

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

I/P ENGINE, INC., <div style="text-align: center;">Plaintiff,</div> <div style="text-align: center;">v.</div> AOL, INC. et al., <div style="text-align: center;">Defendants. </div>))))))))))	Civ. Action No. 2:11-cv-512 REDACTED VERSION
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**MEMORANDUM IN SUPPORT OF PLAINTIFF I/P ENGINE, INC.’S
MOTION TO EXCLUDE OPINIONS AND TESTIMONY OF KEITH R. UGONE**

I. INTRODUCTION

Plaintiff I/P Engine, Inc. (“I/P Engine”) seeks to preclude certain unsupported expert testimony proffered by Defendants’ damages expert, Keith Ugone, Ph.D. On August 29, 2012, Defendants served Dr. Ugone’s expert rebuttal report to respond to I/P Engine’s damages analysis by Dr. Stephen L. Becker. Dr. Becker prepared a detailed analysis with extensive computations to conclude that a reasonable royalty for Defendants’ infringement was [REDACTED]

[REDACTED] In response, Dr. Ugone managed to do something that, in the experience of I/P Engine’s counsel, is unprecedented: He provided his opinion on what he thought was the appropriate measure of damages without doing a single piece of math. In reaching his opinions, he did not attempt to compute Defendants’ revenues, or costs, or to determine an appropriate royalty base; he did not try to calculate a royalty rate; and he did not use the well-established methodologies for determining a reasonable royalty. Instead of using the established methodologies, he used what he called a “proxy” for doing the real thing. Dr. Ugone selected a number of lump-sum

license agreements, most of which he conceded were not comparable to the patents-in-suit, and declared that the damages in this case should be in the same range as those non-comparable agreements.

Dr. Ugone's opinions fail under *Daubert* for two reasons. First, his "proxy" methodology is not an appropriate analytical methodology. I/P Engine can find no case law supporting such a methodology in a patent case. Second, Dr. Ugone – who has no technical expertise whatsoever, and who is not offered as a technical expert witness on issues of liability – extensively opines on the technical operation of the accused systems, with no citation to any factual support. Defendants apparently intend to elicit such technical testimony from Dr. Ugone, even though he clearly has no expertise in that area and has testified that he is not proffering a technical opinion in this case.

II. LEGAL STANDARD

District court judges act as gatekeepers to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001). Under Federal Rule of Evidence 702, expert testimony is admissible only if: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.

Only expert testimony "based on scientific, technical, or other specialized knowledge and not on belief or speculation" may be deemed reliable. *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999). "Reliability of specialized knowledge and methods for applying it to various circumstances may be indicated by testing, peer review, evaluation of rates of error, and general acceptability." *Id.* Not only must an expert employ reliable methodology, but

application of that methodology to the facts must also be proper. *See ePlus, Inc. v. Lawson Software, Inc.*, 764 F. Supp. 2d 807, 813 (E.D. Va. 2011).

In determining whether expert testimony should be admitted, a court is guided by two sometimes competing, principles. *E.W. LLC v. Rahman*, No. 11-cv-1380, 2012 U.S. Dist. LEXIS 133374, at *13 (E.D. Va. Sept. 17, 2012). On the one hand, the court should be mindful that Rule 702 was intended to liberalize the introduction of relevant expert evidence. *Id.* On the other hand, “the court must also recognize that due to the difficulty of evaluating their testimony, expert witnesses have the potential to ‘be both powerful and quite misleading.’” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). Thus, “proffered evidence that has a greater potential to mislead than to enlighten should be excluded.” *Rahman*, 2012 U.S. Dist. LEXIS 133374, at *13.

III. DISCUSSION

The flaws in Dr. Ugone’s opinions as to damages in this case go well beyond those that can be adequately exposed on cross-examination. Rather, the flaws are so fundamental and pervasive that exclusion is the only remedy that will prevent the likelihood of misleading the jury and undue prejudice to I/P Engine. Further, it is the only remedy that will save the large amount of trial time that would be required to cross-examine Dr. Ugone on all of the flaws and inconsistencies in his opinions.

