UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 2:11-cv-512
AOL, INC. et al.,	)	
Defendants.	)	

I/P ENGINE, INC.'S OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Dated: September 26, 2012

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I. INTRODUCTION

All of Defendants' arguments for non-infringement or invalidity in their Motion for Summary Judgment ("Motion") are premised on facts that are disputed and, in many cases, simply incorrect. Defendants' non-infringement arguments rest on a straw man that mischaracterizes a portion of I/P Engine's infringement evidence, and ignores the rest of that evidence on the same limitation. Defendants' invalidity arguments are premised on facts that are in fundamental dispute, and on which the parties' experts have joined issue, such as whether the cited references disclose "filtering" or "content-based" analysis. And Defendants' laches argument is highly disfavored on summary judgment, and is fatally compromised because (1) the documents alleged to provide notice do not teach that Defendants practiced all elements of the asserted claims; (2) Defendants simultaneously assert that these type of high-level documents incorrectly describe the Google system, are unreliable and should be excluded from evidence; and (3) Defendants have unclean hands.

Regarding non-infringement, Defendants make three arguments, all of which mischaracterize their own documents, and ignore substantial evidence of infringement cited by I/P Engine's expert. [redacted]

Google's attempt to speak out of both corners of its mouth demonstrates the material dispute that precludes summary judgment.

Regarding invalidity, Defendants rely on two references whose disclosures are disputed. This is a classic expert dispute that must be resolved at trial. I/P Engine's expert has explained that neither reference discloses key limitations of the asserted claims: neither prior art reference discloses using a combination of content and collaborative data in performing such filtering with respect to a query. The experts disagree on these issues, and the disputed evidence means that the motions for summary judgment on patent invalidity must be denied.

II. SUMMARY JUDGMENT STANDARD

In deciding whether to grant summary judgment, this Court must resolve all ambiguities and draw all reasonable inferences against the moving parties. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Therefore, this "[C]ourt should not grant summary judgment unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that [I/P Engine] cannot prevail under any circumstances." *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994) (internal quotes removed). In this regard, "the trial court's task at the summary judgment motion stage of litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them." *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994).

III. MATERIAL FACTS DISPUTED BY THE PARTIES

Defendants' statement of so-called "undisputed" facts is incomplete, misleading, and at times wholly incorrect.

A. The Asserted Patents

I/P Engine disputes paragraph 4 of Defendants' Statement of Undisputed Facts. Defendants incorrectly state that the U.S. Patent & Trademark Office ("PTO") did not find that filtering information by combining content data and user feedback data was novel or patent

worthy. This is plainly wrong. In the Notice of Allowance for the '664 patent, the PTO stated that "[t]he Application extends the functionality of the two [parent] Patents by teaching a content-based filter system for combining information from the scanning system for a first user and information from feedback by other users, and filtering the combined information for relevance to queries and the a first user." Ex. 1. The PTO further stated that "the prior arts searched and investigated from different domains *do not fairly teach or suggest the teaching of information filtering through a combination of data from the a first user and data from feedback by other users as recited in each of the independent [claims]*." *Id*. (emphasis added). Thus, the PTO specifically referenced the combination of content and collaborative data for filtering search results as a novel feature of the asserted claims.

I/P Engine also disputes Defendants' statement in paragraph 4 that the PTO has allowed the patents-in-suit based on the fact that no prior art disclosed the use of a "wire." This assertion is nonsensical – the "wire" embodiment is not recited in many claims of the '420 patent, and is not recited in a single claim of the '664 patent. The entire file history, including the review by the Examiner of each of the asserted claims, shows that in allowing the patents, the PTO properly considered each claim, and the invention as a whole.

B. The Accused Systems

1. [redacted]

I/P Engine disputes paragraph 9 of Defendants' Statement of Undisputed Facts. [redacted] *See* Ex. 2 at 87:2-88:14; 92:18-93:19.

2. [redacted]

I/P Engine disputes paragraph 11 of Defendants' Statement of Undisputed Facts. Paragraph 11 embodies Defendants' mistaken premise that I/P Engine's proof on the use of

collaborative feedback data is limited to proof that Google calculates the historical clickthrough rate for a specific advertisement. Defendants are wrong. Both I/P Engine's infringement contentions and Dr. Frieder's report list numerous examples of Google's use of collaborative feedback data. [redacted] *Id*. (citing, among other things, Ex. 3 at 101:17-108:23; 110:2-118:21; 195:2-14) [redacted]

Much of this evidence comes from Google's own documents. [redacted] Ex. 7 at 132:15-133:9.[1]

[1] Defendants have known about I/P Engine's reliance upon both types of query log evidence since the infringement contentions were first served in November 2011, and chose not to address this collaborative feedback data in their Motion.

3. [redacted]

I/P Engine disputes Defendants' claim, in paragraph 11, that "[t]he users are not grouped together by whether they have similar interests or needs." Motion at 6. [redacted] thereby grouping the data received from users that have similar needs. [redacted] A query is a well-known way to identify an information need, and accordingly, when two users enter the same or similar query they are expressing a "similar need."

4. [redacted]

I/P Engine disputes additional statements in paragraph 11 of Defendants' Statement of Undisputed Facts. In paragraph 11, Defendants incorrectly state that [redacted] Defendants' own documents (both pre-and-post-litigation) repeatedly

[2] [redacted]

contradict this assertion. Google's documents confirm that the Quality Score for an advertisement is "determined" by a "historical clickthrough rate" for a matched ad:

The Quality Score for Ad Rank on Google and the search network is determined by:

- The historical clickthrough rate (CTR) of the keyword and the matched ad on Google; if the ad is appearing on a search network page, its CTR on that search network partner is also considered
- Your account history, which is measured by the CTR of all the ads and keywords in your account
- The historical CTR of the display URLs in the ad group
- The relevance of the keyword to the ads in its ad group
- The relevance of the keyword and the matched ad to the search query
- Your account's performance in the geographical region where the ad will be shown
- Other relevance factors

IPE 0000061(Ex. 9) (highlighted added)

Google's internal documentation repeatedly confirms the use of historical CTR. For example:

Document	**"Historical Clickthrough Rate" Representation**
IPE0000061-62 (Ex. 9)	Quality Score includes "[t]he historical clickthrough rate (CTR) of the keyword and the matched ad on Google; if the ad is appearing on a search network page, its CTR on that search network partner is also considered" and "[h]aving . . . a strong CTR on Google . . . will result in a higher position for your ad.").
IPE0000058 (Ex. 10)	In AdWords, a component of the "Quality Score" is based on an advertisement's "clickthrough rate (CTR)."
G-IPE-0337659 (Ex. 11)	[redacted]
G-IPE-0347560-64 (Ex. 12)	
G-IPE-0264611 (Ex. 13)	[redacted]
G-IPE-0171132 (Ex. 14)	[redacted]

See also, e.g., Ex. 13; Ex. 15; Ex. 16; Ex. 17; Ex. 18.

[redacted]

[redacted] Ex. 19, Ex. 1 at claim 10(d); Ex. 8 at 25:17-26:15.

