

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

BEDROCK COMPUTER
TECHNOLOGIES LLC,

Plaintiff,

v.

YAHOO! INC.

Defendant.

CASE NO. 6:09-CV-00269

Hon. Leonard E. Davis

JURY TRIAL DEMANDED

**YAHOO! INC.'S MOTION TO DECLARE
THIS AN EXCEPTIONAL CASE AND FOR ATTORNEYS'
FEEES AND COSTS PURSUANT TO 35 U.S.C. § 285**

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Defendant Yahoo! Inc. (“Yahoo!”) moves to declare this an exceptional case and for an award for its attorneys’ fees pursuant to 35 U.S.C. § 285. After about forty minutes of deliberation, the jury in this case returned a verdict that Yahoo! has not infringed the patent asserted by Plaintiff, Bedrock Computer Technologies, LLC (“Bedrock”), U.S. Patent No. 5,893,120 (“the ’120 patent” or “the asserted patent”), thus vindicating Yahoo!. Despite the readily apparent weakness in Bedrock’s case, Yahoo! was forced to defend itself against willfulness and damages theories put forth by Bedrock that no reasonable litigant would have pushed and no reasonable jury could adopt.¹ It is not fair that Yahoo! had to defend against them, and Yahoo! should get its fees back for its defense.

Bedrock should have known that no reasonable jury could find for it on its theories, which violated firmly-established Federal Circuit law. There was no evidence Yahoo! knew of the ’120 patent before the complaint was filed by Bedrock. Without moving for a preliminary injunction, Bedrock alleged willfulness based on post-litigation conduct, despite, during the litigation, rejections of all of the patent claims in reexamination, amendment of some asserted claims during reexamination, an order granting a second reexamination, and strong non-infringement and invalidity arguments.² Ignoring these signposts, Bedrock nevertheless pressed ahead with its willfulness allegation, first amending its complaint to allege willfulness after the close of fact discovery and misrepresenting the facts of the case to support its allegation. For example, at a summary judgment hearing and again during opening statement, Bedrock

¹ During trial, Yahoo! filed motions for judgment as a matter of law that Bedrock’s willfulness and damages theories had no factual or legal basis. *See* Dkt. Nos. 808 and 809 (motions for judgment as a matter of law on willfulness and damages); Dkt. Nos. 823 and 824 (renewed motions for judgment as a matter of law on willfulness and damages). Yahoo! incorporates these motions for the sake of not repeating them entirely here.

² Over Yahoo!’s objection, the Court admitted evidence of the first reexamination but not of the second reexamination of the ’120 patent. Declaration of Bryan James, Ex. 1 (April 27, 2011 Morning Trial Transcript at 4:1-7, 10:18-11:22). Unless otherwise noted, all “Ex.” designations refer to James Declaration Exhibits.

represented that the '120 patent had been first reexamined on *all of the pertinent prior art* presented by Yahoo! in the litigation.³ However, the PTO record reflects that the Linux prior art code was not before the patent examiner when the Notice of Intent of Issuance of Re-Examination Certificate (“NIRC”) was released, and was not identified as being considered by the PTO on the NIRC. Moreover, Bedrock did not submit a key piece of prior art (NRL prior art code) to the PTO until after trial began.⁴ Then, during closing argument, Bedrock summarized its willfulness allegation as based on one selected e-mail from Alexey Kuznetsov, a developer of Linux prior art code, who said that certain of his Linux prior art code did not “collide” with the '120 patent.⁵ However, Bedrock completely ignored other e-mails by Mr. Kuznetsov and his deposition testimony in this case, which clearly supported Yahoo!’s defense that the Linux prior art code *asserted by Yahoo!* actually does invalidate the '120 patent claims. Bedrock also ignored the weakness of its own case. For example, its technical expert did not even arrive at a complete opinion on infringement until after the close of expert discovery; specifically, waiting until the night before the summary judgment hearing to express the opinion he presented at trial that a “spinlock” met the key “same access” limitation of the asserted patent. In short, there was no merit to Bedrock’s willfulness claim, and coupled with Bedrock’s misrepresentations to pursue it, this case is exceptional.