Specifically, to determine a reasonable royalty in this case: Dr. Ugone used what he calls the “proxy/yardstick” method. This methodology has not been published or accepted in the relevant professional community, nor has it been sanctioned by the courts. It involves no math, requires no connection to the patents-in-suit, and has no consideration of the projected or actual use of the invention by Defendants. Moreover, there is no consideration of the relative value of the patented technology. Dr. Ugone did not even attempt to calculate damages based on

Google's revenues. Further, he failed to even refer to Defendants' use of the infringing technology. Ex. 1 at 109:1-13, 139:22-140:4, 171:18-21. Instead, Dr. Ugone ignores the actual data in favor of a "proxy" or "yardstick" methodology, and relies on what he concedes are non-comparable licenses and acquisition agreements, most executed years after the hypothetical negotiation date, to grossly deflate the damages range.

Dr. Ugone's opinion on reasonable royalties can and should be excluded because it violates not just one, but all three prongs of the *Daubert* standard. See *Sundance, Inc. v. DeMonte Fabricating, Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008) (an expert witness' testimony must be based on sufficient facts or data, it must be the product of reliable principles and methods, and the witness must apply the principles and methods reliably to the facts of the case). District courts must exercise a gate-keeping role to ensure that expert testimony is both relevant and reliable. *Daubert.*, 509 U.S. at 592. Testimony that is not helpful to the trier of fact, not relevant, or not reliable should be excluded. *Sundance, Inc. v. DeMonte Fabricating, Ltd.*, 550 F.3d 1356, 1364 (Fed. Cir. 2008). Defendants bear the burden of proving, by a preponderance of the evidence, that Dr. Ugone's testimony is reliable and relevant. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001).

A. Dr. Ugone's Opinion on A Reasonable Royalty Should be Excluded as it Violates All Three Prongs of *Daubert*

Dr. Ugone claims that the methodology he uses is the "proxy" or "yardstick" method to determine reasonable royalties. Ex. 1 at 87:9-13 ("I've taken this proxy/yardstick/benchmarking approach to what the likely outcome of the hypothetical negotiation would be taking into account all of the economic forces and pressures that are discussed in my report."). But I/P Engine has discovered no publications or court decisions accepting any "proxy" methodology as reliable to determine a reasonable royalty. It is telling that Dr. Ugone ignores *actual data* in favor of this

“proxy” approach. To support it, he relies on admittedly non-comparable licenses and acquisition agreements, most executed years after the hypothetical negotiation date.

Specifically, Dr. Ugone relies on nine patent license or purchase agreements that he says inform the hypothetical negotiation. Seven of those agreements (“Lump Sum Agreements”) are relied on solely as evidencing Google’s preference for a lump sum royalty structure. Dr. Ugone relies on the two other agreements as “value indicators” allegedly supporting a lump sum payment of between [REDACTED] Ex. 2 at ¶¶ 12, 125, 132. [REDACTED]

[REDACTED] Ex. 2 at ¶ 124(a). [REDACTED]

[REDACTED] None of these agreements are sufficiently comparable technologically and/or economically to the hypothetical negotiations in this case or the patents-in-suit; this evidence has a greater potential to mislead than to enlighten, and thus should be excluded.

1. The Referenced Agreements Are Not “Comparable” Under the *Georgia Pacific* Factors to Determine a Reasonable Royalty

Licenses relied on as informative of a reasonable royalty must have some discernable link to the claimed technology. “In considering licenses, a damages expert must account not only for technological differences but economic differences as well.” *DataQuill Ltd. v. High Tech Comp. Corp.*, No. 08-cv-543, 2011 WL 6013022, at *18 (S.D. Cal. Dec. 1, 2011). As the Federal Circuit has recently held, “[t]o be admissible, expert testimony opining on a reasonable royalty rate must ‘carefully tie proof of damages to the claimed invention’s footprint in the market place.’” *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011). This includes “whether the patented technology is essential to the licensed product being sold, or

whether the patented invention is only a small component or feature of the licensed product . . .
.” *Lucent Tech. v. Gateway, Inc.*, 580 F.3d 1301, 1330 (Fed. Cir. 2009).

Here, Dr. Ugone *admits* that the Lump Sum Agreements are not comparable to the patents-in-suit. In fact, he relies on them for the sole purpose of supporting his claim that Google has a “strong preference” for lump sum royalty structures. Ex. 1 at 49:20-50:7. There is no explanation as to how these seven licenses informed Dr. Ugone’s “proxy” analysis to arrive at

He also admits that [REDACTED] is not comparable, but claims to have considered it because it was in line with other value indicators (i.e., the amounts of the agreements were similar). Ex. 1 at 178:8-11 and 181:1-6. “[A] lump-sum damages award cannot stand solely on evidence which amounts to little more than a recitation of royalty numbers . . . particularly when it is doubtful that the technology of those agreements is in any way similar to the technology being litigated here.” *Uniloc*, 632 F.3d at 1329. The only information that Dr. Ugone opines is relevant to Google’s negotiating position is “[t]he timing of the agreement, the royalty payment structure and royalty amount.” Ex. 2 at ¶ 11.