[redacted][3]

[3] On September 21, 2012, Google filed a motion in limine to preclude introduction into evidence of Google's own documents, claiming that they lack credibility because they supposedly are "technically inaccurate." D.I. 303 and 304. These documents are Google's communications with the public of how the accused Smart Ads system works. *See, e.g.,*Ex. 9 ("Quality Score for Ad Rank . . . is determined by: the historical clickthrough rate (CTR) of the keyword and the matched ad on Google"); Ex. 20 ("How we calculate Quality Score . . . Your keyword's past clickthrough rate (CTR); How often that keyword led to clicks on your ad"); Ex. 14 ("Quality Score Formula [includes] The historical clickthrough rate (CTR) of the keyword and the matched ad"). [redacted]

5. [redacted]

I/P Engine disputes paragraph 12 of Defendants' Statement of Undisputed Facts.

[redacted]

C. The Prior Art – Bowman and Culliss

1. Bowman does not filter results nor does it disclose "content" filtering

I/P Engine disputes paragraph 17 of Defendants' Statement of Undisputed Facts.

Defendants incorrectly state that Bowman "then filters those results." Bowman does not disclose

filtering items, only ranking. *See, e.g.*, Ex. 21 at 2:36-3:15. Ranking and filtering are different processes, as conceded by Google's own engineers and Google's own technical expert. Ex. 7 at 147:22-148:4 ("Q: Do you agree that ranking and filtering are different as they relate to search engines? . . . A: Yes."); Ex. 22 at 133:21-134:2 ("Q: So it that – would the Top N ranking just be sort of one filter, or no? A: I would not describe it as a filter. I would describe it as a ranking function which returns eligible ads. Q: And you view those as two separate things? A: Absolutely"); Ex. 23 at 249:22-250:10 ("Q: Is there a difference between filtering items and ranking items? . . . A: Well, usually ranking means changing the order. Filtering doesn't have anything to do with the order."); Ex. 24 at 20:19-24 ("Q: Does that article that you refer to in paragraph 10 concern information filtering? A: No it does not. Q: It – it doesn't. And why is that? A: It's a ranking method."); *Id.* at 83:21-85:22 (describing the difference between ranking and filtering). Bowman does not use the words "filter" or "filtering", and I/P Engine's expert has explained that Bowman does not disclose any filtering. *Id.* at 128:5-130:10; Ex. 25 at ¶ 90-91. To the extent Defendants maintain that Bowman discloses filtering, this is a material issue of disputed fact.

Defendants also incorrectly state that Bowman discloses some sort of "content" analysis. But, Bowman's system ranks items purely based on an analysis of feedback data. Ex. 21 at 5:40-6:25. Bowman explicitly acknowledges its lack of content analysis, stating that items are ranked "in accordance with collective and individual user behavior [feedback analysis], *rather than* in accordance with attributes of the items [content analysis]." Ex. 21 at 2:63-3:2; 4:38-48. Thus, Bowman actually *teaches away* from using content analysis of an item. I/P Engine's expert, Dr. Carbonell, explained in paragraph 88 of his Rebuttal Expert Report Regarding Validity, that a

person of ordinary skill in the art would not understand this reference to be disclosing any content analysis. Ex. 25 at 21.

2. Bowman does not describe analyzing how many of the terms in the query appear in the search results' content

I/P Engine disputes paragraph 18 of Defendants' Statement of Undisputed Facts. In paragraph 18, Defendants incorrectly state that Bowman "adjust[s] the ranking score of each search result according to its content by analyzing how many of the terms in the query appear in the search result's content" and that "[s]earch results whose content contains all the terms in the query get higher ranking scores, while search results that contain fewer of the query terms get progressively lower rankings scores." Defendants' citation for this alleged content analysis is three lines of text from the specification (Ex. 21 at 9:50-53)[4] and a single dependent claim (claim 29). Notably, Defendants cite, but do not quote, these sections, so they can mischaracterize the description as looking into the "content" of an item. Bowman never states that the words of the query are "in" the content item. Bowman actually states that scores may be adjusted to reflect a number of query terms "that are matched to the item." Words can be "matched" with an item without being "in" the item because Bowman's validity tables are populated with user selections. Ex. 25 at 19, n. 3. I/P Engine's validity expert has opined that this language does *not* disclose an analysis of *the content* of an item, and has concluded that Bowman does not adjust the ranking score of each search result according to its content. *Id*.

[4] Defendants' actual citation is column 8, lines 50-53, which contains no mention of any adjustment. I/P Engine assumes Defendants intended to cite column 9, lines 50-53, where the text mentions "adjusting" scores.

3. Bowman does not filter search results based on feedback of other users and content filtering

I/P Engine disputes paragraph 19 of Defendants' Statement of Undisputed Facts. Defendants incorrectly characterize the "subsetting" described in Bowman. Bowman's "subsetting" involves retaining a subset of a *ranked* list. Ex. 21 at 9:58-64. In other words, Bowman's subsetting follows a ranking and involves taking some sub-set or some group from that ranking. Ex. 25 at ¶ 90. I/P Engine's expert has testified that Bowman requires the ranking threshold value be one where some elements of a ranked set are above it and some are below it. Ex. 24 at 129:25-10. This is not filtering. Ex. 25 at ¶ 90.

4. Defendants misstate Bowman's ranking score – it is not generated through a combination of feedback-based data and content-based data

I/P Engine disputes paragraph 20 of Defendants' Statement of Undisputed Facts. Defendants' statement that "the final ranking score for each search result in Bowman is generated through a combination of feedback-based data and content-based data" is incorrect, because it is based upon the incorrect premise that Bowman analyzes content-based data. As described above, Bowman does not use content-based data, it ranks items "in accordance with collective and individual user behavior, *rather than* in accordance with attributes of the items." Ex. 21 at 2:63-3:2; 4:38-48.

Defendants' statement that this ranking score is "then used to filter" also is incorrect, because, as described above, Bowman's rankings score is used to rank items, not to filter them. *See, e.g., Id.* at 2:19-3:2; 4:38-48.

5. Culliss does not rank items based on a combination of the content of the search results and feedback from prior users

I/P Engine disputes paragraphs 22 and 28 of Defendants' Statement of Undisputed Facts. In paragraph 22, Defendants incorrectly state that Culliss ranks results "based on a combination

of the content of the search results and feedback from prior users." Dr. Carbonell, I/P Engine's validity expert, explained that Culliss, like Bowman, operates as a purely collaborative system, and does not combine content with feedback from previous users. Ex. 25 at ¶¶ 106-108.[5] Ranking scores in Culliss may be initialized based on the number of times a key term appears in a document, but those scores are merely used to construct the "initial index setting." Ex. 26 at 3:65-67. Importantly, Culliss only uses feedback data to adjust the ranking scores up or down. Ex. 26 at FIG. 1; 4:41-49 (describing the adjustment of scores when a user clicks on a displayed item shown in response to a query). Accordingly, Culliss does not combine both content data with collaborative data in producing a ranking score.

