

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.,)		REDACTED VERSION
)	
Defendants.)		
_____)		

OPPOSITION TO DEFENDANT’S 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 premise their motion on the allegation that “I/P Engine’s damages contentions are directed only to Google.” D.I. 308 at 1. This premise is not true, and Defendants’ motion should therefore be denied. I/P Engine seeks damages from each of the Defendants, as set forth in Dr. Becker’s expert report. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 1. Defendants’ mischaracterization of Dr. Becker’s report is inexplicable.

Even if Defendants somehow misapprehended Dr. Becker’s report, Dr. Becker explicitly testified during his deposition that he had calculated damages for all Defendants, including AOL, IAC, Gannett, and Target:

Q. Have you offered an opinion of an appropriate level of damages against any party other than Google in this case?

A. (By Dr. Becker) **I have** -- the opinion that I offered is....

Q. Well, if, let's say, the jury only found that Gannett was infringing, is there a number that you could find -- that you could point to in your report that would say this is the appropriate amount of the damages against Gannett?

A. I believe that number is in there, **yes**.

Q. That's in one of the charts or something?

A. It's in one of the exhibits to the report.

Ex. 2 at 7:13-8:7 (emphasis added). At trial, I/P Engine will introduce this evidence and seek a judgment against each of these infringers in the amounts set forth in Dr. Becker's report. On this basis alone, Defendants' motion must be denied.

Defendants imply that Dr. Becker's analysis pertains *only* to Google because Google is involved in, and collects the revenue from, each accused transaction. But Google's involvement in each transaction does not free the other defendants from liability.¹ For example, when Target uses the accused Google systems to respond to a user's query, both Target and Google have infringed by using the patented invention. *See* 35 U.S.C. § 271 ("whoever without authority... **uses** any patented invention... infringes the patent."). Both Target and Google are therefore liable for this act of infringement. The same is true for every other non-Google defendant. It is well established that "a patent owner may obtain judgments against unauthorized makers users, sellers, [etc.] as joint tort-feasors." 7-20 Chisum on Patents § 20.03[7][b]. In *Shockley v. Arcan, Inc.*, 248 F.3d 1349, 1364 (Fed. Cir. 2001), the Federal Circuit rejected an infringer's argument that distributor and seller could not be jointly liable, stating that "other courts, including the

¹ Defendants have filed a Daubert motion against Dr. Becker, but that motion does not challenge his opinion that royalties that are due from AOL, IAC, Gannett, and Target.

Supreme Court, have held that parties that make and sell an infringing device are joint tortfeasors with parties that purchase an infringing device for use or resale.... This court agrees with and adopts this rule.”

Defendants’ protestation that “seeking additional damages... would be double dipping” is unfounded. Multiple *recoveries* for the same infringing act are not allowed, but multiple infringers may be jointly and severally liable for their infringement. *Shockley*, 248 F.3d at 1364 (“Each joint tort-feasor is liable for the full amount of damages (up to a full single, recovery) suffered by the patentee.”); *Cooper Industries, Inc. v. Juno Lighting Inc.*, 1 USPQ2d 1313, 1315 (N.D. Ill. 1986) (“it is elementary that a plaintiff who possesses a valid cause of action against two defendants may pursue both of them at once, even though one defendant is capable of providing full relief”).

For both of these reasons, Defendants’ unsupported assertion (at 2) that “evidence or argument about any damages claim against AOL, IAC, Gannett, and Target ... would be irrelevant under Rule 402 and inadmissible under Rule 403” is absurd. I/P Engine has damages claims against *all* Defendants, jointly and severally.

Dated: September 27, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2012, the foregoing **OPPOSITION TO DEFENDANT’S 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**, was served via the Court’s CM/ECF on the following:

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