**

Plaintiff Bright Response, LLC (“Bright Response”) files this Motion for Judgment as a Matter of Law (“Motion”) as a supplement to its earlier pre-verdict rule 50(a) Motion presented to the Court on August 7, 2010, before the Court submitted the case to the jury.

**I. PROCEDURAL BACKGROUND**

The Court expressly permitted the parties to file written submissions to supplement the parties’ Rule 50(a) arguments made before the Court submitted the case to the jury.<sup>1</sup> Bright Response therefore files this written submission, which reiterates and supplements its grounds for judgment as a matter of law made on the record in open court on Saturday, August 7, 2010. *See* Trans. (8/7/10 am) at 4:2-5:1; Trans. (8/6/10 pm) at 175:11-16, 21-25; 176:1 (noting parties could supplement oral motions with later written submissions; no new grounds or arguments permitted). Bright Response files this as to Yahoo’s complete failure of proof on certain of the asserted claim steps, such that no reasonable juror could fail to find infringement on those claim steps.

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<sup>1</sup> Accordingly, Bright Response objects to each of the Defendants’ “supplemental” pre-verdict Motions for JMOL insofar as their scope exceeds the issues presented in their in-Court rule 50(a) JMOL motions. The Court prohibited any new arguments or grounds when it allowed the parties to file later written submissions.

## II. YAHOO FAILED TO PRODUCE EVIDENCE ON CERTAIN CLAIM STEPS

As set forth generally in Bright Response's August 7, 2010 Motion, Yahoo failed to adduce any evidence of non-infringement on certain claim steps, for literal infringement and infringement under Bright Response's doctrine of equivalents theory. Therefore, no reasonable juror could fail to find that Yahoo does not meet certain claim steps given Bright Response's ample evidence on those points.

### A. No Evidence On Certain Steps Of Claim 26

#### 1. Claim 26(c)

Yahoo produced no testimony or evidence to refute Bright Response's evidence in support of "predetermined response." *See* Trans. (8/4/10 am) at 18:19-24:15. Rather, Yahoo witnesses and expert simply repeat that the individual ads are not selected until after the query is received. However, Yahoo! witness, Dave Kolm, agreed that there certainly are ads in the database prior to the receipt of the query. *See* Trans. (8/6/10 am) at 21:13-17 (Is it your testimony that the individual ads in Elcaro are never stored in Elcaro prior to the receipt of the query? A: There are certainly ads in the database prior to the receipt").

In addition, Yahoo's expert, Dr. Allan, confirms—more than once—that there is no evidence or analysis regarding ads being retrieved that were not already in the database:

Q: Now, you don't have any evidence that any ads actually served by Yahoo! were, in fact, received after the http request was received by Yahoo!, correct?

A: I have not done such an analysis, and *I know of no – no such analysis.*

Trans. (8/6/10 am) at 53:19-23 (emphasis added).

Q: Now, Dr. Allan, you have no evidence of any particular case where any ad served by Yahoo! in response to a search request was not in the database prior to Yahoo! receiving the http request, correct?

A: As I said, I have no – I have not done an analysis on that. Q: You have no evidence that that has ever happened, correct? A: That is correct."

*Id.* at 54:23-55:8

**B. No Evidence Of Certain Steps Of Claim 28**

**1. 28(b1)(i)**

Yahoo produced no evidence to refute Bright Response’s evidence in support of “classification as “being able to be responded to automatically.” Trans. (8/4/10 am) at 24:22-27:12 (Dr. Rhyne). Dr. Rhyne and Yahoo witness Mr. Kolm at his deposition—which was read to Dr. Allan—testified that there is a determination made as to whether there are any ads to serve in response to a query:

Q: Okay. And isn't it true, sir, that at his deposition on June 9th, 2010, Mr. Kolm testified as follows. This is at Page 27 of his deposition.

QUESTION: So is it accurate to say that Yahoo! makes a determination as to whether there are any ads that are relevant and of sufficient quality to serve?

A: His [Mr. Kolm’s] answer.

Relevant and of sufficient quality and meet the advertiser’s constraints – advertiser and publisher constraints.

QUESTION: And if the – and if Sponsored Search determines that there are no ads that are relevant of sufficient quality and that meet the advertiser’s constraints – advertiser and publisher’s constraints, then what?

ANSWER: We return no ad.

Trans. (8/6/10 am) at 56:19-25, 57:4-12.

Dr. Allan offered no evidence to contradict this factual statement from Yahoo’s own engineer.

**2. 28(b1)(ii)**

Yahoo also produced no evidence to refute Bright Response’s evidence in support of “classification” as “requiring assistance from a human operator.” Trans. (8/4/10 am) at 27:15-

31:1. Dr. Rhyne testified that there is software that flags or identifies queries in the form of creating logs and sending emails indicating that human operators need to review that query information. *E.g., id.* at 28-29. Dr. Allan agreed that Yahoo will get reports that may trigger review by a human operator:

Now, if Yahoo! gets a report that looks unusual, it will trigger review by human engineers, correct?