In paragraph 28, Defendants incorrectly state that Culliss discloses "filtering" because it *ranks* items. Defendants' expert on invalidity, Dr. Ungar, agreed with I/P Engine's expert, Dr. Carbonell, that "ranking" and "filtering" are different processes. Ex. 7 at 147:22-148:4. Defendants' Motion merely states that Culliss discloses ranking, and Defendants have provided no evidence – much less undisputed evidence – of filtering in Culliss.

D. Allegedly Infringing Activities

I/P Engine disputes paragraph 29 of Defendants' Statement of Undisputed Facts. Google cites three Google Blog posts having minimal explanation of Quality Score as evidence that they "openly advertised and publicized Quality Score." Additionally, Google cites three unrelated documents from third parties as supposed evidence of "numerous third party publications." The documents contain third party statements about AdWords, and "Quality Score." None of these documents contain information that describes the AdWords system in ways that match the claims

[5] In support of their theory of what Culliss discloses, Defendants refer this Court to an irrelevant product called Direct Hit. D.I. 240-12. The Direct Hit product is neither relevant to or admissible in support of Defendants' invalidity case. In any event, this inadmissible exhibit does not disclose any content analysis by Direct Hit.

of the asserted patents to the same level as Google's more recent documents and videos. To the extent the documents can be said to describe anything, the documents appear to refer to general statements about the AdWords system. These Google Blog posts and third party documents (which are not admissible) do not reflect "pervasive, open, notorious activities" with sufficient information that could trigger a duty to investigate.

IV. I/P ENGINE HAS SUBSTANTIAL AND SUFFICIENT EVIDENCE TO PROVE THAT THE ACCUSED SYSTEMS INFRINGE THE ASSERTED CLAIMS OF THE '420 AND '664 PATENTS

"[A] trial court cannot reach a conclusive finding of noninfringement if the record shows some evidence supporting a finding of noninfringement and some evidence to the contrary." *AFG Indus., Inc. v. Cardinal IG Co., Inc.*, 375 F.3d 1367, 1371 (Fed. Cir. 2004). Summary judgment is improper when there is a conflict between expert opinions; a trial with the refining fire of cross-examination is a more effective means of arriving at a conclusion than perusal of ex parte declarations and reports of experts. *See Hilgraeve Corp. v. McAfee Assocs.*, 224 F.3d 1349, 1353 (Fed. Cir. 2000) ("[D]ifferences in the experts' descriptions of [the allegedly infringing system] raise a genuine issue of material fact . . . . The determination of whether either [expert's] description (or neither) is correct requires a factual determination of the actual operation of the [system]."). For purposes of this motion, any doubts, inferences, or issues of credibility must be resolved against Defendants as the movant. *See Helifix, Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1345-46 (Fed. Cir. 2000).

Defendants offer three flawed and factually disputed arguments in support of their non-infringement arguments. First, they claim that I/P Engine's infringement allegations rest entirely on the allegation that Google's Quality Score meets the collaborative feedback limitation by calculating the historical clickthrough rate for a specific advertisement. I/P Engine's allegations are not so limited; and Defendants have failed to address or even recognize I/P Engine's

considerable evidence demonstrating Google's extensive use of other collaborative feedback data. And, even if it was so limited, the evidence shows that Google uses historical clickthrough rate for a specific advertisement. [redacted]

And third, with respect to only the asserted claims of the '664 patent, the accused systems do filter the "combined information" as recited in the claims.

A. The Accused Systems Filter Advertisements Using Feedback Data in the Form of Clickthrough Data

Defendants assert that their accused systems do not infringe the asserted claims of the '420 and '664 patents because they do "not track or use the historical click through rate of an ad." Motion at 1. As an initial matter, the asserted claims have no such requirement. Defendants fail to tie their argument to any particular claim language that they believe is not met by the accused systems.

Nor are I/P Engine's allegations related to feedback data limited to *only* evidence showing use of historical clickthrough rate for a specific advertisement. Nonetheless, even if the claims did require tracking or using such a historical clickthrough rate, and even if I/P Engine's allegations were so limited, the evidence demonstrates that Defendants' systems do utilize a historical clickthrough rate.

1. The asserted claims do not require "tracking and using historical click through rate for a specific advertisement"

The '420 patent requires "receiving collaborative feedback data" and then "filtering based on . . . [that] collaborative feedback data." Similarly, the '664 patent recites "receiving information found to be relevant to the query by other users." The asserted claims do *not* require

that the system "track or use the historical click through rate or ad" or "use or track the historical clickthrough rate ("CTR") for a specific advertisement," as Defendants' allege. Motion at 1, 6.

[redacted] This is true whether or not the accused systems compute a separate "rate" number for each "specific advertisement" and this use of past click data satisfies the feedback limitations in all of the asserted claims.

2. "Tracking and using historical click through rate" is not "central" to I/P Engine's allegation; I/P Engine has shown that the relevant claim limitations are met through Google's extensive use of feedback data in disabling and promotion

Defendants claim that the tracking and use of "historical click through rate" is "central" to I/P Engine's case. Motion at 11. This straw man is simply incorrect, as demonstrated by Dr. Frieder's expert report and the evidence cited within it. First, I/P Engine has identified multiple aspects of the accused systems that receive collaborative feedback data in the form of user clicks, non-clicks and other user behavior. For instance, [redacted]

[redacted]

3. The evidence also shows Google uses historical clickthrough rate

Even if historical clickthrough rate was the only evidence put forth by I/P Engine (which it is not, as shown above and explained in detail in Dr. Frieder's report), the evidence of Defendants' use of historical clickthrough rate in filtering advertisements is overwhelming, and certainly sufficient to show a material disputed issue. As described above, Google's own public statements – including its website – contain numerous statements that they use "historical clickthrough rate" to determine advertisement eligibility. Further, Google has admitted that the historical clickthrough rate is how Google explains the computation of Quality Score. For example, [redacted]

[redacted] Ex. 3 at 102:6-18 (emphasis added). Similarly, with respect to document IPE 00000061 (Ex. 9), which describes the use of "historical CTR," [redacted]

[redacted]

Ex. 3 at 108:5-23. Google thus has admitted that its best description and explanation to its advertisers of the operation of the Quality Score and the rest of its search ad system, is that it uses historical clickthrough rate, or CTR. Mr. Alferness was given the chance in his deposition to testify that the documents were wrong or incorrect, and he refused to do so. Ex. 3 at 38:12-25; 115:3-18.

