

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

I/P ENGINE, INC.

Plaintiff,

v.

AOL, INC., *et al.*,

Defendants.

Civil Action No. 2:11-cv-512

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO EXCLUDE  
THE TESTIMONY OF STEPHEN L. BECKER**

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## I. INTRODUCTION

The numerous factual and methodological errors in Dr. Becker's report render his opinion unreliable and inadmissible under Federal Circuit precedent, and any verdict based on it would be subject to a motion for a new trial. I/P Engine attempts to mask these deficiencies by characterizing them as factual disputes and disagreements about the weight Dr. Becker gives to the evidence. But the assumptions that Dr. Becker bases his opinion on are either not supported by any evidence, refuted by undisputed evidence, or contrary to I/P Engine's own infringement allegations. Further, contrary to I/P Engine's suggestion, Defendants do challenge Dr. Becker's methodology, including his methodology for apportioning Google's revenue base, his methodology in selecting comparable licenses, and his methodology for selecting the appropriate royalty structure.

Dr. Becker's testimony is not admissible, as I/P Engine contends, simply because Dr. Becker will be subject to cross-examination at trial. (D.N. 460, 4.) Such a rule would render Rule 702 a nullity since all witnesses may be cross-examined. Cross-examination is not a substitute for application of the Federal Rules of Evidence and Federal Circuit precedent.<sup>1</sup>

## II. I/P ENGINE OFFERS NO EVIDENCE TO SUPPORT A 2004 DATE OF FIRST INFRINGEMENT

I/P Engine argues that the correct date of the hypothetical negotiation is a subject of factual dispute. That is incorrect, and I/P Engine cites no evidence whatsoever to support a hypothetical negotiation date prior to 2010, much less in 2004. Defendants have submitted undisputed evidence that the [REDACTED] that I/P Engine relies on to prove infringement were not

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<sup>1</sup> *East West, LLC v. Rahman*, No. 1:11-cv-1380, 2012 WL 4105128, at \*5 (E.D. Va. Sept. 17, 2012), is not to the contrary. That decision confirms that, for his testimony to be admissible, "an expert must not only have reliable methodology, but must properly apply that methodology to the facts." *Id.* at \*4.

introduced until 2010. (D.N. 320, 9.; D.N. 322, Furrow Dec. ¶4.) For there to be a “dispute between the parties” about the date of first infringement, as I/P Engine contends, I/P Engine must submit actual evidence in support of its position that Defendants were infringing in 2004 and not rely simply on the say-so of Dr. Becker or attorney argument. I/P Engine fails to identify any evidence that the ██████ its infringement expert, Dr. Frieder, relies on to prove alleged infringement were in use in 2004. I/P Engine is therefore attempting to include in the royalty base literally years worth of revenue for years in which it has cited no evidence of alleged infringement.

Nor is reliance on an unsupported date for the hypothetical negotiation simply a matter for cross-examination. That may be the case where there is evidence supporting alternative dates of first infringement. Where, however, there is no evidence supporting the expert’s proffered date, that testimony is unreliable and inadmissible. *See Oracle Am., Inc. v. Google Inc.*, 798 F. Supp. 2d 1111, 1116 (N.D. Cal. 2011) (excluding expert damages testimony in part based on reliance on an incorrect date of first infringement).

Nor, contrary to I/P Engine’s argument, is the 2010 date of first infringement based on a new, undisclosed non-infringement theory; it is based on I/P Engine’s own supplemental expert report on infringement. I/P Engine disclosed for the first time in its supplemental expert report on infringement that it contended that certain “█████” practiced the asserted claims. (D.N. 320, 9; D.N. 323-4, Ex. 1; Ex. 5, 303:14-05:12.) It is I/P Engine’s burden, as the plaintiff, to identify what it contends practices the asserted claims. Here, I/P Engine has identified ██████ that were not in use prior to 2010, and it cites no evidence that any other aspect of Defendants’

systems in existence prior to 2010 meets the same claim limitations.<sup>2</sup> Thus, the “brand new” theory is I/P Engine’s, not Defendants’.

Nor has Defendants’ expert, Dr. Ugone, opined that a 2004 negotiation date is “correct.” (D.N. 460, 9.) In his report, Dr. Ugone provided his opinion on a reasonable royalty based on I/P Engine’s infringement allegations at the time. I/P Engine then served a supplemental infringement report, altering its infringement theory, after Dr. Ugone had provided his damages report. Dr. Ugone’s alleged “agreement” to a 2004 date of first infringement therefore occurred before I/P Engine altered its infringement theory to rely on ██████████ that were not in existence until 2010.

