Bedrock Computer Technologies, LLC v. Softlayer Technologies, Inc. et al Doc. 188

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC, Plaintiff, v. SOFTLAYER TECHNOLOGIES, INC., CITIWARE TECHNOLOGY SOLUTIONS, LLC, GOOGLE INC., YAHOO! INC., MYSPACE INC., AMAZON.COM INC., PAYPAL INC., MATCH.COM, LLC., AOL LLC, and CME GROUP INC., Defendants.	)	CASE NO. 6:09-CV-00269 Hon. Leonard E. Davis **JURY TRIAL DEMANDED**

REPLY IN SUPPORT OF GOOGLE'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL FACTS REGARDING DEFENDANTS' MOTION TO COMPEL PLAINTIFF TO COMPLY WITH PATENT RULE 3-1 AND TO EXTEND THE TIME TO SERVE INVALIDITY CONTENTIONS

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Bedrock's response to Google's Interrogatory No. 7 demonstrates that Bedrock easily could have – but chose not to – provide additional detail in its infringement contentions. Bedrock correctly points out that "[u]nder this Court's practice for discovery in patent cases, a patentee must disclose its infringement contentions with as much specificity as possible on the date provided by the docket control order." (Opp. at 4.) Bedrock failed to provide as much specificity as possible in its infringement contentions, and its response to Google's Interrogatory No. 7 demonstrates as much. The Court should grant the instant motion so that it can weigh Bedrock's new infringement charts against the disingenuous argument that it could not have provided that level of detail in its original infringement contentions.

I. BEDROCK'S NEW INFRINGEMENT CHARTS ARE BASED UPON PUBLICLY AVAILABLE SOURCE CODE THAT BEDROCK HAD WHEN IT FILED THE LAWSUIT.

Bedrock studiously ignores the fact that the Linux source code is publicly available. Bedrock based its response to Google's Interrogatory No. 7 on this publicly available source code – not on any actual source code of any Defendant. Bedrock could have, and should have, provided a detailed comparison of the publicly available source code with the asserted claims in its original infringement charts, just as it has done in its new infringement charts.

Bedrock did not need to know which versions of Linux Google uses. Bedrock argues that it was only able to provide the new infringement contentions because Google provided it with this information.[1] This argument is just a red herring. Bedrock could have easily provided the more detailed infringement charts based only upon publicly available information. For example, Bedrock could have provided infringement charts for every version of Linux, or it could have

[1] It is no great secret which versions of Linux Google's code is based upon. *See*, *e.g.*, Jonathan Corbet, *KS2009: How Google uses Linux*, LWN.NET, Oct. 21, 2009, http://lwn.net/Articles/357658/ (reproduced in Ex. A).

provided infringement charts for representative versions of Linux with an explanation of why those versions were representative of the non-charted versions. Bedrock did neither of these things. Instead, despite having access to the source code, Bedrock did not identify a single line of source code in its infringement contentions. Bedrock's response to Google's Interrogatory No. 7 demonstrates Bedrock's ability to provide more specific infringement contentions based upon information it had at the time it served its infringement contentions.

II. IT IS AGAINST THE SPIRIT AND LETTER OF THE PATENT RULES FOR BEDROCK TO AMEND ITS INFRINGEMENT CONTENTIONS AT WILL.

It is improper for Bedrock to serve its true infringement contentions in response to an interrogatory. By disguising its supplemental P.R. 3-1 Infringement Contentions as a response to an interrogatory, nothing prevents Bedrock from circumventing and undermining Patent Rule 3-6(b), which governs supplementing infringement contentions. Bedrock could possibly amend and/or supplement its response without seeking leave and showing good cause as would be required under P.R. 3-6(b). This allows great room for mischief, providing Bedrock with a means of moving the infringement target whenever it so chooses simply by amending and/or supplementing this interrogatory response. Alarmingly, Bedrock has confirmed that this is precisely what it intends to do:

> In the upcoming months, as Google gives Bedrock documents and other discovery piecemeal, Bedrock will discharge its duty to supplement its responses to Interrogatory No. 7 . . . but Bedrock should not be required to make parallel supplementations to its infringement contentions.

(Opp. at 6.) As the Patent Rules recognize, such a "shifting sands" regime would greatly prejudice Defendants, who could never be assured in relying on Bedrock's Infringement Contentions when formulating litigation strategy, claim construction positions, and invalidity strategy. *See Nike, Inc. v. Adidas Am. Inc.*, 479 F. Supp. 2d 664, 669-70 (E.D. Tex. 2007) (holding that it would "thwart the purpose of the local patent rules" to allow parties "to adopt a

'rolling' approach to infringement and invalidity contentions in the hope of hiding their true intentions until late in a case").

Bedrock erroneously asserts that "Google would have Bedrock supplement its infringement contentions continuously throughout the course of this lawsuit to include all applicable discovery and even expert analysis." (Opp. at 6.) Nothing could be further from the truth. In fact, Google only wants what the Patent Rules require – notice of Bedrock's theories of infringement – along with the safeguard of Patent Rule 3-6(b) that prevents Bedrock from unilaterally changing its theory of infringement when it so chooses. For the first time, Google has received infringement charts that actually provide notice of Bedrock's theories of infringement, but Bedrock has clearly signaled its intent to modify those theories whenever it likes. The Court should grant Google's motion so that it can evaluate Bedrock's new infringement charts in light of Bedrock's disingenuous argument that it could not have provided the same level of detail in its original infringement contentions.

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Respectfully submitted,

By: */s/ Claude M. Stern, with permission by Michael E. Jones*

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who 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 March 23, 2010. Any other counsel of record will be served by First Class U.S. Mail on this same date.

/s/ Michael E. Jones
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