

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

ROCKSTAR CONSORTIUM US LP)
AND NETSTAR TECHNOLOGIES LLC,)

Plaintiffs,)

v.)

GOOGLE INC.)

Defendant.)

Civil Action No. 13-cv-00893-RG

JURY TRIAL DEMANDED

GOOGLE INC.'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFFS'
PATENT RULE 3-1 INFRINGEMENT CONTENTIONS

Rockstar does not deny that its infringement contentions consist largely of bare screen shots. Rockstar does not deny that it could have, but chose not to, point out, highlight, or annotate specific portions of the screen shots and public code in its charts. And Rockstar does not deny that its charts mix and match different Accused Instrumentalities, rather than show how a single Accused Instrumentality allegedly meets each limitation of each asserted claim. Moreover, Rockstar’s claim that it spent “hundreds of hours” and “rigorously analyzed” Google’s products merely confirms that Rockstar’s choice to withhold the details of this analysis—and instead to provide only bare screenshots—was a deliberate effort to hide its theories and to prejudice Google. Google moved to strike Rockstar’s infringement contentions not as a retaliatory measure, but because Rockstar rejected Google’s efforts to obtain meaningful notice without burdening the Court. The Court should grant Google’s motion to strike.

I. ROCKSTAR’S CONTENTIONS DO NOT SATISFY P.R. 3-1.

Rockstar admits that its contentions contain bare screen shots to allegedly “demonstrat[e] how Google products satisfy each element of the claims.” (Opp. at 5 (citing Ex. 3 at 2-9).) Indeed, no screen shot on pages 2-9 of the ’969 Patent chart contains added highlighting or annotation, nor do hundreds of other screen shots in Rockstar’s 1,200-plus pages of charts. (Mot. at 4-9.) Nor do the few highlights that are present provide meaningful notice of Rockstar’s infringement theories. For instance, Rockstar points to pages 57-62 of its chart for the ’970 Patent. (Opp. at 5.) But Rockstar offers no defense of the bare screen shots in the first 56 pages, and pages 57-61 merely show portions of a search results page and the corresponding HTML, with no explanation of how these portions track to the required claim language on page 43. (Dkt. 138-6 at 1-61.) Likewise, page 62 calls out a domain name encoded in a URL, but it does not explain how that domain name indicates “selection of an advertisement.” (*Id.* at 62.)

Rockstar cites no cases that support its failure to highlight or annotate screen shots.

Rather, Rockstar argues courts do not “require” screen shots in P.R. 3-1 contentions. (Opp. at 6 (citing *Am. Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005) (“AVG”).) That is irrelevant because Rockstar chose to rely exclusively on screen shots for almost all claim limitations. Moreover, AVG supports Google, because the patentee in AVG confessed that providing screen shots “would not inform Defendants of how the source code infringes,” and the court did not comment on whether screen shots are required. 359 F. Supp. at 560-61. Rockstar next shifts course to argue that courts “approve” using representative screen shots to show infringement. (Opp. at 7.) But Rockstar misrepresents the cases on this point¹ and ignores that Rockstar has asserted more than 130 claims against numerous Accused Instrumentalities. Indeed, Rockstar’s position is that the Accused Instrumentalities are materially distinct, as shown by its demand that Google produce “all source code relating to functionalities identified in Plaintiffs’ infringement contentions,” and its refusal to narrow that request. (Dkt. Nos. 122-9, 122-10.)

Rockstar does not deny that its charts mix and match distinct Accused Instrumentalities rather than map a single Accused Instrumentality to the asserted claims. Rockstar instead conflates the concept of providing representative product examples with its act of mixing and matching screen shots from separate products in mapping a single claim. Rockstar cites no cases where courts condone such mixing and matching.² Rockstar also criticizes Google’s use of a

¹ In *Global Sessions LP v. Travelocity.com LP*, No. 10-cv-671, 2012 WL 1903903 (E.D. Tex. May 25, 2012), the court held plaintiff’s use of representative screen shots from a subset of accused websites did not “adequately chart” all of plaintiff’s accused websites. *Id.* at *4-7. In *Orion IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006), there was only one accused functionality and plaintiff’s infringement contentions “expressly accused” the entire functionality (a website). *Id.* at 817. The court found that under these facts, it should not strike an expert’s infringement contentions regarding uncharted features of the website. *Id.* at 816-18.