### **III. I/P ENGINE OFFERS NO EVIDENCE TO SUPPORT DR. BECKER’S ERRONEOUS REVENUE BASE**

I/P Engine fails to justify Dr. Becker’s undisputed and unjustified broadening of the revenue base to include worldwide revenue and revenue not attributable to the patented technology. Notably, I/P Engine does not dispute that Dr. Becker applies his royalty rate against Google’s worldwide revenue. Nor does I/P Engine present any evidence to rebut Defendants’ showing that, despite Dr. Becker’s attempt at apportionment, he nevertheless includes incremental revenue from Google’s Smart Ads system that is unrelated to the patents-in-suit.

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<sup>2</sup> I/P Engine contends that this argument is based on untimely disclosed source code from 2004. (D.N. 460, 9.) That argument fails even if the Court grants I/P Engine’s motion to exclude that source code. It is I/P Engine’s burden, as the plaintiff, to prove infringement and an entitlement to damages. *See Lucent*, 580 F.3d at 1324 (plaintiff has burden of proving damages). It is therefore I/P Engine’s burden to prove that Defendants were infringing in 2004, not Defendants’ burden to cite source code from 2004 showing that their products did not infringe prior to 2010. I/P Engine states in conclusory fashion that there is “additional evidence of infringement,” (D.N. 460, 9 n.8), but it cites no actual evidence of infringement prior to 2010 to support that claim, and it therefore has not met its burden.

**A. It Is Undisputed That Dr. Becker Has Misinterpreted The Chart That Is The Foundation For His Revenue-Base Apportionment Opinion**

I/P Engine does not even attempt to dispute that Dr. Becker has misapplied and misinterpreted the chart that is the foundation of his apportionment opinion. I/P Engine simply asserts without any support other than Dr. Becker's *ipse dixit* that the chart "expressly isolates the impact that the patented features of the accused system had on revenue." (D.N. 460, 6.) It offers no evidence rebutting the declaration of Nicholas Fox, a Vice President of Product Management at Google, demonstrating that Dr. Becker's understanding of the chart is incorrect. (D.N. 321 (Fox Dec.)) Mr. Fox's unrebutted declaration establishes that the chart does *not* isolate the impact of the patented features on Google's revenue. Instead, it is undisputed that Mr. Becker has lumped in revenue generated by features of or changes to Google's system, including unaccused changes to the [REDACTED] that have nothing to do with I/P Engine's patents. (D.N. 320, 16; D.N. 321, ¶5.)

I/P Engine's attempt to excuse Dr. Becker's other deficiencies is unpersuasive. I/P Engine argues that Dr. Becker's opinion is close enough, even if it does include revenue not attributable to the patents.<sup>3</sup> I/P Engine cites nothing to support its position that experts in the field would find reliable an apportionment that was admittedly over-inclusive. Indeed, the law is to the contrary. The Federal Circuit has recently held in the context of a product that is sold to consumers that the apportionment must be to the revenue attributable "to the smallest salable

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<sup>3</sup> I/P Engine's reliance on *PACT XPP Techs., AG v. Xilinx, Inc.*, No. 2:07-cv-563, 2012 WL 1666390 (E.D. Tex. May 11, 2012), is misplaced. In that case, the court denied a motion to exclude the testimony of the patentee's damages expert, who apportioned the revenue base by 30% based on the opinion of the patentee's technical expert that 30% of the value of the accused product was attributable to the patents-in-suit. *Id.* at \*1-2. The court therefore found that there were "facts to support his opinion." *Id.* at \*2. Dr. Becker has not relied on any similar technical opinion, and the chart he cites does not support his opinion, as described in Defendants' motion.

patent-practicing unit.” *LaserDynamics, Inc. v. Quanta Computer, Inc.*, -- F.3d --, 2012 WL 3758093, at \*12 (Fed. Cir. 2012). Although the accused products in this case are not salable, the same principle is applicable; Dr. Becker must exclude revenue not attributable to the patented technology. The royalty rate may not be applied against a revenue base broader than the evidence supports.