[redacted]

[redacted]

[redacted]

In view of this overwhelming evidence that Google uses the historical clickthrough rate and other forms of collaborative feedback data in its accused systems, there are clearly disputed issues of fact for the jury to decide.[6]

B. With Respect to the '420 Patent, The Accused Systems Filter Based on Data From Users With "Similar Interests or Needs"

The Court construed the terms "receiving collaborative feedback data" and "collaborative feedback data" in the '420 patent as "data from system users with similar interest or needs regarding what informons such users found to be relevant." D.I. 212 at 4. According to Google's non-litigation statements, the accused systems receive data from users with similar needs when they receive clickthrough data of users who ran the same or similar queries. *See, e.g.*, IPE 0000073 ("by allowing users to vote with their clicks, we have millions of people that are helping us to decide which ads are best for each search query"); Ex. 19 at 217:21-220:3; *see also* Ex. 33 at IPE 0000064; Ex. 18 at G-IPE-0260374; Ex. 11 at G-IPE-0337659; Ex. 15 at G-IPE-0407258. Thus, the evidence shows that users who enter the same or similar query have similar needs.

[6] I/P Engine has not filed a motion for summary judgment on this issue because it is aware of the conflicting opinions offered by Dr. Ungar. Nevertheless, I/P Engine submits that no reasonable juror would find in favor of Google on this issue.

Defendants argue that two users who run the same query (e,g., "Washington Nationals") may not have the same interests or needs. This argument is refuted by testimony of the experts for both I/P Engine and Defendants.[7] Dr. Frieder, I/P Engine's expert, explained that in Google's accused systems, the information available to the system about a user's information need is the content of the query itself. He concludes that the query *is* the embodiment (and the best indication) of a user's information need. Therefore, when two users run the same or similar query they have a "similar" information need. A system's use of data from those users satisfies the claim language of the '420 patent.

Defendants' example of two users who run the query "Paris" is merely an example where the system may not always be *perfect* at identifying a user's *exact* information need. Such precision, however, is not required by this Court's construction, nor is it a plausible reading of the "similar interests or needs" language. Defendants' own expert, Dr. Ungar, recognized that the Court's construction does not require that a system perfectly identify the specific interest or need that is in a user's head:

> My interpretation is that a reasonable interpretation is that that means there's some information about them…..that indicates that they may have similar interests or needs…. It's hard for me to image a system that truly, truly knows whether two people in their deepest hearts have similar interest or needs . . . so I can't image how anything could possibly exist that says I really, really, really, really know what your interests are.

Ex. 7 at 197:5-14. Dr. Ungar later added:

> I think a reasonable interpretation is that one can't ever know for sure if people have the same interest. And so as a matter of practical practicality, all that one has to go on is *indications* of similar interest.

[7] Google constructs a faulty hypothetical that fails to suggest that such users would never have the same interests or needs – two users who enter the same query likely do have the same interest or need. This is more clearly demonstrated by varying the hypothetical (e.g. "Buy Washington Nationals baseball jersey") to demonstrate infringement even more clearly, confirming Dr. Frieder's opinion that such users do have similar interests or needs.

Ex. 7 at 206:18-22 (emphasis added). The experts thus agree that the same or similar search query is an "indication" of a similar need by different users.

Accordingly, even under Defendants' interpretation, the accused systems use feedback from users with "similar interests or needs." At a minimum, however, I/P Engine's evidence illustrates that there is a material dispute, precluding summary judgment.

C. With Respect to the '664 Patent, The Claims Do Not Require Filtering Based on Data From Users With "Similar Interests or Needs"

Defendants' arguments regarding the "similar interests or needs" language is wholly inapplicable to the '664 patent as that phrase does not appear in the asserted claims of the '664 patent. The '664 patent instead recites receiving "information found to be relevant to the query by other users." D.I. 171 at 11. This Court has twice rejected Google's attempt to have it read the "interests or needs" limitation into the '664 patent claims, and instead decided that no construction of this phrase was necessary. *Id.* at 12; D.I. 212. Defendants appear to be hoping that the third time is the charm, citing the same "evidence" that they did in their two failed *Markman* briefs on this issue.[8]

Even if Defendants' argument regarding the "similar interests or needs" language was applicable to the '664 patent, which it is not, there is still a genuine issue of material fact as to whether Google's system uses feedback from users with "similar interests or needs." As described above with reference to the '420 patent, filtering based on users that ran the same or similar query is filtering based on users with "similar needs."

[8] I/P Engine occasionally has stated that both patents relate to filtering using collaborative feedback data among other things. This is because the '664 claim language ("information found to be relevant to the query by other users") refers to a type of collaborative feedback. I/P Engine's references, however, do not mean that the claim language from the '420 patent is somehow imported into the claims of the '664 patent.

D. With Respect to the '664 Patent, There is a Genuine Issue of Material Fact as to Whether the Accused Systems Filter the "Combined Information"

[redacted]

V. GENUINE ISSUES OF MATERIAL FACT EXIST BECAUSE THE EVIDENCE DEMONSTRATES THAT INDIRECT INFRINGEMENT OF THE '420 AND '664 PATENTS EXISTS

There is ample evidence to demonstrate a finding of induced infringement. Google's actions, for example, induced infringement and Google knew or should have known that its actions would induce infringement. As described below, with respect to at least its publishers and partners (the other Defendants being prime examples), the facts and record clearly demonstrate that Google knowingly induced infringement and possessed the specific intent to

induce infringement. For example, Dr. Frieder opined that "Defendants induced their end users, customers, and publishers to infringe by, for example, instructing their customers to use the systems." Ex. 8 at ¶ 72. Defendants wholly ignore this evidence in their motion.

Defendants' assertion (at 19) that I/P Engine "provides no evidence as to which Defendants are liable of indirect infringement, and for those Defendants, which end users, customers, and publishers those Defendants actively induced or contributed to infringe the Patents" is without merit. (emphasis in original). [redacted]

This evidence is sufficient to show that Google knowingly induced infringement. The Federal Circuit has consistently found that such evidence is sufficient to support a finding of induced infringement. *See Lucent*, 580 F.3d at 1322-23 (holding that evidence of induced infringement based on circumstantial evidence of defendant's sales, expert testimony regarding potential use of the accused product in the infringing manner, and distribution of instruction materials directing users to operate the accused system in an infringing manner is sufficient).

The evidence also supports a finding of contributory infringement because Google, for example, knew that the combination for which the accused features of the accused systems were especially made was both patented and infringing and the accused features have no substantial non-infringing uses. There is sufficient circumstantial evidence to infer infringement by others, including the non-Google defendants and other users of the accused systems. I/P Engine's evidence also illustrates that the accused systems are used only in a manner that infringes the '420 and '664 patents. This evidence is sufficient to support a showing that Google's actions induced infringing acts. *Lucent*, 580 F.3d at 1322.

Defendants argue that I/P Engine has no evidence to show Defendants had knowledge of the patents-in-suit. To the contrary, Google had knowledge of the patents-in-suit as early as 2003, well before it commenced its infringement, when it cited the '420 patent as a reference in one of Google's own patent applications. Ex. 40 and 41. AOL likewise was aware of the patents-in-suit in 2003, when it applied for a patent that specifically referenced the '420 patent as prior art. Ex. 42.[9] In view of this evidence, Google possessed the requisite intent for indirect infringement. Because there are at least genuine material disputes, summary judgment as to indirect infringement should be precluded.