A: I – I—I – I’m aware that Dr. Kolm – Mr. Kolm’s testimony said something along those lines.

Q: Q. I'd like to read from your deposition at Page 49, Lines 13 through 19.

MR. FENSTER: This is Clip 23.  
(Video playing.)

QUESTION: So if you get a report of an aggregated number of queries that looks unusual – if Yahoo! gets a report that looks unusual, it will trigger a review by human engineers, correct?

A: It may trigger one, yes.

Trans. (8/6/10 am) at 58:1-5; 58:10-14.

Dr. Allan instead simply states that this activity takes place after the receipt of the predetermined response (Trans. (8/6/10 am) at 47:8-9 (“and traffic protection is happening long after the results are returned”)). This Court has already construed that the timing of (b1)(ii), however, is not relevant to the timing of the response, and Dr. Allan’s testimony then is of no moment.

Lastly, Yahoo offered no expert testimony to refute Dr. Rhyne’s testimony regarding the doctrine of equivalents. Dr. Allan’s testimony shifts from claim 28 to claim 33 without pausing to address the doctrine of equivalents theory for this claim step. *See id.* at 47:20-25 (transitioning from claim 28 to 33 with no mention of doctrine of equivalents).

### 3. Claim 28(c)

Yahoo also produced no evidence sufficient to refute Bright Response's evidence in support of "predetermined response." Trans (8/4/10 am) at 34:3-39:19. Rather, Yahoo witnesses and expert simply repeat that the individual ads are not selected until after the query is received. However, Yahoo! witness Dave Kolm agreed that there certainly are ads in the database prior to the receipt of the query. *See* Trans. (8/6/10 am) at 21:13-17) (Q: "Is it your testimony that the individual ads in Elcaro are never stored in Elcaro prior to the receipt of the query? A: There are certainly ads in the database prior to the receipt").

In addition, Yahoo's expert Dr. Allan confirmed that there is no evidence of ads being retrieved that were not already in the database. Trans. (8/6/10 am at 53:19-23) (Now, you don't have any evidence that any ads actually served by Yahoo! were, in fact, received after the http request was received by Yahoo!, correct? A: I have not done such an analysis, and I know of no – no such analysis"); *id.* at 54:23-55:8 (Now, Dr. Allan, you have no evidence of any particular case where any ad served by Yahoo! in response to a search request was not in the database prior to Yahoo! receiving the http request, correct? A: As I said, I have no – I have not done an analysis on that. Q: You have no evidence that that has ever happened, correct? A: That is correct").

### C. No Rebuttal Evidence For Certain Steps of Claim 30

Yahoo produced no evidence sufficient to refute Bright Response's evidence in support of "assigning a score ... increasing when at least one of the attributes and text match." On cross-examination, Dr Allan was impeached with statements from his deposition that he was not able to reconcile his interpretation. *See, e.g., id.* at 68:18-69:13. Indeed, not a single one of the Claim 30(b) steps—Claim steps 30(b)(1) through 30(b)(5) were supported by any expert testimony to demonstrate how Yahoo did not infringe.

#### **D. No Rebuttal Evidence For Claim 33**

Yahoo produced no evidence to refute Bright Response's evidence in support of normalization. As to doctrine of equivalents, Dr. Allan did not provide any opinion to refute Dr. Rhyne's argument regarding doctrine of equivalents. Bright Response produced evidence that scores are normalized to always represent a range within the same maximum possible score of "1." Dr. Allan simply stated in conclusory fashion that the mathematics of Sponsored Search do not constitute normalization, but failed to explain why. Mere ipse dixit of an expert rejecting an opposing theory based on factual analysis does not rise to the level of "evidence" and leaves Yahoo without probative evidence to refute that it infringes Claim step 33. An expert's opinion must be supported to provide substantial evidence—bare opinion such as this will not suffice. *See Guile v. U.S.*, 422 F.3d 221, 227 (5th Cir. 2005). "A claim cannot stand or fall on the mere ipse dixit of a credentialed witness." *Id.*

Dr. Allan offered no testimony whatsoever to rebut Dr. Rhyne's testimony of how this claim is infringed under the doctrine of equivalents. Thus, Bright Response's testimony stands un rebutted, and infringement of this claim is established as a matter of law.

### **III. CONCLUSION**

Through admissions from fact witnesses, bare conclusory statements from Yahoo's expert witness on non-infringement, or no evidence whatsoever, Bright Response's evidence of infringement regarding certain claim steps stands completely un rebutted. On those claim steps, as outlined above and set forth generally in Bright Response's Motion for JMOL on August 7, 2010, no reasonable jury could fail to find that Yahoo infringes those claim steps.

Dated: August 9, 2010

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that counsel of record who are deemed to have consented to electronic service are being served this 9th day of August, 2010, with a copy of this document via the Court's CM/ECF systems per Local Rule CV-5(a)(3). Any other counsel will be served electronic mail, facsimile, overnight delivery and/or First Class Mail on this date.

\s\ Elizabeth A. Wiley  
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