Dr. Ugone does not explain, however, how the purchase amount provides any basis for a comparison with Defendants’ infringing sales; how the parties calculated the purchase price; Google’s intended products; or how many products in which Google expected to use the licensed technology. In short, the lack of a discernible link [REDACTED] and the patents-in-suit renders Dr. Ugone’s testimony as to a reasonable royalty unreliable and warrants its preclusion. *DataQuill*, 2011 WL 6013022, at *18.

Finally, Dr. Ugone claims that [REDACTED] is the “most technologically comparable” to the patents-in-suit, because it supposedly relates to internet advertising. Ex. 2 at

¶ 12. I/P Engine strongly disagrees that the technology licensed in [REDACTED] is comparable or similar to the technology of the patents-in-suit. But even accepting Defendants' claim as true, this would be the *only* similarity or comparable term that Defendants are able to identify about [REDACTED]. It occurred four and half years after the hypothetical negotiation date.

Dr. Ugone never explains why Google entered into this transaction. He provides no information about whether Google ever used or planned to use the technology it acquired from [REDACTED], and, if so, the extent of that use. Damages experts cannot use non-comparable licenses, with little relationship to the claimed invention or parties-in-suit, as a basis for calculating reasonable royalties. *Oracle Am., Inc. v. Google Inc.*, 2011 U.S. Dist. LEXIS 141399 (N.D. Cal. Dec. 6, 2011) (*citing ResQNet*, 594 F.3d at 870).

2. Lycos Patent Sale Seven Years Removed From Hypothetical Negotiation Date

The measure of damages for patent infringement is “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.” 28 U.S.C. § 284. This is determined in primary part by applying the 15-part *Georgia Pacific* test, which focuses on a hypothetical negotiation as of the date of first infringement. In this case, the date of the hypothetical negotiation is in 2004. In determining damages under § 284 and *Georgia Pacific*, a reasonable royalty is based on “the fact of infringement” (*Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364, 1375-76 (Fed. Cir. 2002)), and *not* the patent owner’s purchase of intellectual property assets.

How much I/P Engine paid Lycos for the patent portfolio is not relevant to the reasonable royalty analysis. Neither does it account in any way for the use made by the Defendants of the invention. The “[p]urchase price is simply not a reasonable or sufficiently reliable

approximation of the value of the allegedly misappropriated intellectual property” *Alcatel USA, Inc. v. Cisco Systems, Inc.*, 239 F. Supp. 2d 660, 669-71 (E.D. Tex. 2002).

As yet another flaw in his methodology, Dr. Ugone relies on the purchase price ultimately paid for the Lycos portfolio and offers for sale fielded by Lycos for its patent family including the patents-in-suit as an “ex-post market-related value indicator of the Patents-in-Suit and an indicator of Lycos’ willingness to accept for its patent family that included the Patents-in-Suit.” Ex. 2 at ¶ 12 and Appx. A. He likewise refers to various discussions that Lycos had with other prospective purchasers, to bolster his opinions, including the bidding details between Altitude Capital Partners and Hudson Bay Capital. *Id.* Nothing about the amount of the Lycos sale in 2011 and the negotiations and bidding associated with that sale is informative as to the economic mindset of the parties in June 2004 (the hypothetical negotiation date that the jury must consider). The Lycos sale occurred in 2011, seven years after the hypothetical negotiation date. Lycos had been sold twice in the interim. During his deposition, Lycos’s General Counsel, Mark Blais, testified about a myriad of internal and external pressures that led to the sale of the Lycos portfolio, none of which related to the value of the patents-in-suit. Ex. 3 at 122-156. Nothing regarding the 2011 sale, or the various discussions Lycos had between 2009 and 2011 regarding a possible sale, is “a reasonable or sufficiently reliable approximation of the value of the allegedly misappropriated intellectual property” *Alcatel*, 239 F. Supp. 2d at 669-71.

3. Settlement Agreements From Litigations That Do Not Involve The Patents In Suit

Dr. Ugone’s reliance on three 2011 settlement agreements between [REDACTED], two of which do not involve a license to the patents-in-suit, further calls into question the soundness of his methodologies. The Federal Circuit has repeatedly called into question the probative value of settlement agreements,

noting that doing so is dubious because they may have very little relation to the demonstrated economic demand for the patented technology.