[9] There is considerable other evidence reflecting Google and AOL's knowledge of the patents-in-suit. For example, as alleged in I/P Engine's complaint, in 2004, the patents-in-suit were cited multiple times as prior art in the prosecution of a patent related to the patent asserted against Google in its litigation against Overture. *See* D.I. 1 at ¶¶42-53: Ex. 43 and 44. In another litigation, Google relied on a patent as prior art that showed the parent of the patents-in-suit on its face, suggesting that Google had carefully analyzed the family of the patents-in-suit. Ex. 45. Further, Google has produced emails, press releases, and other documents from 1996 through 1998 showing that it was aware of the inventors of the asserted patents, their company and their products. Ex. 46, 47, 48, and 49. AOL likewise had knowledge of the patents-in-suit prior to this litigation because it has submitted at least one patent application that references the '420 patent as prior art. Ex. 49 and 50.

VI. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER BOWMAN AND CULLISS ANTICIPATE ALL OF THE ASSERTED CLAIMS OF THE '420 AND '664 PATENTS

Defendants fail to carry their heavy burden to prove the invalidity of every asserted claim of the '420 and '664 patents. To succeed on their motion, Defendants must prove that the references they rely on disclose *each and every* element recited in the claims at issue without any genuine issues of material fact. Defendants have done no such thing in either their motion or their expert report on invalidity. Defendants cannot show that there are no genuine issues of material fact to be tried. The record shows that neither of the references cited by Defendants discloses: (1) a content analysis of an item's relevancy to a query, or (2) filtering items on the basis of a combination of content and collaborative data.

A patent is presumed valid, 35 U.S.C. § 282. This presumption can be overcome only by clear and convincing evidence to the contrary. *See, e.g., Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1322 (Fed. Cir. 2011); *WMS Gaming Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1355 (Fed. Cir. 1999). A claim is invalid as anticipated under 35 U.S.C. § 102 *only if each and every* limitation is found either expressly or inherently in a single prior art reference. *See Pressure Products Medical Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1318 (Fed. Cir. 2010). The party challenging a patent's validity bears the burden of proving invalidity under the clear and convincing standard. *See Pregis Corp. v. Doll*, 698 F. Supp. 2d 584, 597 (E.D. Va. 2010) (citing *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1346 (Fed. Cir. 2000)).

Anticipation is a question of fact. *Green Edge Enters., LLC v. Rubber Mulch Etc.*, LLC, 620 F.3d 1287, 1297 (Fed. Cir. 2010). To resolve factual disputes, "expert testimony regarding matters beyond the comprehension of laypersons is sometimes essential," especially when considering complex technology. *Proveris Seientific Corp. v. Innovasystems, Inc.*, 536 F.3d 1256, 1267 (Fed. Cir. 2008). In these cases, expert testimony is critical to show the existence (or

lack thereof) of a claimed element within a prior art reference when anticipation is at issue. *See Koito Mfg. Col, Ltd. v. Turn-Key-Tech, LLC*, 381 F.3d 1142, 1152 (Fed. Cir. 2004).

A. Bowman Does Not Anticipate the Asserted Claims of the '420 Patent

I/P Engine has asserted two independent claims from the '420 patent – claims 10 and claim 25. I/P Engine's validity expert, Dr. Carbonell, has concluded that Bowman lacks numerous limitations required by claims 10 and 25 of the '420 patent. He opines, for example, Bowman does not disclose either "filtering the informons on the basis of applicable content profile data for relevance to the query" or "combining pertaining feedback data . . . with the content profile data in filtering each informon for relevance to the query." Because the parties dispute the underlying factual matter of whether Bowman discloses each and every claim element in the asserted claims, summary judgment invalidating the '420 patent is improper.

1. Bowman does not disclose "filtering the informons on the basis of applicable content profile data for relevance to the query" because Bowman does not analyze content profile data

This limitation of claim 10 requires that "informons"[10] be filtered "on the basis of applicable content profile data" for relevance to the query. For example, as described in the '420 patent, items can be filtered based on a such a content analysis by comparing the words of a document to the words in the query to determine how well the content of the document matches the query. Ex. 51 at 4:23-26; 19:20-24. Dr. Carbonell has concluded Bowman does not do this. Bowman is a purely collaborative ranking system, and in fact ignores the content (i.e., attributes) of the items being ranked. Ex. 25 at ¶¶ 82-88, pages 18-21. Bowman repeatedly states that the system ranks items "in accordance with collective and individual user behavior, *rather than in*

[10] An "informon" is an "information entity of potential or actual interest to the [individual/first] user." D.I. 171 at 8.

accordance with attributes of the items." Ex. 21 at 2:63-3:2; 4:38-48 (emphasis added); Ex. 25 at ¶ 82, page 18. This statement *teaches away* from using content analysis.

Defendants suggest that the "matching" described in Bowman satisfies this claim limitation. Bowman's "matching," however, does not consider the content of an item. Instead, Bowman states that scores may be adjusted to reflect a number of query terms "that are matched by the item" – it does not state that scores are adjusted to reflect a number of query terms that are present *in the content* of an item. Ex. 21 at 9:50-54. This is an important difference, because the asserted claims require consideration of the "content" of an item, such as the words in the item.

Bowman's references to query terms that are "matched to" or "matched by" an item are references to Bowman's use of tables, which are populated based on purely collaborative data. *See, e.g.*, Ex. 21 at 6:9-25. Dr. Carbonell, I/P Engine's validity expert, has explained that "a person of ordinary skill in the art would understand that Bowman uses the word 'matched' to indicate that term-item association is contained in Bowman's rating table rather than contained in the item (document)." Ex. 25 at 19, n. 3. In other words, these terms are present in the table (and therefore available to be "matched" with queries) only due to collaborative feedback, it does not mean that the terms are "in" the content of the item. *Id*. As explained by Dr. Carbonell, this understanding of the described "matching" is fully consistent with Bowman's teaching of ranking items "in accordance with collective and individual user behavior, rather than in accordance with attributes of the items." *Id*. Accordingly, Bowman does not, and cannot, disclose scoring items "on the basis of applicable content profile data for relevance to the query." Thus, Bowman does not disclose this limitation of claims 10 and 25. To the extent Google's expert believes otherwise, there is a material dispute, and summary judgment cannot be granted.

2. Bowman also does not disclose "filtering each informon on the basis of applicable content profile data for relevance to the query" because Bowman does not filter items

Claims 10 and 25 of the '420 patent recite a search system that combines content and collaborative data to filter items for relevance to the query. The filtering of items is an important aspect of the claims, as it is a stated purpose of the patented invention to effectively handle massive amounts of information by weeding material out. Ex. 51 at 1:10-2:26. Bowman is a ranking system, and does not in any way disclose a filter system or filtering. *See, e.g.* Ex. 21 at 2:19-3:2; 4:38-48; Ex. 25 at ¶¶ 90-91, pages 21-22. The distinction between ranking and filtering is well known, and has been explained by Dr. Carbonell, by numerous Google engineers and even by Dr. Ungar, Defendants' expert. *See, e.g.*, Ex. 7 at 147:22-148:4 ("Q: Do you agree that ranking and filtering are different as they relate to search engines? . . . A: Yes."); Ex. 22 at 133:21-134:2; Ex. 23 at 249:22-250:10; Ex. 24 at 20:19-24; 83:21-85:22. Bowman does not use the words "filter" or "filtering", and I/P Engine's expert has explained that Bowman does not disclose any filtering. Carbonell Dep. Tr. 128:5-130:10; Carbonell Report at ¶ 90-91, page 22.

