

**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. 2:13-cv-893

JURY TRIAL DEMANDED

**ROCKSTAR'S REPLY TO MOTION TO COMPEL
DISCOVERY FROM GOOGLE INC.**

Google's Response to Rockstar's Motion to Compel demonstrates why this Court should grant Rockstar's Motion. Despite its protestations to the contrary, Google has produced very little documentation and instead seeks to interpret Rockstar's requests in strained manners, all the while refusing to provide Rockstar with critical documents. While Google claims to have produced 950,000 pages of documents, the vast majority come from simply re-producing what Google produced in a prior case. Its production here has been extremely limited. Indeed, it appears that Google has not produced any custodial documents from searches in this case.

I. Google Must Collect ESI from Relevant Custodians, Including Executives

Google does not address a threshold argument that requires Google to search for and produce non-email custodial ESI—this Court already rejected Google's argument in the Protective Order briefing. The ESI Order imposes limitations on the number of custodians and search terms for e-mail, not other documents. Motion at 4. Google attempts to justify its behavior by arguing that it—in its own discretion—picked 20 people and searched their documents. Response at 3-4. Importantly, the 20 individuals chosen by Google do not include any of Google's senior executives whose employment at Google covers the early design and development of the accused products. This search on its face is defective. Rockstar's infringement allegations go to the very core of Google's business and span multiple products. Google's self-described efforts demonstrate its unreasonable search. In stark contrast to other cases, Google has produced—at best—minimal documents from its custodian searches done for this case. Two-thirds of its production (approximately 621,000 of 957,000 pages and over 102,000 of the approximately 159,000 documents) is from re-producing documents from one case that is similar to one part of Rockstar's infringement allegations. *See* Declaration of Jonathan Solomon ¶¶ 4-6. Indeed, according to Rockstar's document vendor, “it appears that Google has not provided any custodial documents from its productions and searches in this case. Rather, all documents from custodians were re-produced from the previous case.” Solomon Dec. ¶ 8 (emphasis added).

Google also tries to downplay the relevance of its senior executives, but information from these senior executives is critical. As Google concedes, these executives “are among Google’s earliest employees.” Response at 4. Documents from Google’s early days will be central in this case, as the infringing products were designed and developed then. Not only are they critical to infringement, they are also important to non-obviousness. Google’s original search plus advertising product—developed years after the patents—used a per-impression (“CPM”) model, rather than a cost-per-click (“CPC”) model. Later, Google moved to a CPC model and its revenues started to soar. Rockstar’s inventions cover the CPC model. Google’s founder also discussed search technology with some of the companies Google now asserts as prior art, such as Excite. Google effectively concedes that it has not searched these documents because none of its current custodians date to that early era. These senior executives also have current relevant information, although notably Google argues that it cannot segregate early from later information. Response at 4. Google also amazingly argues that its senior-most executives will not have any non-duplicative information. But these executives will have the plans and materials covering the full range of accused products over the entire timespan.

Google’s self-appointed list by necessity covers only particular timeframes and particular products. Google wants to limit its production to “source code and technical wikis.” Response at 4. But limiting its production to that narrow category is inconsistent with the ESI order as well as with common sense. Rockstar’s document requests cover a broad range of accused products as well as topics that are not simply technical issues. It is difficult to imagine how 20 custodians (even searched properly) could cover Rockstar’s requests. Moreover, power point presentations and documents often have highly relevant material, and it is counsel’s experience, both generally and with Google in particular, that many relevant documents are not stored in a technical wiki or central repository. *See also Function Media v. Google*, Case No. 2:07-cv-279 (E.D. Tex.), Dkt. 219 (granting motion to compel search of Google senior executives); *Personal Audio LLC v. Apple, Inc.*, 9:09-cv-111, 2010 WL 9499679 *4, n. 9 (E.D. Tex. June 1, 2010).

Finally, Google’s lead argument that the parties did not meet and confer on this point has no merit and is telling about the weakness of Google’s position. Before the in-person meet and confer, Rockstar specifically raised the point that Google was relying too heavily on its 3-4 disclosures and asked Google “to produce responsive, non-privileged documents” and not just rely on those disclosures. Exh. 1 to Lahad Dec. Then, at the in-person meet and confer, the parties specifically discussed senior executives. *See* Declaration of John Lahad ¶ 4.

II. Google Should Produce Organizational Chart and Server Information

Google admits that it has “an internal tool” that would “show[] who the engineers on its Initial Disclosures report to and who reports to them.” Response at 5. Notably, Google does not discuss its senior management organizational structure. Regardless, if this internal tool is where the information resides and if the departmental chart exists only in electronic form via this “internal tool,” Google should make this “tool” available to Rockstar. Google cannot evade its discovery obligations by stating the information exists only in electronic form and then refuse to produce information from that “tool.” Likewise, Google should produce information related to the location of its servers (Requests 96-109). Google argues that this data is irrelevant because it does not now seek to limit United States revenue, although reserves the right to do so in the future. Response at 6 n 6. This concession by itself is sufficient to grant these requests. These documents also relate to whether Rockstar can seek recovery for “international” revenue. The data flow and server location is important to this analysis, which accounts for approximately half of Google’s revenue. If Google stipulates that all revenue from the accused products—both domestic and international—is properly included, this information is not necessary.