Bedrock’s damages arguments also rise to the level of exceptional conduct because Bedrock stopped at nothing to pursue ever-shifting theories throughout the case without any legal basis. Throughout fact discovery, Bedrock asserted that its damages theory was based on

³ See Ex. 1 (April 27, 2011 Morning Trial Tr. at 55:21-56:24).

⁴ Yahoo! has moved for judgment as a matter of law that these key pieces of prior art invalidate the asserted '120 patent claims as a matter of law.

⁵ See Ex. 2 (May 10, 2011 Trial Tr. at 65:12-66:12). Bedrock’s closing argument also attempted to set up a false duty on Yahoo!’s part to investigate unknown patents before using the Linux operating system. *Id.* at 64:6-65:7.

the protection the '120 patent allegedly provided against denial of service (“DoS”) attacks. However, Bedrock’s damages expert report largely abandoned this theory, and calculated damages based on litigation-induced settlement agreements. The Court then struck this theory as not probative of damages.⁶ In response, Bedrock shifted to yet another damages theory, namely, that the '120 patent (or accused Linux code) provided a 10-20% efficiency benefit and thus Bedrock should receive a percentage of the cost of each accused Linux server as alleged cost savings.⁷ Bedrock’s efficiency theory, pursued at trial, blatantly contradicts Federal Circuit law. For example, Bedrock, in effect, applied an entire market value rule for damages, but utterly failed to distinguish the patented component versus unpatented components, contrary to Federal Circuit law. Bedrock also alleged that it should evenly split any purported cost savings, contrary to the Federal Circuit’s abolition of any “rule of thumb.”⁸ By repeatedly pursuing one legally incorrect damages theory after another, Bedrock made this case exceptional.

Mounting a formal defense to patent infringement requires significant time and expense. Bedrock’s pursuit of its willfulness arguments and damages theories only compounded the time and expense required for Yahoo! to defend itself. Taken together, Bedrock’s willfulness and damages theories could have amounted to almost \$100 million. When plaintiffs like Bedrock swing for the proverbial fences with baseless allegations in the hopes of obtaining large damages awards—only to strike out—they should be held responsible for their exceptional litigation conduct. Thus, Yahoo! requests that the Court declare this an exceptional case under § 285.

⁶ See Dkt. No. 656, March 25, 2011 Order (sealed).

⁷ See Dkt. No. 666.

⁸ See *Uniloc USA Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1315 (Fed. Cir. 2011).

II. STATEMENT OF FACTS

A. Bedrock's Allegation of Willful Infringement

1. **Yahoo!'s Lack of Notice of the '120 Patent or Willfulness Claim**

1. Bedrock filed its original complaint in June 2009, which did not allege willful infringement by Yahoo! (Dkt.1). Bedrock never sought a preliminary injunction.
2. On January 12, 2011, the last day of fact discovery, Bedrock answered Yahoo!'s interrogatory regarding its willfulness allegation, stating that Yahoo! knew of the patent since the lawsuit began, and that Yahoo! raised "objectively trivial non-infringement theories and objectively trivial invalidity theories." (Ex. 3 at 8). Also, in response to Yahoo!'s second set of Requests for Admissions, Bedrock admitted that "Bedrock did not inform Yahoo! of the '120 patent before filing this lawsuit." (Ex. 4 at 4).
3. On January 24, 2011, in its Third Amended Complaint, Bedrock first alleged in a complaint that "[a]t least as early as June 16, 2009, upon commencement of this action, Defendants were made aware of the '120 Patent, had knowledge of the infringing nature of their activities, and have nevertheless continued their infringing activities. Defendants' infringement has been and continues to be willful." (Dkt. No. 410).

2. **Reexamination of the '120 Patent**

4. In July 2010, all eight '120 patent claims were rejected by the PTO in a first reexamination. (Ex. 5).
5. In November 2010, Bedrock responded by amending all method claims and arguing against the rejection of all eight '120 patent claims. (Ex. 6).⁹

⁹ On March 16, 2011, Bedrock executed its Sealed Notice of Covenant Not to Sue for method claims 3, 4 and 7-12 of the '120 patent. (Dkt. No. 602).