Defendants incorrectly suggest (at 9, 23-24) that Bowman's "subsetting" is the same as filtering. The two concepts are distinct, however. "Subsetting" as disclosed in Bowman is retaining a subset of a ranked list. Ex. 21 at 9:58-64. Dr. Carbonell explains that Bowman's subsetting follows a ranking and involves taking some sub-set or some group from that ranking. Ex. 25 at ¶ 90, page 21-22 ("'Subsetting' as disclosed in Bowman is retaining a subset of a ranked list either by thresholding or ranking values or retaining the top 'N' results"). This is different than a filter process that would evaluate each item independent of the others to determine if it would pass through the filter. Dr. Carbonell testified that the subsetting examples in Bowman are not an implementation of filtering, in my opinion." Ex. 24 at 133:6-23. Defendants' invalidity expert, Dr. Ungar, implicitly concedes this point, because, in his report,

he provides an obviousness argument that combines Bowman with other references to teach the claimed filtering limitations, thereby indicating that Bowman lacks any disclosure of filtering. Ex. 52 at ¶ 248-255, pages 91-94. At a minimum, to the extent Defendants now claim that Bowman does disclose filtering, there is a material dispute.

3. Bowman does not disclose "the filter system combining pertaining feedback data . . . with the content profile data in filtering each informon for relevance to the query"

Because Bowman fails to disclose either of the limitations discussed above, Bowman cannot disclose combining the "content profile data" with feedback data "in filtering each informon for relevane to the query." The teachings of Bowman therefore lack key limitations of claims 10 and 25 of the '420 patent. Ex. 25 at ¶¶ 78-92; pages 17-22. Hence, Bowman cannot possibly anticipate claims 10 and 25 of the '420 patent.

The remaining asserted claims of the '420 patent – claims 14, 15, 27 and 28 – depend from claims 10 and 25 respectively and cannot be anticipated by Bowman for the same reasons that Bowman does not anticipate claims 10 and 25.

B. Bowman Does Not Anticipate the Asserted Claims of the '664 patent

Similar to the reasons set forth above, Bowman does not disclose each and every limitation of the asserted claims of the '664 patent. In addition to Bowman's failure to disclose filtering, Dr. Carbonell concluded that Bowman fails to disclose "searching for information relevant to a query associated with a first user in a plurality of users." Ex. 25 at ¶¶ 80; 82-88. He likewise concluded that Bowman fails to disclose "combining the information from the feedback system with the information from the scanning system and for filtering the combined information for relevance to at least one of the query and the first user." *Id.* at ¶¶ 80; 82-88. He also concluded that Bowman fails to disclose "combining the information found to be relevant to the query by other users with the searched information; and content-based filtering the combined

information for relevance to at least one of the query and the first user." *Id*. All of those requirements are recited in claims 1 and 26.

1. Bowman does not disclose "searching for information relevant to a query associated with a first user in a plurality of users."

Claims 1 and 26 specifically require that the system search "for information relevant to a query." Dr. Carbonell concluded that because Bowman does not analyze the relevance of an item's content to a query, Bowman cannot disclose searching for information relevant to a query. Ex. 25 at ¶¶ 82-88. As described above, Bowman discloses ranking items "in accordance with collective and individual user behavior, rather than in accordance with attributes of the items." Ex. 21 at 2:63-3:2; 4:38-48. Accordingly, for the same reasons described above, Bowman does not disclose searching for information relevant to a user's query.

2. Bowman does not disclose "a content based filter" because (a) Bowman does not disclose a filter and (b) Bowman does not consider the content of an item.

As described above, Bowman is a system for ranking items, not a filtering system, and thus does not disclose filtering any combined information. *See supra* VI, A, 2. Additionally, because Bowman does not disclose a content analysis, it cannot disclose combining the content data with the feedback data. *See supra* VI, A, 2. For these reasons, Dr. Carbonell concluded that Bowman does not, and cannot, disclose the "content based filter" recited in claim 1 of the '664 patent, or the "combining" and "filtering" limitations of claim 26 of the '664 patent. Ex. 24 at ¶¶ 80-91. Because the teachings of Bowman lack limitations of claims 1 and 26 of the '664 patent, Bowman cannot possibly anticipate those claims.

The remaining asserted claims of the '664 patent – claims 5, 6, 21, 22, 28 and 38 – depend from claims 1 and 26 respectively and cannot be anticipated by Bowman for at least the same reasons that it does not anticipate claims 1 and 26.

C. Culliss Does Not Anticipate the Asserted Claims of the '420 Patent.

Claims 10 and 25 of the '420 patent recite, among other things, "filtering the informons on the basis of applicable content profile data for relevance to the query" and "combining pertaining feedback data . . . with the content profile data in filtering each informon for relevance to the query." Dr. Carbonell has concluded that neither of these features is disclosed in Culliss.

1. Culliss does not disclose "filtering each informon on the basis of applicable content profile data for relevance to the query," because Culliss does not filter items

Defendants' Motion does not offer any position on whether Culliss discloses the filtering limitation. Filtering is required in each of the asserted independent claims, which is then carried through to the asserted dependent claims. To prevail on the issues of anticipation – the basis of Defendants' invalidity arguments – the prior art must disclose each and every element of all of the asserted claims. Defendants' omission of any discussion of the filtering limitation is fatal to their motion. Culliss is not a filter system; it is a system that, in Defendants' own words, "uses article's aggregate key term scores to *rank* the articles." Motion at 31 (emphasis added); *see also* Ex. 26 at 5:5-10. As described above, ranking and filtering are two different technologies, and this has been explained by Dr. Carbonell, Dr. Frieder, several of Google's own engineers, and Defendants' expert Dr. Ungar.

While Defendants state that Dr. Carbonell is incorrect, they have provided no evidence to the contrary. Instead, they merely state (at 32-33) that "Culliss discloses that the article with the highest score is presented to the user in the first or highest position, the article with the second-highest score is presented in the second position, etc." This is evidence of ranking, not filtering.

Nothing that Defendants have cited in their Motion[11] shows anything other than ranking, which Dr. Ungar has admitted is different than filtering. *See, e.g.*, Ex. 7 at 147:22-148:4.