III. Google Should Produce Other Categories of Relevant Documents

Both before, during, and after the parties’ in-person meet and confer, the parties discussed numerous other requests. At the time of Rockstar’s Motion, over one month after the meet and confer, Google had not yet responded. In its Response, Google discusses the requests. Requests 28 and 119 relate to Google’s technology transfer agreements and set a royalty rate that must be

arms-length between Google and its subsidiaries. This information may be highly relevant to a *Georgia-Pacific* hypothetical negotiation. At a minimum, it is information that may lead to admissible evidence, and Rockstar and its experts should be able to analyze and probe these agreements—especially where, as here, the patents read on Google’s core functionality. Request 117 relates to Google’s accounting practices. Google asserts that Rockstar can ask questions about this issue at a deposition, but refuses to produce documents about it. In Requests 120-122, Google attempts to put the burden on Rockstar. Rockstar does not know how Google keeps its documents, and it should produce responsive documents. Google now claims it will produce requests 25 (cost per click), 34 (statements on its website), and 39 (location). To the extent that Google will search for this information across its documents, Rockstar withdraws these disputes.

IV. Google Should Produce Infringement, Damages, and Validity Documents

Parties cannot shirk discovery obligations based on their own assessment of what a jury should do or how an appeal should turn out. *Positive Technologies, Inc. v. Sony Electronics, Inc.*, 2013 WL 707914 * 4-5 (N.D. Cal. 2013) (ordering production of convoyed sales information despite defendant’s unilateral belief that plaintiff would not be able to bring a sustainable convoyed sales case). Google misunderstands Rockstar’s contentions in an attempt to limit the scope of discovery. Request 26 relates to whether Google uses the information collected in the accused products for other Google products, including Doubleclick. Rockstar accuses Doubleclick and other services to the extent they use data from the accused systems and methods. Moreover, these products are the definition of a convoyed sale. They also are relevant to damages and the importance of the invention. Moreover, Doubleclick’s information is also relevant to validity. Google has alleged that Doubleclick invalidates the patents, and Rockstar should have the ability to explore how Doubleclick works. For request 44, Rockstar seeks information on how Google uses prior purchasing information. Request 36 relates to search terms report, which is part of the accused system, and which allows the advertiser to see how well its advertisements performed. These documents relate directly to both search and search

plus advertising, which Google admits is accused. Request 57 involves an accused product, and Google has placed so many caveats in what it is agreeing to produce, it is impossible to tell whether it is actually agreeing. The same applies to Request 53 as well.

Requests 13, 14, 17, 18, 26-27, 39, 57, and 58 all relate to using data collected from the Accused Instrumentalities in other products, and how that data is used by Google. Again, this data is relevant to the importance of the accused products, possible conveyed sales, and the *Georgia-Pacific* analysis. Google still refuses to give a straight answer on whether it will produce documents responsive to many of the requests. Google claims not to understand how using data gathered from the accused products in other products is relevant. Rockstar needs Google's technical and financial information about these products to understand how it uses the information gathered from the accused products to further generate revenue. In request 29, Google tries to use Rockstar's agreement to narrow the request to then claim that the information in just the narrowed request does not exist. It cannot attempt to limit the request, then say that because the limited information does not exist, it does not have to produce anything. For request 90, Google cannot claim that it is burdensome to know when in prior litigation it has asserted the patents-in-suit. Google's in-house counsel should have their invalidity contentions. Similarly, Google should know how it has described the prior art it now asserts. Indeed, Google owns some of the prior art, and other prior art was its closest competitor in the late 1990s.

V. Google Should Produce Documents From Related Litigation and Relevant Licenses

With respect to licenses, Google should produce all licenses related to search or advertising functionality, and Google has provided no good reason otherwise. Google also should produce documents from other litigations regarding the accused functionalities. So far it has produced documents from one related litigation. Even there, however, it has only produced the expert reports helpful to its side. The additional requested reports, even if not admissible themselves, contain the documents most relevant to the accused products. Similarly, Google should produce all its own deposition testimony from these cases as well as the exhibit lists from both sides.

Google has produced only scattered deposition transcripts, and likely only those favorable to its position. Especially in light of Google’s onerous, recently implemented document destruction policy, documents produced in prior cases about the accused products may be the only sources for some highly relevant information. Google refuses to produce any document related to the *Function Media* case, for example, on the ground that *Function Media* involved AdSense for Content only. This is incorrect on multiple levels. First, an advertiser must submit advertisements through AdWords, even when using AdSense for Content. Second, Google’s production was not limited to AdSense for Content. *See, e.g., FM v. Google Claim Construction Order*, Dkt. 218 at 1 (“The three FM patents disclose both methods and systems that automate the process of formatting and delivering advertising to all types of media.”) (emphasis added). Moreover, counsel for both Rockstar and Google were involved in that case, and much of the documents and deposition testimony was not limited to AdSense for Content. Other cases are equally relevant—if not more so. To the extent documents still exist from the *Overture/Yahoo!* litigation, they are directly relevant to the click-through claims and the importance of the patents-in-suit. Google notably does not say whether it inquired with its outside counsel about what exists from this case. And the *I/P Engine* case involves one of the same features accused here (user profile information) with the same counsel representing Google.

VI. Google Must Produce Certain Categories of Post-Complaint Documents

Google attempts to use the Protective Order as a shield to prevent discovery of anything after the complaint. But the parties agreed to limit production to pre-complaint documents only with respect to ESI. Rockstar seeks limited categories of post-complaint documents—Google’s non-public file histories for patent applications that discuss the patent family in suit as well as Google’s communications with third-party witnesses. Google itself recognizes that it must produce some post-suit documents, such as financial data. It is just as appropriate to produce these limited categories as well. Google points to the protective order to claim that it does not have to produce. Not only is Google wrong, this Court can modify the protective order.

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Respectfully submitted,

By: /s/ Justin A. Nelson

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 26th day of September, 2014 with a copy of this document via the Court's CM/ECF system per Local Rule CD-5(a)(3).

/s/ Justin A. Nelson