I/P Engine’s attempts to justify Dr. Becker’s inclusion of revenue not attributable to the accused aspects of Google’s accused functionality are as unconvincing as they are numerous. I/P Engine begins by claiming that Defendants’ “argument is unsupported by any citations.” (D.N. 460, 7.) Then, in the same paragraph, it admits that Defendants’ argument is supported by “a declaration from Google employee Nicholas Fox.” (*Id.*) Mr. Fox’s undisputed and unrebutted declaration establishes that Dr. Becker has misapportioned the revenue base.

I/P Engine then argues that Dr. Becker’s misinterpretation of the chart is somehow Defendants’ or its expert, Dr. Ugone’s, fault. For example, I/P Engine argues that because Google produced the chart, I/P Engine should be allowed wide latitude in interpreting it. (*Id.*, 6.) A damages expert is not, however, free to interpret documents produced by an adversary contrary to undisputed evidence of what the data in those documents represents. Nor, contrary to I/P Engine’s contention, was it Dr. Ugone or Google’s obligation to explain the correct interpretation of this chart to Dr. Becker. (*Id.*, 7.) I/P Engine was free to question Google witnesses, including Mr. Fox, about the proper interpretation of this chart at deposition. It chose not to and instead based its entire damages model on a document that it opted not to ask any Google officer or employee to explain. That I/P Engine failed to take discovery to gain a full understanding of a key document upon which it based its damages model is not Defendants’ doing, and not a basis for admitting unreliable expert testimony.

I/P Engine's implication that Google somehow failed to timely disclose information about this chart is also flawed. (*Id.*, 8.) It cites no interrogatory or Rule 30(b)(6) topic that this information was responsive to and no Rule 30(b)(6) deponent who was questioned but unable to provide answers about the interpretation of this chart. Nor, contrary to I/P Engine's request, is there any basis for striking Mr. Fox's declaration. (*Id.*, 7 n.5.) I/P Engine cites no document request that this declaration was responsive to. Further, the Fox declaration was signed on September 21, 2012 and produced to I/P Engine on that same day in connection with this motion. There is therefore no basis for I/P Engine's allegations of untimely disclosure of the Fox declaration or any other evidence related to this chart.

Contrary to I/P Engine's arguments, (*Id.*, 6 n.4 & 7), Dr. Ugone's opinions and testimony do not justify Dr. Becker's failure to properly apportion the revenue base. That Dr. Ugone may have also lacked knowledge of the sources of the data in the chart upon which Dr. Becker relied does not render Dr. Becker's reliance on that chart reasonable. The fact that Dr. Ugone did not have complete knowledge about this chart does not give Becker license to make unsupported assumptions or speculate about its meaning in the face of contrary evidence. Nor does Dr. Ugone's decision not to calculate an apportioned revenue base support Dr. Becker's opinion. Dr. Ugone based his opinion on [REDACTED] one advantage of which is that it does not require determination of a royalty base.<sup>4</sup>

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<sup>4</sup> I/P Engine suggests that the correct interpretation of the chart is contrary to Dr. Ugone's expert report. (D.N. 460, 8.) That is incorrect. Dr. Ugone consistently states in his report that Dr. Becker should limit the revenue base to revenue attributable to the accused [REDACTED]. (D.N. 460, Ex. 7 at ¶170.) Mr. Fox's declaration is undisputed evidence that [REDACTED] of the chart that Dr. Becker relies on refer to changes made to the [REDACTED] themselves, separate from the accused use of [REDACTED]. (D.N. 320, Fox Dec. ¶5.)



**B. It Is Undisputed that Dr. Becker Has Improperly Included Worldwide Revenue In The Revenue Base**

I/P Engine does not dispute that Dr. Becker improperly included Google's worldwide revenue in the revenue base of his calculations. (D.N. 460, 10-11.) I/P Engine argues that Dr. Becker was justified in doing so because it alleges that Google did not timely produce sufficient data concerning its U.S. revenues. I/P Engine does not contend, however, that relying on worldwide revenue when determining a reasonable royalty for a U.S. patent is appropriate, that Google and Lycos would have based their negotiation on worldwide revenue, or that Dr. Becker attempted in any way to apportion Google's U.S. revenue from the worldwide revenue data that he relied on. An expert may not rely on irrelevant worldwide data to inflate the revenue base simply because U.S. data was not available. *See* Fed. R. Evid. 702 (requiring that expert testimony be based on "sufficient facts or data" and the "product of reliable principles and methods"). Dr. Becker could have, for example, apportioned Google's worldwide revenue to obtain a measure of the corresponding U.S. revenue, but chose not to.

