

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC.

Plaintiff,

v.

AOL INC., *et al.*,

Defendants.

Civil Action No. 2:11-cv-512

MEMORANDUM IN SUPPORT OF MOTION IN LIMINE # 5 TO PRECLUDE PLAINTIFF FROM INTRODUCING EVIDENCE OF DAMAGES AGAINST AOL INC., GANNETT CO., INC., IAC SEARCH & MEDIA, INC., AND TARGET CORPORATION

Defendants respectfully file this Memorandum in support of their Motion to preclude Plaintiff I/P Engine from offering evidence of any damages against AOL, IAC, Gannett, and Target. I/P Engine's damages contentions are directed only to Google. It has articulated no damages theory against any of the other Defendants in this case.

The Expert Report of Stephen L. Becker sets forth I/P Engine's damages theory. Dr. Becker bases his calculation of a reasonable royalty on a hypothetical negotiation in 2004 between Google and Lycos (the predecessor in interest to the patents in suit). (*See* Declaration of Emily C. O'Brien in Support of Defendants' Motion to Exclude, Ex. 1 (7/25/12 Expert Report of Stephen L. Becker, Ph.D. ("Becker Report")), ¶ 11(b).) As Dr. Becker explains in his expert report, a license resulting from this hypothetical negotiation would cover "not only Google, but Google customers, such as AOL, IAC, Gannett and Target, for whom Google served search-based ads through the accused Google Systems." (Becker Report, ¶11(b).) Nowhere in his

report does Dr. Becker undertake a separate damages analysis for any of the other Defendants.¹ He does not perform a reasonable royalty calculation based on a separate hypothetical negotiation involving any other Defendant. And he does not base any damages claim on any revenue from any Defendant, other than Google.² This is not surprising because if Google pays a reasonable royalty for the use of the accused systems to serve advertisements on its website as well as the websites of the other Defendants, I/P engine has been fully compensated for the alleged infringement. Seeking additional damages from the other Defendants would be double dipping.

Moreover, in response to interrogatories asking for I/P Engine's damages contentions with respect to Gannett, IAC, and Target, I/P Engine provided no additional allegations. Instead, I/P Engine merely incorporated by reference the expert report of Dr. Becker. But as Dr. Becker's report makes plain, I/P Engine claims damages from Google only.³

Any evidence or argument about any damages claim against AOL, IAC, Gannett, and Target that Plaintiff might attempt to offer at trial would be irrelevant under Rule 402 and inadmissible under Rule 403 as unfairly prejudicial, likely to confuse the jury, and a waste of

¹ At most, in his report, Dr. Becker attempts to allocate Google's revenue by website. (See Becker Report, ¶ 191, ¶ 191 n.245, Ex. SLB-2A.)

² Additionally, I/P Engine does not contend that any other Defendant is jointly and severally liable for the damages attributed to Google's operation of its accused systems. Indeed, I/P Engine has no factual or legal basis to do so.

³ See Declaration of Margaret P. Kammerud in Support of Defendants' Motion to Dismiss All Claims Against AOL Inc., Gannett Co., Inc., IAC Search & Media, Inc., and Target Corporation ("Kammerud Dec."), Ex. A, Plaintiff I/P Engine, Inc.'s Responses and Objections to Defendant Gannett Company, Inc.'s First Set of Interrogatories; Kammerud Dec., Ex. B, Plaintiff I/P Engine, Inc.'s Responses and Objections to Defendant IAC Search & Media, Inc.'s First Set of Interrogatories; Kammerud Dec., Ex. C, Plaintiff I/P Engine, Inc.'s Responses and Objections to Defendant Target Corp.'s First Set of Interrogatories.

time and resources. Therefore, Plaintiff should be precluded from offering such evidence at trial or arguing to the jury that it seeks any amount of damages from AOL, IAC, Gannett, and Target.

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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