[redacted]

Apparently recognizing that Culliss does not disclose filtering, Defendants include a footnote on page 33 stating that it would be an obvious modification to Culliss to add a filter as in Bowman. Bowman, however, does not have a filter either – it is another ranking technology. Ex. 21 at 2:36-3:15; Ex. 25 at ¶¶ 90-91. Bowman's disclosure describes the goal of "ranking" items, and specifically describes a goal of present at least some items in response to every query**.** Ex. 21 at 2:55-58. This is fundamentally different than a filtering system that separately considers each item's eligibility based on an independent standard that may result in no items being displayed. Ex. 25 at ¶¶ 90-91. Moreover, Defendants have failed to explain any apparent

[11] At his deposition, Dr. Ungar attempted to put forth, via redirect, a new theory of filtering in Culliss that was not disclosed in his expert reports. This theory, based on a portion related to G-ratings and R-ratings, was not in Defendants' Motion, was not in any of Dr. Ungar's expert reports and is not properly before this Court at this time or at any other time. To the extent Defendants try to introduce this new theory through their Reply, I/P Engine notes that the same undisclosed theory was presented to Dr. Carbonell in his deposition and he explained that it did not disclose a filtering mechanism. Ex. 24 at 93:16-95:16.

reason for combining the two references. Merely asserting, without any reasoning or evidence, that the references are "fundamentally similar" is not sufficient to establish obviousness by clear and convincing evidence – especially at the summary judgment stage.

At the very least, there is a genuine issue of material fact, based on the dispute as to whether Culliss discloses filtering, and whether it would be obvious to combine Culliss with Bowman to disclose a filter system. The experts disagree as to whether Bowman's "subsetting" is sufficient to disclose the claimed filtering is a question to be resolved by the jury. Defendants have certainly not shown by clear and convincing evidence in their single footnote on this issue that a reasonable juror could only find that Culliss discloses filtering – they have not identified a single citation for such disclosure.

2. Culliss does not disclose "filtering each informon on the basis of applicable content profile data for relevance to the query," because Culliss does not analyze content profile data

As described above, Culliss is a purely collaborative system in operation. The portion of Culliss that Defendants cite as including a content analysis (the initialization of ranking scores) is merely used once to construct an "initial index setting," not to operate the system. Ex. 26 at 3:65-67. There is no dispute that Culliss only uses feedback data to adjust the ranking scores up or down. Ex. 26 at 4:41-49 (describing the adjustment of scores when a user clicks on a displayed item shown in response to a query); Ex. 52 at ¶ 67. This is why Dr. Carbonell has explained that "in the steady state as if Culliss were to be implemented . . . any content information would not play – would not play a role." Ex. 24 at 39:2-17. For this additional reason, Culliss does not disclose "filtering each informon on the basis of applicable content profile data."[12]

[12] Defendants offer inadmissible Exhibit 12 which purports to describe the Culliss system and notably does not disclose any content analysis either. I/P Engine objects to Exhibit 12 as

3. Culliss does not disclose "the filter system combining pertaining feedback data . . . with the content profile data in filtering each informon for relevance to the query"

As described above, Culliss does not disclose the content profile data or filtering, and therefore could not disclose filtering items on the basis of a combination of content data and collaborative data for relevance to the query, a key component of the claimed invention. Culliss does not disclose each and every limitation of claims 10 and 25 of the '420 patent. Hence, Culliss cannot possibly anticipate claims 10 and 25 of the '420 patent.

The remaining asserted claims of the '420 patent – claims 14, 15, 27 and 28 – depend from claims 10 and 25 respectively and cannot be anticipated by Culliss for at least the same reasons that it does not anticipate claims 10 and 25.

D. Culliss Does not Anticipate the Asserted Claims of the '664 patent

1. Culliss does not disclose "searching for information relevant to a query associated with a first user in a plurality of users"

Culliss does not analyze the relevance of an item's content to a query and therefore cannot disclose searching for information relevant to a query. As described above, Culliss is a purely collaborative system in operation. Accordingly, for the same reasons described above in Section VI, C, 2, Culliss does not disclose searching for information relevant to a user's query.

2. Culliss does not disclose "a content based filter" because (a) Culliss does not disclose a filter and (b) Culliss does not consider the content of an item

As described above, Culliss is a system for ranking items, not a filtering system. *See* Section VI, A, 2. And, even the ranking in Culliss is not in any way based on the "content" of an item. *See* Section VI, A, 1. For these reasons, Culliss does not, and cannot, disclose the "content based filter" recited in claim 1 of the '664 patent, or the "combining" and "filtering" limitations

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irrelevant and hearsay. Nonetheless, I/P Engine notes that the description of the Culliss system in Exhibit 12 demonstrates that this system does not have any content analysis. D.I. 240-12 (product "tracks what actual users have found useful across the Web").

of claim 26 of the '664 patent. Because the teachings of Culliss lack limitations of claims 1 and 26 of the '664 patent, Culliss cannot possibly anticipate each and every limitations of claims 1 and 26 of the '420 patent.

The remaining asserted claims of the '664 patent – claims 5, 6, 21, 22, 28 and 38 – depend from claims 1 and 26 respectively and cannot be anticipated by Culliss for at least the same reasons that it does not anticipate claims 1 and 26.

VII. SUMMARY JUDGMENT ON LACHES IS INAPPROPRIATE

To prevail on laches, Defendants must show (1) plaintiff delayed an unreasonable and inexcusable time in filing suit, and (2) the delay resulted in material prejudice to the defendant. *A.C. Auckerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037-38 (Fed. Cir. 1992). Even then, such a showing does not "mandate" recognition of the defense; it only "lays a foundation for the trial court's exercise of discretion." *Id.* at 1036. To obtain summary judgment on laches, there must be "no genuine issue of material fact as to either element." *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir. 1995). This Court must also consider "evidence of other factors which would make it inequitable to recognize the defense" and therefore may deny laches even where undue delay and prejudice exist. *Aukerman*, 60 F.2d at 1036. Such a fact-intensive inquiry typically is not amenable to resolution at summary judgment, *Hemstreet v. Computer Entry Sys. Corp.*, 972 F.2d 1290, 1292 (Fed. Cir. 1992) (laches ultimately turns on underlying factual determinations), and usually requires the kind of record only created "by full trial on the merits." *Country Floors, Inc. v. Gepner*, 930 F.2d 1056, 1067 (3d Cir. 1991). And even if a presumption of laches is established, it is a "bursting bubble" that vanishes completely once the patentee offers evidence sufficient to create an issue of fact. *Aukerman*, 960 F.2d at 1037. Here, Google's bubble burst before it formed.

A. Google is Not Entitled to A Presumption of Laches

Defendants count backwards to argue that the correct laches time period is 6 years and 3 months – from July 2005 to September 2011, when this action was filed. The laches clock started running, they contend, in July 2011. But Defendants do not contend that any incremental alleged prejudice occurred during the period from July 2011 to September 2011. This alone defeats their argument for a presumption. *Aukerman*, 960 F.2d at 1038.

According to Defendants, the laches clock began running no later than July 2005, when Google posted *one sentence* on a blog about Quality Score. *See* Motion at 39 and Exh. 10 thereto.[13] Based on this posting, Defendants argue that Lycos should have known that Google was practicing every element of every asserted claim in both of the patents in suit. As discussed above, the meaning of these claims, with their many elements, is the subject of lengthy expert reports as to whether Defendants infringe, and whether every element is present in certain prior art. Defendants have not proffered sufficient, undisputed and admissible evidence that, based on the one sentence, Lycos knew, reasonably should have known, or even could have known, that Google was infringing before September 2005. Defendants' failure of proof defeats this defense. *Aukerman*, 960 F.2d at 1035-36.