6. On January 14, 2011, the PTO issued a Notice of Intent to issue a Reexamination Certificate for the '120 Patent. (Ex. 7).¹⁰
7. On February 22, 2011, the PTO issued a second reexamination order for the '120 patent, declaring that there was a substantial new question of patentability based on prior art and combinations assessed in the first reexamination. (Ex. 8).

3. Bedrock's Pre-Trial Arguments

8. On February 16, 2011, the Court conducted a hearing prompted by Defendants' January 12, 2011 Letter Brief seeking leave to file a motion for summary judgment that there was no willful infringement. (Dkt. No. 384). At the hearing, Judge Love questioned whether the willfulness allegations should go the jury at all. (Ex. 10 (Feb. 16, 2011 Hearing Tr. at 13:7 – 14:13)). In apparent desperation to save its newly-minted willfulness claim, Bedrock told the Court that “that *[a]ll of the Defendants' invalidity contentions* in this case, *all the prior art, all their invalidity charts* have been before the examiner during the reexamination process.” *Id.* at 15:12-21 (emphasis added). Bedrock also told the Court that Linux prior art author, Mr. Kuznetsov, “stated his belief that he felt that the prior art, *of which he was aware*, did not collide with the claims of the patent, and that the best the Defendants could do would [sic] to seek an expert who could help them find a loophole in the patent rules.” *Id.* at 16:10-18.¹¹

¹⁰ On April 12, 2011, the PTO issued a reexamination certificate from the first reexamination proceeding. (Ex. 9).

¹¹ At the conclusion of the hearing, the Court permitted Bedrock to submit a Letter Brief (Dkt. No. 496) to further articulate the points that Bedrock made at the hearing. Bedrock represented to the Court that “on January 14, 2011, the PTO confirmed the validity of the asserted claims of the '120 patent (claims 1, 2, 5 and 6) after considering Defendants' invalidity contentions and each of the prior art references cited by Defendants during ex parte reexamination proceedings.” Dkt. No. 496 at 1. Bedrock asserted that “Mr. Kuznetsov's opinion swiftly and explicitly dispelled both of Defendants' invalidity and noninfringement defenses.” *Id.* at 2.

4. Bedrock's Trial Arguments

9. On April 27, 2011, in its opening statement, Bedrock represented that the '120 patent had been reexamined on *all of the pertinent prior art* presented by Yahoo! in the litigation (in the first reexamination. (Ex. 1 (April 27, 2011 Morning Trial Tr. at 55:21-56:24)).
10. On April 27, 2011, contrary to Bedrock's representations to the Court and to the jury, Yahoo! pointed out that Bedrock never submitted a key piece of prior art (the NRL prior art code) to the PTO in the first reexamination. (Ex. 11 (April 27, 2011 Afternoon Trial Tr. at 142:19-146:20)). Moreover, the Linux prior art code was not listed by the PTO as being considered in the first reexamination.¹²
11. The next day, on April 28, 2011, Bedrock submitted an information disclosure statement to the PTO for the first time identifying the NRL prior art code with the key prior art. (Ex. 13).
12. In closing argument at trial on May 10, 2011, Bedrock summarized its willfulness allegation as based on one selected e-mail from Linux prior art, Mr. Kuznetsov, who said that certain of his Linux prior art code did not "collide" with the '120 patent. (Ex. 2 (May 10, 2011 Trial Transcript at 65:12-66:12)). However, Bedrock did not mention the other e-mails by Kuznetsov and his deposition testimony in this case, in which Mr. Kuznetsov said that the Linux prior art code *asserted by Yahoo!* actually does invalidate the '120 patent claims. (Ex. 14 (April 29, Morning Trial Tr. 14:16-16:11); Ex. 15 (April 29, 2011 Afternoon Trial Tr. 152:1-23).)

¹² Yahoo! also presented testimony from others that there was no evidence that these key pieces of prior art were submitted to the PTO. (Ex. 12 (May 9, 2011 Trial Tr. at 158:14-162:12; 178:2-6; 196:2-6; 196:16-21 (testimony by Dr. Godici and Mr. Williams)).

