**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF VIRGINIA**
**NORFOLK DIVISION**

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| I/P ENGINE, INC.<br><br>Plaintiff,<br><br>v.<br><br>AOL, INC., *et al.*,<br><br>Defendants. | Civil Action No. 2:11-cv-512 |

**MEMORANDUM IN SUPPORT OF MOTION IN LIMINE #3 TO EXCLUDE MARKETING AND HIGH-LEVEL NON-TECHNICAL MATERIALS RELATED TO HISTORICAL CLICK-THROUGH RATE**

Plaintiff I/P Engine intends to present to the jury evidence and argument regarding marketing and high-level non-technical Google AdWords, AdSense for Search, and AdSense for Mobile documents, including advertiser-facing documents and videos discussing the use of historical click-through rate ("CTR"). This evidence, as opposed to the actual operation of the accused products as revealed in technical documents, source code, and depositions of Google Inc. ("Google") employees, is irrelevant, especially because it is undisputed that [redacted]. This evidence should therefore be excluded from presentation at trial under Federal Rule of Evidence 402. Moreover, Plaintiff's evidence is highly prejudicial to Google and should be excluded under Federal Rule of Evidence 403. Plaintiff's intent in presenting this evidence is to distract the jury with side issues by improperly and falsely suggesting that Google intended to mislead advertisers about the operation of its products, and to confuse the jury as to the actual operation of the accused products. Accordingly, Google hereby moves this Court, *in limine*, for an order

excluding marketing and high-level non-technical materials referencing the use of historical CTR.

## I. PLAINTIFF INTENDS TO INTRODUCE MARKETING AND NON-TECHNICAL MATERIAL EVEN THOUGH [redacted].

As set forth in Defendants' Motion for Summary Judgment, Plaintiff's infringement contentions, as reflected in Plaintiff's infringement contentions and [redacted], are based on the allegation that the accused products use historical CTR of an advertisement to "filter" ads in determining which ads to display. (D.N. 238, 11-12.) [redacted]. (*Id.*, 12-13.)

Nevertheless, even though this issue is not credibly in dispute, Plaintiff appears to intend to introduce marketing and high-level non-technical documents related to historical CTR in order to distract the jury with an irrelevant sideshow. At recent depositions, Plaintiff's counsel has asked multiple questions about marketing documents containing statements regarding the use of historical CTR of an ad. Plaintiff's counsel has questioned Google witnesses about the accuracy of the documents, asked whether Google intended to mislead advertisers, and inquired about the oversight process related to creation of these documents. (Deposition Transcript of Nicholas Fox ("Fox Tr."), 127:13-128:15; Deposition Transcript of Jonathan Diorio ("Diorio Tr."), 199:6-23, 119:1-120:18; Deposition Transcript of Jonathan Alferness ("Alferness Tr."), 110:2-111:16.) But as detailed above, these issues have nothing to do with this patent litigation.

## II. THESE MARKETING AND NON-TECHNICAL MATERIALS ARE IRRELEVANT, PREJUDICIAL, AND A WASTE OF TIME.

Plaintiff's attempt to use marketing and high-level non-technical documents related to historical CTR is not relevant or probative of infringement. Plaintiff's own expert acknowledges that [redacted]

[redacted] Even if this were not the case, it is Google's technical documents, employees, and source code that are reliable sources of evidence as to the operation of the accused products, not oversimplified documents directed at laypersons. Accordingly, Google's non-technical documents are not relevant and should be excluded under Federal Rule of Evidence 402. *See Bradley v. Cooper Tire & Rubber Co.*, Case No. 4:03-cv-00094, 2007 WL 4624613, at *5 (S.D. Miss. Aug. 3, 2007) (excluding advertisements regarding the off-road capabilities of the Ford Explorer in a products liability case under Federal Rules of Evidence 402 and 403 for offering no probative value and likely resulting in prejudice, confusion, and waste of time).

Further, given that Plaintiff agrees that the products [redacted], these documents are probative of no issue, and can serve only to confuse the jury as to the operation of the products. *Bradley*, 2007 WL 4624613, at *5.

Moreover, Plaintiff's behavior at recent depositions suggests that it intends at trial to disparage Google for issuing these marketing and non-technical materials and to accuse Google of misleading its advertisers. (*See, e.g.*, Fox Tr., 127:13-15 ("Q: Do you believe it is misleading to inform advertisers that quality score is calculated based on historical click-through rate?").) Such questioning would be nothing but a sideshow because it has nothing to do with whether the accused products infringe the patents-in-suit.

Google can of course offer evidence to establish that its intent in issuing these documents is not to mislead, but to simplify technologically complex concepts for a lay audience whose main concern is using the front end of the advertising systems, not understanding technical details. (Alferness Tr., 102:10-12, 102:25-103:6; Fox Tr., 112:20-113:2.) But it should not have to, because Plaintiff's insinuations are entirely beside the point. Introduction of this evidence will only prejudice Google without making any disputed fact more or less probable.

For the foregoing reasons, Defendants respectfully requests that the Court exclude Plaintiff from presenting any marketing or high-level non-technical materials referencing the use of historical CTR.

DATED: September 21, 2012

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## CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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