Not only is reliance on settlement agreements generally disfavored, but the circumstances suggest any reliance on [REDACTED] is misplaced. For example, Dr. Ugone actually *admits* that none of those agreements are comparable licenses. Ex. 2 at ¶¶ 82-83, n.200 and n.208; Ex. A at 52 (agreeing that no weight was placed on the settlement amounts in damages analysis). Moreover, Dr. Ugone acknowledged that the agreements were entered into as a result of adverse litigation events, and a desire by Lycos to terminate the litigation. Ex. 1 at 113:3-17. Not only are the settlement agreements seven years removed from the hypothetical negotiation date, but Lycos had been sold two different times during that time frame.

Notwithstanding these circumstances, Dr. Ugone describes [REDACTED] as evidence of “Lycos’ willingness to accept a lump-sum royalty payment structure” and that Lycos “attributed value to other patents in this patent family besides the ‘420 and ‘664 Patents.” Ex. 2 at ¶¶ 82 and 83. Dr. Ugone does not explain how these agreements, each having taken place seven years after the hypothetical negotiation date are evidence showing that Lycos would have been willing to accept a lump sum payment structure in 2004 (the hypothetical negotiation year), especially in light of all the changes that occurred at Lycos during the intervening time. There is absolutely no reasonable connection to be drawn from these settlements, the circumstances surrounding these settlements in 2011 and the mindset of Lycos in a hypothetical negotiation in 2004. In short, Dr. Ugone’s reliance on these agreements further calls into question the reliability of his methodology in determining a reasonable royalty.

B. Methodology Involves Doing No Math: No Apportionment, No Extent Of Use, No Relative Value

By relying on the non-comparable licenses and settlement agreements set forth above as indicators of value, Dr. Ugone amazingly was able to render a damages report that required no math on his part. Dr. Ugone's failure to account for the value of the patented technology through either apportionment or by adjusting his lump sum determination to account for the value of the patented technology and the extent of Defendants' infringing use further illustrates exactly how flawed and unreliable his methodology was in this case.

In determining his lump sum royalty range, Dr. Ugone made no attempt to apportion the value of the patented technology. As the Federal Circuit has recently held, "[t]o be admissible, expert testimony opining on a reasonable royalty rate must 'carefully tie proof of damages to the claimed invention's footprint in the market place.'" *Uniloc*, 632 F.3d at 1317. This includes "whether the patented technology is essential to the licensed product being sold, or whether the patented invention is only a small component or feature of the licensed product" *Lucent*, 580 F.3d at 1330.

In opining on a reasonable royalty, Dr. Ugone failed to weigh the relative value of the technology covered by the patents-in-suit against the technology that Google acquired rights to under its allegedly comparable licenses. Dr. Ugone cites nine patent license or purchase agreements in his expert report. Ex. 2 at ¶124. But nowhere in the report does Dr. Ugone provide any information from which one could glean the relative contribution of those patents, including whether they relate to core technology or a small component of a system.

During his deposition, Dr. Ugone analogized his proxy approach to using comparable properties in a neighborhood to try to appraise a piece of real estate. Ex. 1 at 33:16-24. As Dr. Ugone explains, one can adjust up or down based upon the number of bedrooms and bathrooms

in a house in order to compensate for the differences. *Id.* Not only is this not a generally accepted damages methodology for patent cases, but he blatantly relies on other agreements that he concedes have nothing to do with the patents-in-suit. Dr. Ugone elected to use this unaccepted methodology in the face of his knowledge that his so-called comparable properties were in no way comparable. This failure makes it impossible for the fact finder to determine if and how these agreements inform the hypothetical negotiation. This Court should exercise its gate-keeping function and exclude Dr. Ugone's testimony with respect to these agreements. *See Fenner Invs., Ltd. v. Hewlett-Packard Co.*, No. 08-cv-273, 2010 WL 3911372, at *2 (E.D. Tex. Apr. 16, 2012).

In license agreements involving a lump sum structure, parties typically take into account the licensee's projected use or sales of the patented technology in deciding upon the amount of consideration. *See, e.g., Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1384 (Fed. Cir. 2001) (noting that the Federal Circuit has "previously upheld awards of damages premised on a lump sum royalty payment *based on an infringer's expected sales*") (emphasis added); *Snellman v. Ricoh Co., Ltd.*, 862 F.2d 283, 289 (Fed. Cir. 1988) ("The jury justifiably could have calculated a lump sum royalty *based upon Ricoh's expected sales . . .*") (emphasis added). The Federal Circuit recently vacated a lump sum damages award where the only two lump sum licenses admitted at trial "provide[d] no basis for comparison with [the defendant's] infringing sales." *Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010) ("Neither license describes how the parties calculated each lump sum, the licensees' intended products, or how many products each licensee expected to produce.").