² In *ConnecTel, LLC v. Cisco Sys., Inc.*, 391 F. Supp. 2d 526, 528-29 (E.D. Tex. 2005), the court ordered plaintiff to designate exemplar accused products in amended charts, but did not say plaintiffs could mix those products as Rockstar has done. In *Plant Equipment, Inc., v. Intrado, Inc.*, Case No. 2:09-cv-395, Dkt. No. 113 (E.D. Tex. Feb. 1, 2012), the court held plaintiff need not chart “every permutation” of the accused system where plaintiff disclosed only one infringement theory and confirmed it applied to all variations of the system. In *Epicrealm*,

case where only two products and claims were at issue. (Opp. at 7 (citing *Computer Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819 (E.D. Tex. 2007).) Yet Rockstar supports its use of representative examples by citing *Orion IP*, where plaintiff accused only one product. (Opp. at 8; *supra* n. 1.) Moreover, the court in *Computer Acceleration* did not strike the second product simply because it was uncharted, but rather because it was not “identical” to the charted product “for infringement purposes”: only 70 percent of the claims against the uncharted product related to those against the charted product. 503 F. Supp. 823. Here too, according to Rockstar, Google’s products are not “identical for infringement purposes.”

Further, Google’s description of what the screen shots depict is not an admission that Rockstar’s charts go beyond mere parroting. (Opp. at 7.) As Google explained, the charts’ scarce text mirrors claim language almost verbatim. (Mot. at 5-9.) Finally, regarding P.R. 3-1(d), Rockstar newly argues that its contentions simply reserve the right to add theories under the doctrine of equivalents if claim construction forecloses its literal infringement theories. (Opp. at 10-11.) This is not what Rockstar’s contentions say, but in any event Rockstar effectively concedes that its contentions do not currently satisfy P.R. 3-1(d).³

II. ROCKSTAR’S CLAIMS OF EXTRAORDINARY EFFORT SHOW IT DELIBERATELY WITHHELD DETAILS OF ITS INFRINGEMENT ANALYSIS.

Rockstar’s heavy reliance on unexplained screen shots, as well as its mix and match

Licensing, LLC v. Autoflex Leasing, Inc., 2007 WL 2580969 at *2-3 (E.D. Tex. Aug. 27, 2007), the court held that the “scope of discovery may include” websites and systems that were “‘reasonably similar’ to those accused in the PICs,” and said nothing about mixing and matching.

³ Rockstar fails to mention that in *Schutz Container Sys., Inc. v. Mauser Corp.*, 2010 WL 2408983 (N.D. Ga. June 11, 2010), the court found, before claim construction, that plaintiff’s “boilerplate” doctrine of equivalents contentions did not meet the N.D. Ga. equivalent of P.R. 3-1(d). *Id.* at *2. The court held that if plaintiffs wanted to assert a doctrine of equivalents claim, they must “amend the contention to assert such a claim on a limitation-by-limitation basis as dictated under the rules” within 20 days – a deadline that fell before claim construction would be complete. *Id.*; *see also Schutz* Dkt. Nos. 19, 23. In *Thomas Swan & Co. v. Finisar Corp.*, Case No. 2:13-cv-178, Dkt. No. 167 (E.D. Tex. Aug. 11, 2014), the court held defendant would not experience prejudice if plaintiff added a timely disclosed doctrine of equivalents contention to one asserted claim. Here, there are 132 asserted claims and numerous accused products.

approach, is inconsistent with Rockstar's protestations that its lawyers and experts spent "hundreds of hours" preparing the contentions. Collecting screen shots does not take hundreds of hours. Compiling a hodgepodge of screen shots from different Accused Instrumentalities is not a model of diligence. Rockstar's repeated references to its painstaking analysis thus indicate that Rockstar is deliberately concealing the details of its infringement theories developed through this alleged diligence. And no amount of hard work excuses Rockstar's deficient disclosure or cures the prejudice to Google. (Mot. at 4-9, 13-15.) Moreover, these (undocumented) claims of extraordinary effort undermine Rockstar's litany of excuses for why it needs 60 days to comply with the Patent Rules. If Rockstar's claims of rigorous analysis are made in good faith, it can promptly disclose its detailed infringement theories to Google.

