

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

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|-----------------------|---|----------------------------------|
| PA ADVISORS, LLC, | § | |
| | § | |
| Plaintiff, | § | |
| | § | Civil Action No. 2:07-cv-480-RRR |
| v. | § | |
| | § | |
| GOOGLE, INC., et al., | § | JURY TRIAL DEMANDED |
| | § | |
| Defendants. | § | |

nXn TECH, LLC’S RESPONSE TO YAHOO! INC.’S MOTION *IN LIMINE* NO. FOUR

Yahoo’s Motion in Limine No. 4, in which it attempts to prevent nXn from offering any evidence or testimony that Yahoo had constructive notice of the patent in suit (the “Motion”) is without merit and should be denied.

In its Motion Yahoo asserts that nXn should be precluded from offering evidence regarding constructive notice because nXn is “unable to marshal any evidence showing that it marked its own products, or that any marking were ‘substantially consistent and continuous.’” Motion at 7 (quoting *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994)). However, Yahoo is simply mistaken. The evidence is clear that ‘067 Patent’s prior owners did consistently mark tangible items associated with the claimed inventions.

First, Ilya Geller’s company, Mightiest Logicon Unisearch, maintained a company website at www.unisearch.net. See Declaration of Patrick Anderson, Ex. A (excerpts of unisearch.net archive produced at PA0001419-1513) (hereafter “Anderson Decl., Ex. _”). These early webpages were archived prior to the issuance of the ‘067 Patent and were produced early in

this litigation to Yahoo. For example, in an executive summary of the Unisearch technology, notice is provided that “[t]he Company has applied for patent protection in the US and under the Patent Cooperation Treaty ...” Anderson Decl, Ex. A at PA0001488. Mr. Geller has previously testified that these pages came from his original Unisearch website. Anderson Decl., Ex. B (Geller August 2009 Deposition) at 152:8-153:18. Second, Geller’s company later maintained a website at Lexiclone.com, which described the patented technology in detail. Anderson Decl., Ex. C (Excerpt of Lexiclone.com) at GELLER033540 (describing the ‘067 Patent). Mr. Geller previously testified that this description was publically available as displayed on his website. Anderson Decl., Ex. D (Geller December 2009 Deposition) at 314:11-21. Courts have previously noted that a website is an object that can be marked. *See* Anderson Decl., Ex. E, *IMX, Inc. v. Lendingtree, LLC*, Civ. No. 03-1067-SLR, 2005 U.S. Dist. LEXIS 33179 at *12 (D. Del. December 14, 2005) (“[A]s interpreted by the Federal Circuit, the website is intrinsic to the patented system and constitutes a ‘tangible item to mark by which notice of the asserted method claims can be given.’”). *See also* *Soverain Software LLC v Amazon.com, Inc.*, 383 F. Supp. 2d 904, 909 (E.D. Tex 2005) (“Here, however, Amazon has produced evidence that a website can be marked by submitting screen shots of websites that include patent notices.”)

For these reasons, Yahoo’s Motion should be denied.

Dated: February 24, 2010

Respectfully submitted,

Andrew W. Spangler
LEAD COUNSEL
SPANGLER LAW P.C.
208 N. Green Street, Suite 300
Longview, Texas 75601
(903) 753-9300
(903) 553-0403 (fax)
spangler@spanglerlawpc.com

By: /s/ Patrick R. Anderson
Patrick R. Anderson

Marc A. Fenster, CA Bar No. 181067
CA Bar No. 181067
mfenster@raklaw.com
Andrew Weiss
CA Bar No. 232974

David M. Pridham
LAW OFFICE OF DAVID PRIDHAM
25 Linden Road
Barrington, Rhode Island 02806
(401) 633-7247
(401) 633-7247 (fax)
david@pridhamiplaw.com

John M. Bustamante
Texas Bar No. 24040618
BUSTAMANTE, P.C.
54 Rainey Street, No. 721
Austin, Texas 78701
Tel. 512.940.3753
Fax. 512.551.3773
Email: jmb@BustamanteLegal.com

Kip Glasscock
Texas State Bar No. 08011000
KIP GLASSCOCK P.C.
550 Fannin, Suite 1350
Beaumont, TX 77701
Tel: (409) 833-8822
Fax: (409) 838-4666
Email: kipglasscock@hotmail.com

aweiss@raklaw.com
Adam Hoffman
CA Bar No. 218740
ahoffman@raklaw.com
RUSS, AUGUST & KABAT
12424 Wilshire Blvd., 12th Floor
Los Angeles, CA 90025
(310) 826-7474
(310) 826-6991 (fax)

Patrick R. Anderson
PATRICK R. ANDERSON PLLC
4225 Miller Rd, Bldg. B-9, Suite 358
Flint, MI 48507
(810) 275-0751
(248) 928-9239 (fax)
patrick@praplpc.com

Debera W. Hepburn,
Texas Bar No. 24049568
HEPBURN LAW FIRM PLLC
P.O. Box 118218
Carrollton, TX 75011
Telephone: 214/403-4882
Facsimile: 888/205-8791
Email: dhepburn@heplaw.com

Elizabeth A. Wiley
Texas State Bar No. 00788666
THE WILEY FIRM PC
P.O. Box. 303280
Austin, Texas 78703-3280
Telephone: (512) 420.2387
Facsimile: (512) 551.0028
Email: lizwiley@wileyfirmpc.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

\s\ Patrick R. Anderson
Patrick R. Anderson