In deciding upon a lump sum as the appropriate royalty structure, Dr. Ugone failed to take into consideration the extent of Defendants' infringing use in deciding upon a lump sum

amount. During the hypothetical negotiation, Google and Lycos both would have been aware that the accused instrumentality is utilized every single time that the AdWords and AdSense for Search systems serve an advertisement. Yet, Dr. Ugone does not acknowledge this fact in his expert report and how it may affect the reasonable royalty. When asked during his deposition what weight he put on the extent of Google's use in determining his lump sum royalty, Dr. Ugone testified only that he assumed that Google was using the technology so that it would have to take a license. Ex. 1 at 109:1-9. The failure by Dr. Ugone to consider how the extent of the infringement would have affected the amount of any lump sum royalty the parties may have agreed to during a hypothetical negotiation renders his methodology flawed and unreliable.

C. Ugone Is Not Qualified To Offer Technical Testimony On The Operation Of The Accused Systems

Dr. Ugone is a damages expert, not a technical liability expert. He has no skill or training or expertise to opine on technical issues. Dr. Ugone's report, however, contains extensive unsupported technical information about the purported operation of Google's accused systems. Even though his 118-page report contains more than 500 footnotes identifying every supporting reference, crucial technical statements lack any supporting citations. For example:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ex. 2.

Dr. Ugone's testimony, as set forth above, might be acceptable if he were a technical expert opining on liability. But for a damages expert who must assume infringement, Dr. Ugone's testimony set forth above is far outside the scope of his expertise. Dr. Ugone is not

accepting I/P Engine's infringement allegations as true, but is instead redefining I/P Engine's patents-in-suit, narrowly construing the function of the claimed invention – contrary to the report and testimony of Dr. Frieder, I/P Engine's expert. For example, instead of Dr. Ugone focusing on Google's use of the patented technology within Google's search advertising system as set forth by Dr. Frieder, Dr. Ugone compartmentalizes each part of Google's system and refuses to recognize infringement based on Google's use the patented technology as a whole.

Dr. Ugone is opining regarding the substance of Defendants' infringement. A damages expert, however, may not assert such technical opinions. *Sundance*, 550 F.3d at 1362 (holding that it was an abuse of discretion for the district court to permit a non-technical expert to testify as an expert on the issues of non-infringement). Defendants may not salvage Dr. Ugone's improper opinions by claiming that he only is relying on the testimony of others, because he cites nothing in the foregoing paragraphs to support his substantive technical analysis.

When Dr. Ugone did provide supporting citations, they frequently were to evidence that is not admissible at trial. For example, on at least nine different occasions, Dr. Ugone cites the Federal Circuit opinion in *Bid for Position, LLC v. AOL Inc. et al.*, 601 F.3d 1311 (Fed. Cir. 2010) as substantive support for his opinions.¹ That judicial decision is not an appropriate basis for substantive support. Likewise, in paragraph 95, Dr. Ugone cites to the "Trial Testimony of Jeff Huber, August 5, 2010, Bright Response v. Google et al., pp. 23 – 26." Mr. Huber is not a trial witness in this case, and Defendants have not included that testimony in their designations, because it is hearsay and cannot be offered against I/P Engine.

In short, Dr. Ugone is not a technical expert, and should not be permitted to offer his independent opinions on the technical operation of the accused systems. To the extent

¹ See, e.g., Ex. 2 at footnotes 87, 88, 92, 93, 97, 99, 245, 268, and 304.

Defendants lay a proper foundation with their other witnesses, and Dr. Ugone has properly disclosed a basis to rely on such evidence, only then may he be permitted to opine. But until and unless that happens, Dr. Ugone's substantive technical opinions about the operation of the accused systems is outside of the area of his expertise, and should not be permitted.

IV. CONCLUSION

Dr. Ugone's damages report and related opinions fail to satisfy the admissibility requirements of Federal Rule of Evidence 702 or the Supreme Court's directive in *Daubert*. Accordingly, I/P Engine respectfully requests that this Court to exclude Dr. Ugone's opinions and testimony from any trial of this matter.

Dated: September 21, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2012, the foregoing

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