5. Noninfringement of the '120 Patent

13. On January 25, 2011, through the opening expert report of Dr. Mark Jones, Bedrock alleged that Yahoo! infringed the '120 patent and met the "same access" limitation of all of the asserted claims.¹³ Although Dr. Jones purported to incorporate Bedrock's infringement contentions, nowhere did Dr. Jones express an opinion that the "same access" limitation was met by a "spinlock." (*See Ex. 16*).
14. On February 8, 2011, Yahoo! submitted its motion for summary judgment of non-infringement (Dkt. No. 463). Yahoo!'s motion set forth the same arguments submitted to the jury.
15. On March 16, 2011, the night before the MSJ hearing, Bedrock submitted a declaration from Dr. Jones in a declaration accompanying a surreply to Yahoo!'s motion for summary judgment of non infringement, for the first time expressing Dr. Jones' opinion that the "same access" limitation was evidenced by a "spinlock" (Dkt. No. 601).
16. At trial, the "spinlock" became the centerpiece of Bedrock's "same access" infringement theory. (*Ex. 17 (April 28, 2011 Morning Trial Tr. at 83:20-84:6)*).
17. Yahoo!'s noninfringement expert, Mr. Stephen Gray, testified as to why Dr. Jones' "spinlock" theory did not meet the "same access" limitation of the asserted claims. (*Ex. 12 (May 9, 2011 Trial Tr. at 96:24-98:16)*).
18. Called adversely by Bedrock during its case-in-chief, Mr. David Filo, co-founder of Yahoo!, explained why Yahoo! did not infringe the '120 patent and why the '120 patent

¹³ The Court construed all of the claims in the '120 patent to require both identification and removal of expired records during the "same access" of the linked list. Dkt. 369 at 21-22.

is invalid. (Ex. 14 (April 29, 2011 Morning Trial Tr. at 128-157)).¹⁴

19. After about forty minutes of deliberation, the jury returned a verdict of no infringement by Yahoo!. (Dkt. 834).

B. Bedrock's Damages Theories

1. Bedrock's First Damages Theory During Fact Discovery

20. As early as March 2010, Yahoo! sought the detailed basis for Bedrock's damages theory. (See Ex. 18 at Interrog. 1).
21. On April 30, 2010, Bedrock sought categories of documents from Yahoo!, specifically seeking DoS documents but nowhere specifically requesting documents concerning any alleged efficiency associated with the accused Linux code. (Ex. 19).
22. On July 14, 2010, Bedrock served its two Rule 30(b)(6) notices to Yahoo!, both of which sought testimony on DoS attacks, but did not specifically seek testimony regarding any efficiency associated with the accused Linux code. (Exs. 20, 21).
23. On September 2, 2010, Bedrock responded to Yahoo!'s third set of interrogatories, answering that the accused Linux code could be useful in responding to certain types of DoS attacks but nowhere alleging that the accused Linux code enhanced efficiency. (Ex. 22). Bedrock mentioned "performance degradation," but only with respect to DoS attacks. See *id.* at Bedrock's Response to Interrogatory No. 5 ("In this way, the Linux community identified in 2003 that the lengthening of a linked list, as described by Dr. Nemes in the '120 Patent in 1999, causes serious system performance degradation. On-the-fly garbage removal is a solution to this type of denial of service attack as well, but

¹⁴ On April 26, 2011, the Court granted Bedrock's April 22, 2011 motion to exclude any evidence of efforts that Yahoo! had taken to remove the allegedly infringing code. Dkt. No. 771.

Linux developers, even when faced with this problem, did not come up with on-the-fly garbage collection as the solution.”).

24. At the Markman hearing on October 7, 2010, Bedrock’s lead trial counsel told the Court that the damages theory in the case was about DoS. (Ex. 23 at 10:6-11).
25. On December 3, 2010, Bedrock answered an interrogatory saying that “Yahoo’s ordinary network traffic, which is so voluminous and diverse that it is comparable to traffic generated by a junoz.101f.c denial of service attack, is a constant demonstration of how the infringing code that is operating on Yahoo’s servers mitigate and prevent what would otherwise be significant system degradation on Yahoo’s servers but for Yahoo’s infringement.” (Ex. 24 at 7). Nowhere did Bedrock allege that the accused Linux code enhances efficiency of servers.
26. For the first time on January 12, 2011, Bedrock hinted that it may believe that the ’120 patent or accused Linux code may provide some efficiency enhancement. In response to Yahoo!’s Interrogatory No. 19 seeking discovery on obviousness, Bedrock said “The improved efficiency of systems which implement the ’120 patent evidences unexpected results.” But Bedrock did not say more about efficiency. (Ex. 3 at 19).