I/P Engine claims that Dr. Becker relied on Google's interrogatory response to erroneously conclude that Google's worldwide revenue figures were actually U.S. revenue figures, (D.N. 460, 10), but that claim does not withstand scrutiny. Dr. Becker states in his report that he reviewed the deposition of Google's Rule 30(b)(6) designee, Sanja Datta. (Ghaussy Dec., Ex. 18, 18.) Mr. Datta testified that the documents upon which Dr. Becker relied disclosed worldwide, not U.S., revenue. (D.N. 323-6, 24:19-23, 54:22-55:18.) Further, in Exhibit SLB-6 of his report, Dr. Becker cites G-IPE-0218440 as providing Google's worldwide revenues from August 2009 through 2010. (D.N. 323-1, SLB-6.) Yet, in Exhibit SLB-5 of his report, where Dr. Becker provides Google's revenue figures that he claims represents Google's U.S. revenue base, he cites the same document. (*Id.*, SLB-5.) Because Dr. Becker acknowledges

in his report that the documents he relies on represent Google's worldwide revenue, I/P Engine is incorrect when it claims that he somehow relied on any alleged representation that these documents contained only U.S. revenue.

I/P Engine admits that "Dr. Becker could easily adjust his royalty base" to accurately reflect Google's U.S. revenues because this is "an issue of mathematics." (D.N. 460, 11.) Defendants agree. In light of the undisputed fact that Dr. Becker has included worldwide revenue in his revenue base, he should make that correction, and his testimony based on Google's worldwide revenue should be excluded.

#### **IV. THE LICENSES DR. BECKER RELIES UPON FAIL EVEN I/P ENGINE'S STANDARD FOR COMPARABILITY**

I/P Engine fails to establish that the three license agreements that Dr. Becker bases his royalty rate analysis on are comparable to the hypothetical negotiation. Indeed, those licenses fail to even satisfy the standard for comparability that I/P Engine argues for. In an attempt to salvage Dr. Becker's opinion, I/P Engine improperly cites evidence that even Dr. Becker did not rely upon.

I/P Engine agrees that, to be comparable, a license must be for patents that are "of similar relative value as the patented technology." (D.N. 460, 12.) I/P Engine does not dispute that the Overture licenses that Dr. Becker relied on are not of similar value. I/P Engine admits that the Overture licenses were for rights in "a seminal patent" and that the Overture patents were "a pioneering event in the paid-search advertising market." (D.N. 460, 14.) It cites no similar evidence or recognition that its own patents are "seminal" or "pioneering."

I/P Engine nevertheless contends that its patents are even *more* valuable than Overture's, which justifies Dr. Becker's reliance on the Overture licenses. (*Id.*) The only evidence it cites for that proposition, however, is Dr. Becker's own damages calculations, rendering the argument

completely circular. I/P Engine cannot justify Dr. Becker's reliance on the Overture licenses' [REDACTED] by pointing to the size of the damages calculations that rate produces when applied to Defendants' products. Further, Dr. Becker's calculations are not a reliable measure of the value of I/P Engine's patents because, as stated in Defendants' motion and above, they are based on an improperly broad revenue base.<sup>5</sup>

I/P Engine also contends that, to be comparable, licenses must "[h]ave been negotiated under comparable circumstances to the license being negotiated in the hypothetical negotiation." (D.N. 460, 12.) Dr. Becker admitted at deposition that he had no knowledge of the circumstances under which the Overture licenses were negotiated. (D.N. 323-2, at 88:1-21.) He testified that he did not know how the parties to those agreements came to the [REDACTED] they eventually agreed upon, and knew nothing about the negotiation beyond what was on the face of the agreements. (*Id.*) Under I/P Engine's own standard, Dr. Becker lacked sufficient information to rely on the Overture licenses.