III. ROCKSTAR'S OPPOSITION DOES NOT RESOLVE GOOGLE'S SPECIFIC EXAMPLES OF DEFICIENCIES.

Rockstar now claims that Google should understand that "becoming a nurse" is the "search argument" recited in claim 1 of the '969 Patent because, among other things, that phrase is pictured in the search box. (Opp. at 9.) Similarly, Rockstar says it "graphically lays out what constitutes user preference input" in the chart for claim 1 of the '245 Patent and that a "bolded red dashed line" in the chart for claim 1 of the '183 patent shows how "advertisements occur in one portion of the display and search results in another." (*Id.*) Setting aside the insufficiency of this response, Rockstar could have provided explanations like these in the charts themselves, or when Google asked for them in correspondence, but intentionally waited until after Google had submitted its invalidity contentions and the parties had taken their respective claim construction positions to do so. Moreover, the explanations still do not resolve Google's complaints about the lack of notice. For instance, Rockstar continues to avoid taking any position as to whether the required "display portion" is a portion of the physical screen, the window on the screen, the web page rendered within the window, or something else entirely. Indeed, Rockstar has gone so far

as to avoid taking any position on this issue in claim construction, asserting that claim language requires a “plain and ordinary meaning” without indicating why Google’s proposal is deficient.⁴

The deficiencies in Rockstar’s contentions are not excused simply because this case involves software patents. (Opp. at 4-5.) As Rockstar admits, while drafting its contentions, it had access to so much publicly available information and code from Google that “rigorously analyz[ing]” it took hundreds of hours over several months. (Opp. at 1-2.) Furthermore, Google has substantially completed its confidential source code production and has produced more than 180,000 pages of technical documents. (Mot. at 12; Opp. at 3.) Therefore, this is not a case where “plaintiffs’ preparation is restricted by defendants’ sole possession of the information plaintiffs need.” *AVG*, 359 F. Supp. 2d at 560.⁵ And unlike the defendant in *STMicroelectronics, Inc. v. Motorola, Inc.*, 308 F. Supp. 2d 754, 755 (E.D. Tex. 2004), Google is not demanding that Rockstar’s contentions provide “reverse engineering or its equivalent.” Google simply asks that Rockstar “set[] forth particular theories of infringement with sufficient specificity” – which *STMicroelectronics* demands. (*Id.*) Rockstar’s offer to supplement its contentions only after Google completes its source code production (Opp. at 3-4) does not extinguish its duty to comply now. Google has repeatedly sought Rockstar’s cooperation, and Rockstar has refused to budge. Without adequate notice of Rockstar’s infringement contentions, Google is prejudiced, and its prejudice will increase as this litigation proceeds. Google’s motion to strike should be granted.

⁴ (Dkt. 121-1 at 5.)

⁵ In *AVG*, the defendant was about to begin its rolling source code production, and the court ordered plaintiffs to supplement their charts with specific references to code. 359 F. Supp. 2d at 561. The *ConnectTel LLC* court emphasized that “the initially-served PICs in [*AVG*] . . . were replete with details and specific theories of infringement” and that “discovery was circumscribed, with plaintiff only wanting to view precise pieces of source code to build its case.” 391 F. Supp. 2d at 528-29 (holding plaintiff’s preliminary contentions for accused software products were insufficient even before defendants had completed source code production); *see also Orion IP*, 407 F. Supp. 2d at 817 (“[I]n software cases, the Court has recognized the pragmatic limitation on detailed PICs when plaintiffs do not have the necessary access to non-public software” (emphasis added)).

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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) on September 11, 2014.

/s/ Andrea Pallios Roberts _____

Andrea Pallios Roberts