2. Bedrock’s Second Damages Theory in Opening Expert Reports

27. On January 25, 2011, Bedrock took the position, through its opening expert report of Dr. Mark Jones, that the accused Linux code makes Linux servers 10-20% more efficient based on Dr. Jones’ testing, begun as early as Fall 2010. (*See, e.g.*, Ex. 16 at 98).
28. With one week to respond, Yahoo! did its best to rebut Bedrock's efficiency theory, but the bulk of Yahoo!’s rebuttal testing was directed to DoS attacks through the expert report of Aaron Turner (as Bedrock would later point out). (Ex. 12 (May 9, 2011 Trial Tr. at 257:17-25); Ex. 2 (May 10, 2011 Trial Tr. at 73:20-74:3)).

29. Bedrock failed to produce important testing data and parameters used in Dr. Jones' testing. (Ex. 25 (April 28, 2011 Afternoon Trial Tr. at 18:9-21:22; 23:8-24:16); Ex. 12 (May 9, 2011 Afternoon Trial Tr. 38:8-13)).
30. Bedrock's opening damages expert report on January 25, 2011, through Mr. Roy Weinstein, mentioned both DoS and efficiency, but did not give a damages number based on either. Instead, Mr. Weinstein calculated his damages number from litigation-induced settlement agreements. (Ex. 26 at 51-56, 89).

3. Bedrock's Third Damages Theory at Trial

31. After the Court struck his opening report as not being reasonable in relying on the litigation-induced settlement agreements (*see* Dkt. No. 656), Mr. Weinstein shifted course and gave a damages number based on Dr. Jones' efficiency testing (again, not giving a damages number calculated based on DoS). (*See* Dkt. No. 666).
32. At trial, Bedrock all but completely abandoned its DoS theory. Bedrock's damages expert, Mr. Weinstein, admitted that he did not base his damages number on DoS. (Ex. 25 (April 28, 2011 Afternoon Trial Tr. at 50:3-5; 52:22-53:14)).

III. LEGAL STANDARD FOR EXCEPTIONAL CASE

"The court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. By providing for attorney fees, section 285 serves to "prevent[] gross injustice where a party has demonstrated bad faith and misconduct during litigation." *Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc.*, 549 F.3d 1381, 1388 (Fed. Cir. 2008). A suit is frivolous when "the [plaintiff] knew or, on reasonable investigation, should have known [it] was baseless." *Stephens v. Tech Int'l, Inc.*, 393 F.3d 1269, 1273- 74 (Fed. Cir. 2004). A case may be exceptional where the losing party has "prolong[ed] litigation in bad faith." *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1379 (Fed.Cir.2008) (citations omitted).

In exceptional cases, attorney fees and costs have been awarded to the defendant as the prevailing party. For example, in *Taurus IP, LLC v. DaimlerChrysler Corp.*, the court characterized the plaintiff's infringement theory as a "long shot," and stated the plaintiff should have "thrown in the towel" after claim construction rejected the plaintiff's long-shot theory. 559 F.Supp.2d 947, 968 (W.D. Wis. 2008). Continuing to litigate the plaintiff's theory through motions in limine "prolonged the litigation in bad faith" and did "gross injustice to defendants to have to expend resources on this suit at all." *Id.* The court thus awarded the defendants' fees for the entire case. *Id.* at 969.

IV. ARGUMENT

Bedrock's frivolous willfulness and damages theories worked a gross injustice upon Yahoo!. Neither theory had any basis under Federal Circuit law. Yahoo! was forced to endure a damages claim of \$32 million dollars, with the potential for trebling to almost \$100 million dollars considering willfulness. Bedrock vexatiously pursued its willfulness and damages theories at trial, distracting from the issues of infringement and invalidity. Fortunately, the jury saw through Bedrock's irrelevant, inflammatory, and non-probative willfulness and damages allegations, and returned a verdict of noninfringement.