I/P Engine contends that Dr. Becker accounted for all these unknown differences in bargaining position by making an un-quantified "adjustment" to the royalty rate. (D.N. 460, 15.) The law is clear that you cannot render an incomparable license agreement "comparable" simply by making an unspecified and unquantifiable "adjustment." *See ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 871 (Fed. Cir. 2010) (rejecting patentee's damages expert opinion as unreliable because it relied on incomparable license agreements despite expert's "decision to

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<sup>5</sup> I/P Engine also argues that "Dr. Becker does not measure the value of the patents in suit through the use of the Overture Licenses." (D.N. 460, 13.) That contention is belied by the fact that the [REDACTED] for the patents-in-suit that Dr. Becker applies to the hypothetical negotiation is based on the royalty rate in the Overture agreements. In any event, I/P Engine does not dispute that, for a license agreement to be relevant to determining the royalty rate or amount for the hypothetical negotiation, it must be comparable.

adjust his proposed rate downward” to account for differences); *Whitserve, LLC v. Computer Packages, Inc.*, -- F.3d --, 2012 WL 3573845, at \*14 (Fed. Cir. 2012) (“And, while mathematical precision is not required, some explanation of both why and generally to what extent the particular factor impacts the royalty calculation is needed.”).

I/P Engine also does not dispute that, for their ██████████ to be relevant, the Overture licenses must be of comparable scope. It does not dispute that the Overture licenses provide

██████████ while the hypothetical negotiation would be for a license to U.S. patents only and would be applied to, at most, a U.S. revenue base. (D.N. 460, 15.) These further differences confirm that the Overture licenses are not of comparable scope.

I/P Engine insists that Dr. Becker selected the “[m]ost [c]omparable [l]icense [a]greements [p]roduced [i]n this [c]ase.” (D.N. 460, 11; *see also id.*, 13 n.10.) I/P Engine misinterprets a damages expert’s obligations. A damages expert is not charged with selecting the most comparable licenses that the parties choose to produce. Instead, if he chooses to rely on license agreements, he must rely on comparable agreements, irrespective of what has been produced. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1316 (Fed. Cir. 2011) (“This court noted that the ‘licenses relied on by the patentee in proving damages [must be] sufficiently comparable to the hypothetical license at issue in suit.’”) (quoting *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009)) (alterations in *Uniloc*).

**V. I/P ENGINE IS UNABLE TO CITE SUBSTANTIAL EVIDENCE IN SUPPORT OF A RUNNING ROYALTY**

I/P Engine is able to point to only two pieces of evidence that it contends support structuring the royalty payment as a running royalty. (D.N. 460, 16.) Neither provides adequate support for Dr. Becker’s opinion. First, it points to the fact that the Overture licenses are a

██████████. Those agreements cannot, however, have any relevance to how Lycos and Google would have chosen to structure their license agreement. Neither Lycos nor Google is a party to any of the Overture licenses upon which Dr. Becker relies. Further, the fact that unrelated parties agreed to a ██████████ for a “seminal” and “pioneering” portfolio of patents does not support awarding a ██████████ for I/P Engine’s patents.

Second, I/P Engine points to the testimony of Lycos officer Mark Blais. (D.N. 460, 16.) As an initial matter, Dr. Becker nowhere mentions or relies on testimony from Mr. Blais in his expert report. In any event, I/P Engine, misrepresents that testimony when it claims that Mr. Blais “testified that Lycos had a preference for a running royalty.” (*Id.*) Mr. Blais actually testified that in 2007, when it was negotiating a license to ██████████, Lycos offered either a lump sum or a running royalty option, but there was “some preference for a running royalty to create a revenue stream, but it wasn’t strong.” (D.N. 460, Ex. 11, 57.) Mr. Blais then testified that in 2006 and 2005, which are closer to when I/P Engine contends the hypothetical negotiation took place, Lycos had no preference either way. (*Id.*, 57-58.) Mr. Blais’s equivocal testimony that Lycos had a weak preference for a running royalty in 2007 and which Dr. Becker did not even rely upon is too tenuous a thread upon which to hang a ██████████ award.

Devoid of evidence supporting a running royalty, I/P Engine attacks the evidence in the record that demonstrates that Google and Lycos would have agreed to a lump-sum royalty, including the numerous ██████████ ██████████. (D.N. 460, 17.) Yet I/P Engine does not dispute that the damages analysis in this case should consider ██████████ ██████████ or that those agreements further demonstrate that preference.

\_\_\_\_\_ is clearly relevant to that preference, regardless of the technology at issue in those agreements.

**VI. CONCLUSION**

For the foregoing reasons, Dr. Becker's testimony should be excluded pursuant to Rule 702.

DATED: October 2, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 2, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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