To find that Lycos had constructive knowledge in July 2005, this Court would have to make a factual determination as to whether Lycos knew or should have known of Defendants' infringement by the standard of an "ordinary" person. *Beam Laser Sys. v. Cox Communs., Inc.*, 144 F. Supp. 2d 464 (E.D. VA. 2001). There is no evidence that Lycos knew of this blog post; Google deposed Lycos pursuant to Rule 30(b)(6), but never asked Mr. Blais about Exhibit 10 to

[13] Google has not explained how it intends to introduce this blog post. As explained below, Google has moved *in limine* to exclude its "high level" descriptions of its AdWords system, which would include this document. I/P Engine objects to the admission of Exhibit 10 on the grounds of hearsay.

its Motion. Whether an "ordinary" person would have enough information from those two lines of text in a single document to justifiably conclude that Defendants infringed the '420 and '664 patents is not a question that can be resolved on summary judgment. This is especially clear when one considers the raft of arguments between the parties over the meaning of claims terms, the meaning of Google's own documents, the factual disputes between the parties as reflected in the summary judgment briefs, and a variety of other factual issues, many of which are before this Court for consideration.

Further, the maxim "he who seeks equity must do equity" applies here. *Aukerman* 960 F.2d at 1038. Google and the other defendants rely on Exhibit 10 in this motion while simultaneously arguing that "non-technical" postings like Exhibit 10 are "an irrelevant sideshow" that should be excluded from trial of this case because they are technically inaccurate and do not describe the accused systems. D.I. 303 and 304. This is not the argument of a litigant who is doing equity.

Defendants also suggest that Lycos' business relationship with Google and its use of Google's advertising system were sufficient to show constructive knowledge of Google's infringing activities. There is no evidence of that alleged fact; at the deposition of Lycos, the Defendants never showed that Lycos knew how the Google system operated. In fact, Google has shown that it is incredibly secretive as demonstrated, *inter alia*, by multiple motions to seal, and by Google's recent motion to seal the courtroom. *Google wants to make sure no one outside of Google knows how Quality Score works.* To that end, Google's counsel, at the September 18 hearing before this Court, emphasized this point.[14] In short, Defendants cannot and have not

[14] At the September 18, 2012 hearing, Google's counsel stated: "Google wants to protect is the information regarding its internal systems and involving how ads are delivered, what determinations are done, the nonpublic information regarding the determinations made in order

provided sufficient evidence to show that Lycos had constructive knowledge of how the accused system worked in July 2005.

[redacted] Lycos could not sell the patents until the Blockbuster litigation was resolved,[16] because a terminal disclaimer (providing that the later patents in the same family will be enforceable only if all patents remain commonly owned) prevented sale of less than the entire patent family. Ex. 55 at pages 206-07; MPEP §1490(c)(3); *see also* Ex. 54 at 132 (sale necessarily included the whole patent family).

Lycos also testified that once it did finally settle with Blockbuster, a new complication arose in its efforts to sell the patents: its Korean owner had entered into a letter of intent agreement to sell Lycos to an Israeli company, Ybrant Digital Limited, in 2010. Because of this letter of intent, the sale of the patents was again delayed while the prospective new owner conducted a due diligence on Lycos, including its intellectual property portfolio. Ex. 54 at 120-

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to determine which ads are served. And, you know, this is information that is very important, not only as against competitors, but there are also substantial risks from revealing this information in terms of advertisers trying to game the system . . . ." D.I. __, 9/18/12 Tr. at 48.

[15] Lycos' litigation asserting the '799 and '214 patents (the '799 is the parent patent for the two patents in suit here) was pending from January 2007 to January 2011. *See, e.g.*, Ex. 54 at 54, line 1-page 94 line 18; Ex. 56 at LYCOS0000001-25; Complaint, Lycos, Inc. v. Tivo, Inc. et al., No. 2:07-cv-3 (E. D. Va. Jan. 10, 2007); Order Dismissing Case, Lycos, Inc. v. Tivo, Inc. et al., No. 1:07-cv-11469 (MLW) (D. Mass. Jan. 10, 2011), D.I. 224.

[16] The settlement with Blockbuster was further delayed by Blockbuster's bankruptcy.

21. Under the letter of intent, Lycos could not continue to negotiate a sale of the patents. Ex. 54 at 130 (testifying that in Spring 2010 the letter of intent prohibited negotiations to sell the patents). And even after it bought Lycos, Ybrant wanted a chance to evaluate the proposed patent sale. *Id.* at 131.

These events do not reveal a patentee who is sleeping on its rights. Lycos first sought to assert its rights with respect to other patents in the same family, including the parent patent to the '420 and '664 patents-in-suit. Lycos then attempted to sell the patents, but was substantially delayed by a dispute over the terms of a settlement agreement and then by the sale of Lycos itself. These events tolled any laches period and demonstrate that there was no undue delay. *Aukerman* at 1033.

B. Even If A Presumption of Laches Applies, I/P Engine Overcomes the Presumption

Regardless of any delay, failure to prove prejudice, by itself, warrants denial of summary judgment on laches grounds. *Gasser Chair*, 60 F.3d at 773 (must show that "delay resulted in material prejudice or injury" to successfully invoke laches); *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1371 (Fed. Cir. 2001). Here, there are abundant genuine issues of material fact for trial regarding both evidentiary and economic prejudice precluding summary judgment.[17] *Aukerman*, 960 F.2d at 1038.

There is no evidentiary prejudice. Such prejudice arises by reason of a defendant's inability to present a full and fair defense on the merits due to the loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court's

[17] Material prejudice to adverse parties resulting from the I/P Engine's delay is essential to the presumption of laches and the laches defense in general. Such prejudice may be either economic or evidentiary. *Aukerman*. at 1033 (citing *Cornetta v. United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988)).

ability to judge the facts. *Id.* (citing *Barrois v. Nelda Faye, Inc.*, 597 F.2d 881, 885 (5th Cir. 1979)). Defendants deposed the inventors of the patents-in-suit, Ken Lang and Donald Kosak, the prior owner of the patents-in-suit, Lycos, and I/P Engine, the current owner of the patents-in-suit. Defendants have not identified any lost records that diminish their ability to have a fair defense in this case. Likewise, Defendants have made no argument that they suffered economic prejudice, *see Aukerman*, 960 F.2d at 1038, and are foreclosed from doing so now on reply.[18]

VIII. CONCLUSION

For the foregoing reasons, I/P Engine respectfully requests that this Court deny Defendants' Motion for Summary Judgment.

Dated: September 26, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2012, the foregoing **I/P ENGINE, INC.'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT,** was served via the Court's CM/ECF system and via Hand Delivery, on the following:

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