A. Bedrock Never Had a Legitimate Basis to Allege Willful Infringement

"[T]o establish willful infringement, a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *In re Seagate*, 497 F.3d 1360, 1371 (Fed. Cir. 2007). "If the accused infringer's position is susceptible to a reasonable conclusion of no infringement, the first prong of *Seagate* cannot be met." *Uniloc USA v. Microsoft, Inc.*, 632 F.3d 1292, 1310 (Fed. Cir. 2011). "A substantial question about invalidity or infringement is likely sufficient not only to avoid a preliminary injunction, but also a charge of willfulness based on post-filing conduct."

See Webmap Technologies, LLC v. Google, Inc., 2010 WL 3768097 at *4 (E.D. Tex. Sept. 10, 2010) (quoting *Seagate*, 497 F.3d at 1374). Here, Bedrock's relentless pursuit of a willfulness allegation based on misrepresentations of fact, and in the face of Yahoo!'s clearly reasonable defenses, renders Bedrock's conduct exceptional under § 285.

Bedrock repeatedly blew past signpost after signpost that should have told it to refrain from alleging willful infringement.¹⁵ Yahoo! had no pre-suit notice of the patent-in-suit. Bedrock sought no preliminary injunction in this case. Bedrock's willfulness theory was based entirely on post-complaint conduct. Yet, during the litigation: (1) in a first reexamination, the PTO rejected all claims in the '120 patent, and required amendment of over half of the claims in order for the patent to survive; (2) the PTO granted a second reexamination request on prior art common in the first reexamination;¹⁶ and (3) Yahoo! raised a more than legitimate noninfringement defense, as confirmed by the jury's swift verdict of noninfringement.

To press on with its willfulness theory, Bedrock advanced two arguments. First, Bedrock argued that Yahoo! should have stopped using the accused Linux code because Bedrock had submitted the prior art NRL code and the prior art 1995 Linux code to the PTO during a first reexamination, which the patent survived. Second, Bedrock argued that Yahoo! should have stopped using the alleged infringing code because a third party witness – Mr. Kuznetsov – opined in a single email that the '120 patent was infringed and not invalid.

No reasonable litigant would have stopped using the accused Linux code for either of these reasons. Bedrock's allegation that the prior art NRL code and the prior art 1995 Linux

¹⁵ *See, e.g.*, Dkt. 824 (renewed JMOL motion on willfulness).

¹⁶ Yahoo! moved the Court to allow evidence of the second, ongoing reexamination proceeding involving the '120 Patent as evidence that Yahoo! is not a willful infringer. On April 27, 2011, the Court denied this request. Yahoo! made an offer of proof regarding the second reexamination (Dkt. No. 803) as probative evidence that Yahoo! is not a willful infringer. (Dkt. 824).

code were before the PTO in the re-examination is false. Bedrock knew that it had not submitted the NRL code to the PTO at the time it made its willful infringement allegation against Yahoo!, and that the prior art Linux was not listed as considered by the PTO. Bedrock knew this during opening statement and closing argument. Bedrock knew this at all points during the trial. Yet Bedrock allowed the jury to be charged with the issue of willfulness based on its false representation.

Nor would a reasonable litigant have stopped using the accused Linux code based on the Kuznetsov's email. Mr. Kuznetsov had opined in an earlier email that the patent was invalid. In his deposition, he testified again and again that the single email containing his opinion that the patent was infringed and not invalid was his mistake, and that it was clear to him that the patent was invalid. A reasonable litigant looks at all evidence. By ignoring all of the Kuznetsov emails, Bedrock crossed the line in alleging that one of the emails constituted "clear and convincing evidence" of willfulness. No reasonable fact finder could or would so conclude.

Bedrock's willfulness theory is even more astounding in view of the lack of proof of infringement in this case. First, Dr. Jones did not even offer an opinion on whether Yahoo! met the "same access" limitation by the use of a "spinlock" until after he filed his opening report in this case. The fact that Bedrock was forced to pursue this belated "spinlock" theory at trial reveals the weakness of its infringement allegations. Bedrock had nearly two years to review the accused open source code, yet could not cobble together a timely and complete expert report on the subject of infringement. Second, the "spinlock" argument was inconsistent with Bedrock's own opening statement that the patent was concerned with the notion of removing expired records during the "walk through the destination of the hash chain." Ex. 1 (April 27, 2011 Morning Trial Tr. at 50:8-9). In short, there was simply no basis to allege infringement, let alone

willful infringement, given the claim language at issue in this case and the clear recognition by Bedrock's own counsel that infringement required removing records during an "access" which was defined by the walk of the hash chain and not a contrived "spinlock."

