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

NORTHEASTERN UNIVERSITY and JARG CORPORATION Plaintiffs, v. GOOGLE INC. Defendant.	Case No. 2:07-CV-486-CE JURY TRIAL DEMANDED

PLAINTIFFS' SURREPLY TO DEFENDANT GOOGLE INC.'S MOTION FOR SUMMARY JUDGMENT THAT ANY ALLEGED INFRINGEMENT OF U.S. PATENT NO. 5,694,593 WAS NOT WILLFUL

Plaintiffs file this Surreply to Defendant Google Inc.'s Motion for Summary Judgment that Any Alleged Infringement of U.S. Patent No. 5,694,593 Was Not Willful ("Motion") [Dkt. No. 153] for the limited purpose of asking the Court to clarify what appears to be Defendant's misunderstanding of the Court's claim construction order.[1] This misunderstanding centers on whether the term "hashed query fragment" is limited to just a single number as Google contends or whether, consistent with the Court's construction of "hashing" and the parties' claim construction positions, it may encompass "a value," which Plaintiffs' expert will testify may be composed of more than one number.

In Defendant's Reply in support of its Motion, Google argues that during claim construction it proposed that the term "hashed query fragment" should be construed to be

[1] While this issue is also set forth in the Parties' Joint Proposed Jury Instructions, filed on March 20, 2011, at 32-33 (Dkt. No. 188), the Court's claim construction will be presented to the jury in the trial on this matter beginning Monday, April 11, 2011.

"a number" and that the Court adopted that construction in its Claim Construction order.[2] This argument is not true. First, neither party asked the Court to construe the term "hashed query fragment." Instead, the parties asked the Court to construe the term "hash function," and the Court in its *Markman* Order construed that term to mean "a mathematical function that converts inputs into a *value* within a predetermined range."[3] The Court's construction is consistent with the claim constructions previously proposed by both parties. In fact, in its original Local Patent Rule 4-2 disclosure, Google proposed that the term "hashed query fragment" should be construed to be "a data *value* resulting from hashing a query fragment."[4]

Nevertheless, Google now argues that the term "hashed query fragment" is limited to just a single number based on footnote 3 of the Court's claim construction opinion and order. That footnote states, "[a]s will be explained later, a 'hashed query fragment' is a number."[5] But neither that footnote nor the Court's subsequent construction of "hashing" can be represented to the jury as the Court's construction of "hashed query fragment," which was simply not a term that the Court was asked to construe. Thus, Google should not be permitted to refer to footnote 3 in the jury's presence.[6]

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[2] Reply (Dkt. No. 203) at 3.

[3] Memorandum Opinion and Order, dated November 9, 2010 (Dkt. No. 101) ["*Markman* Order"] at 15 (emphasis added).

[4] Google's Patent Rule 4-2 Disclosure at 3 (emphasis added), attached hereto as Exhibit 1. The parties subsequently agreed that the term "hashed query fragment" did not need to be construed. Therefore, this term was not submitted to the Court as a disputed claim term in the Parties' Joint Claim Construction and Prehearing Statement. (Dkt. No. 62)

[5] *Markman* Order at 12.

[6] *See id.* at 25 ("[T]he parties are ordered to refrain from mentioning any portion of this opinion, other than the actual definitions adopted by the court, in the presence of the jury.").

Moreover, not even footnote 3 of the Court's *Markman* Order supports the argument that Google apparently intends to present to the jury in this case—that the Court's claim construction limits the term "hashed query fragment" to a single number.[7] The asserted claims are directed to a system that hashes query fragments into "a plurality of hashed query fragments," and it is a well settled "rule" of claim construction that the use of the article "a" means "one or more."[8] Google did not raise this argument during claim construction because it knew it was a battle it could not win. Google should not now be allowed to circumvent this rule by mischaracterizing the Court's claim construction to the jury based on its misreading of footnote 3 in the Court's opinion.

Dated: April 7, 2011

Respectfully submitted,

/s/ *Bernard C. Shek*

[7] During voir dire, Google's counsel repeatedly urged that Plaintiffs' invention was limited to just a "single number." See Transcript Of Voir Dire Proceedings Before The Honorable Chad Everingham United States Magistrate Judge, dated April 4, 2011, at 54:13-15 & 20-22 ("The patent in this case, the patent that Mr. Carroll showed you is about a very particular way of organizing things where you use -- use a number. . . . You calculate a single number, and that number tells you not only where the information is stored, what computer, what haystack Mr. Carroll talked about, but where inside that computer the information is. You -- you come up with a single number, and that tells you where you have to go and then where you have to look once you get there."); 55:17-19 ("They've got to prove they're using that single-number approach to try to go out and find that information and find where it is."); 56:4-6 ("So that simple single-number approach that Dr. Baclawski's patent talks about just won't work."), relevant excerpts attached hereto as Exhibit 2.

[8] *See, e.g., Baldwin Graphics Sys. Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed. Cir. 2008) ("That 'a' or 'an' can mean "one or more" is best described as a rule, rather than merely as a presumption or even a convention.").

Otis W. Carroll, Jr. (Tx Bar No. 03895700)
Collin Maloney (Tx Bar No. 00794219)
IRELAND CARROLL & KELLEY
6101 S Broadway, Suite 500
Tyler, Texas 75703
Tel: (903) 561-1600
Fax: (903) 581-1071
Fedserv@icklaw.com

Constance S. Huttner
VINSON & ELKINS LLP
666 Fifth Avenue, 26th Floor
New York, New York 10103
Tel: (212) 234-0040
Fax: (212) 237-0100
chuttner@velaw.com

Robert M. Schick (Tx Bar No. 17745715)
VINSON & ELKINS LLP
First City Tower
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
Tel: (713) 758-2222
Fax: (713) 758-2346
rschick@velaw.com

William B. Dawson (Tx Bar No. 05603600)
GIBSON, DUNN & CRUTCHER
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6912
Tel: (214) 698-3132
Fax: (214) 571-2900
wdawson@gibsondunn.com

David B. Weaver (Tx Bar No. 00798576)
David P. Blanke (Tx Bar No. 02453600)
David R. Woodcock, Jr. (Tx Bar No. 24028140)
Christopher V. Ryan (Tx Bar No. 24037412)
Michael Valek (Tx Bar No. 24044028)
R. Floyd Walker (Tx Bar No. 24044751)
Stephen C. Stout (Tx Bar No. 24060672)
James D. Shead (Tx Bar No. 24070609)
Nicole E. Glauser (Tx Bar No. 24050694)
Zeke DeRose, III (Tx Bar No. 24057421)
VINSON & ELKINS LLP
2801 Via Fortuna, Suite 100
Austin, Texas 78746
Tel: (512) 542-8400
Fax: (512) 236-3338
dweaver@velaw.com
dblanke@velaw.com
dwoodcock@velaw.com
cryan@velaw.com
mvalek@velaw.com
fwalker@velaw.com
sstout@velaw.com
jshead@velaw.com
nglauser@velaw.com
zderose@velaw.com

Bernard C. Shek (CA Bar No. 191365)
VINSON & ELKINS LLP
525 University Avenue, Suite 410
Palo Alto, California 94301-1918
Tel: (650) 687-8200
Fax: (650) 618-1970
bshek@velaw.com

ATTORNEYS FOR PLAINTIFFS NORTHEASTERN UNIVERSITY AND JARG CORPORATION

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 7th day of April 2011.

/s/ Bernard C. Shek
Bernard C. Shek