Given these facts, it seems possible that Bedrock pursued a willfulness claim in an attempt to leverage a better settlement offer, make up for a perceived loss in the low damages amount received in its trial against Google, or to confuse the jury at trial. Bedrock's pursuit of a baseless willfulness claim by its tactics in this litigation of withholding the claim until the close of fact discovery, and misrepresenting its nature to the Court and the jury, justify a finding of exceptional case against Bedrock.

B. Bedrock Never Had a Legitimate Damages Theory

Bedrock bore "the burden of proving the amount of reasonable royalty damages it is entitled to recover." *Transclean v. Bridgewood Servs.*, 290 F.3d 1364, 1376 (Fed. Cir. 2002). A patentee must employ "sound economic and factual predicates" in proving a reasonable royalty. *Riles v. Shell Exploration & Prod. Co.*, 298 F.3d 1302, 1311 (Fed. Cir. 2002). In an attempt to obtain significant damages at any price, Bedrock, however, blatantly failed to follow Federal Circuit precedent and blindly ignored the facts of the case. By repeatedly propounding damages theories that lacked legal and factual basis, Bedrock made this case exceptional.

Throughout fact discovery, Bedrock maintained that it was entitled to damages because the '120 patent allegedly protected against DoS attacks. By its opening report, Bedrock had essentially abandoned this theory as a basis for calculating damages, and instead calculated damages based on litigation-induced settlements.¹⁷ After the Court struck Bedrock's settlement-based damages calculation, Bedrock resorted to an efficiency theory.

¹⁷ Bedrock's true damages contentions were thus either obfuscated over the course of the case or manufactured at the last minute.

Rather than accepting that it had no basis for damages in this case, Bedrock pursued an efficiency damages theory that violated numerous canons of Federal Circuit damages law.¹⁸ First, Bedrock arrived at a royalty rate through an unjustified and improper application of the Entire Market Value Rule by seeking a percentage of the cost of Yahoo!’s servers, without any analysis of the allegedly patented component versus unpatented components. Second, Bedrock’s damages theory improperly applied its own variant of the “25% Rule” by seeking a 50/50 split of the alleged cost savings of the ’120 patent, contrary to *Uniloc*. Third, Bedrock’s experts never analyzed the acceptability of FreeBSD as a non-infringing alternative run on Yahoo!’s servers despite clear and unmistakable evidence that Yahoo! continues to use FreeBSD. Fourth, Bedrock had no evidentiary basis for seeking a one-to-one relationship, as it did, between the accused code and any cost savings. Fifth, Bedrock relied on inconsistent and inconclusive testing results by its technical expert. Finally, Bedrock stopped at nothing to try to prop up its damages case. Contrary to the Court’s rulings precluding revenue information, Bedrock presented “loss of revenue numbers” in the event of a complete shut down of Yahoo!’s global network as a “check” to his artificially inflated damages estimates. *Compare* Dkt. 660 at Def. MIL 1 *with* Ex. 25 (April 28, 2011 Afternoon Trial Tr. at 115:2-116:7).

Bedrock’s tactics regarding its damages theory during the case and at trial were unfair to Yahoo! in its preparation of the case and evidence Bedrock’s misconduct.

V. CONCLUSION

For the foregoing reasons, Yahoo! respectfully requests that this Court declare this an exceptional case and for an award of its attorneys’ fees and costs pursuant to 35 U.S.C. § 285.

¹⁸ *See, e.g.*, Dkt. 823 (renewed JMOL motion on damages).

Dated: June 6, 2011

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that Counsel for Defendant Yahoo! conferred with counsel for Bedrock regarding the subject of this motion via telephone on June 6, 2011.

/s/ Yar R. Chaikovsky

Yar R. Chaikovsky

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on June 6, 2011 to counsel of record in the manner agreed by the parties, via electronic mail.

/s/ Yar R. Chaikovsky

Yar R. Chaikovsky