I/P Engine, Inc. v. AOL, Inc. et al Doc. 814

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

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

DECLARATION OF STEPHEN L. BECKER, PH.D. IN FURTHER SUPPORT OF PLAINTIFF I/P ENGINE, INC.'S MOTION FOR AN AWARD OF PREJUDGMENT INTEREST, POST-JUDGMENT INTEREST AND DAMAGES FOR DEFENDANTS' CONTINUING INFRINGEMENT

I, Stephen L. Becker, Ph.D., declare as follows:

1. I submit this declaration in further support of Plaintiff I/P Engine, Inc.'s ("I/P Engine") Motion for an Award of Prejudgment, Post-Judgment Interest and Damages, and to respond to the statements made in the Declaration of Keith R. Ugone submitted in support of Defendants' Opposition to I/P Engine's Motion. I have personal knowledge of the facts set forth in this Declaration. If called upon to testify, I could and would certify competently to these facts.

2. As I explained in my November 9, 2012 Declaration, the methodology that I used in deriving my prejudgment-interest calculation was as follows: (a) I determined the average prime interest rate, as reported by the Federal Reserve, that prevailed during each quarter of the period since September 15, 2011 to November 6, 2012; (b) I allocated by Defendant the proportional damages awarded by the jury to the infringing revenues, by quarter, from the third quarter of 2011 through the third quarter of 2012; (c) I then determined the number of quarters of

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interest that would be due on each of those amounts; and (d) using the average prime interest rate, as reported by the Federal Reserve, and compounded quarterly, I computed the amount of interest presently due on the royalties associated with each quarter. Using this methodology I calculated the prejudgment interest due on the damages awarded by the jury from September 15, 2011 to November 6, 2012 to be $643,084. See Exhibit A of my November 9, 2012 Declaration (Dkt. 794).

3. In his Declaration, Dr. Ugone does not dispute my ultimate calculation. Instead, he takes issue with what he calls my "'midpoint' formula" of calculating the interest. (See Ugone Decl., ¶ 6.) In arriving at my calculation, I assume that the damages were incurred by Google and the other Defendants ratably over each quarter and, hence, I/P Engine earned those royalties ratably over each quarter. My method calculates the interest that is due on the infringement as it occurred. In my experience, this is an accepted and appropriate method for calculating prejudgment interest. And it is the only calculation that will fully compensate I/P Engine for Defendants' infringement.

4. For example, for Google's infringement from October 1, 2011 through December 31, 2011 (i.e. "Q4 2011"), Dr. Ugone assumes the allocated damages for Google are $3,805,236.[1] He assumes that interest begins to accrue on those damages on the last day of the quarter, namely on December 31, 2011. He calculates the interest for that quarter's allocated damages as 311 days of interest (i.e. the number of days from December 31, 2011 to November 6, 2012) times a daily interest rate. The result of his calculation (in his Prime Rate scenario) is

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[1] I note that Dr. Ugone's allocation of the damages award to various quarters differs slightly, but not materially, from my allocation method. Dr. Ugone allocates the damages award ratably over the period from September 15, 2011 through September 30, 2012 based on the number of days in each quarter. See Ugone Decl., Exhibit 1, footnote (b). In contrast, I allocated the damages award based on the proportion of the underlying accused revenue of each Defendant in each quarter. See my November 9, 2012 Declaration, ¶ 4 (Dkt. 794).

$105,374. A consequence of Dr. Ugone's assumption regarding when interest begins to accrue is that Google's infringement that occurred on October 1, 2011, for example, and for which I/P Engine was awarded damages, accrues no interest until December 31, 2011 and, only after that date does I/P Engine begin to be credited with interest on those royalties.

5. In contrast, I assume that the royalties for Q4 2011 are earned ratably over each quarter which has the result of making the midpoint of the quarter the effective date from which interested is calculated. For example, for the Q4 2011 allocated royalty, I assumed that I/P Engine is owed four full quarters of interest at a quarterly interest rate of 0.813% (3.25% annual rate divided by 4). Using my methodology, the interest for Q4 2011 is $123,310. This is a common and accepted way to estimate the timing of payments that occur ratably over a period, such as a quarter. Dr. Ugone does not appear to dispute this.

6. The difference between Dr. Ugone's result of $105,374 and my $123,310 in interest for Google's allocated damages for Q4 2011 is almost entirely due to the fact that Dr. Ugone has calculated only 311 days of interest on the $3,805,236 of principal (# of days from 12/31/2011 through 11/6/2012), while I calculate interest on that amount for a full year (i.e., the Q4 2011 allocated damages is for royalties that royalty were earned in Q4 2011 and we are now in Q4 2012, a full four quarters later).

7. Dr. Ugone's calculation of pre-judgment interest includes interest that is compounded annually. (See Ugone Decl. ¶ 5.) Dr. Ugone provides no explanation or justification for the use of annual compounding as opposed to quarterly compounding. His use of annual compounding is inconsistent with his explicit assumption that the royalties owed to I/P Engine would have been paid quarterly. (See Ugone Decl. ¶ 5.) In contrast, my approach

includes quarterly compounding, consistent with the assumed timing of the underlying infringement that was found to have occurred.

8. Dr. Ugone presents two pre-judgment interest scenarios, one based on the 1-Year T-Bill Rate and another based on the Prime Rate. Using the T-Bill rate, he calculates total interest of $27,329. Using the Prime Rate he calculates total interest of $499,197. As reflected in Dr. Ugone's calculations, the T-Bill rate has been less than 0.2% over the period from September 15, 2011 through November 6, 2012. (See Ugone Decl. Exhibit 1). Dr. Ugone provides no opinion or explanation that would justify the use of the T-Bill rate as a basis to compensate I/P Engine for the time value of the royalties that it did not, in fact, receive at the time of the Defendants' infringement.

9. It is my opinion that the T-Bill rate does not provide a reasonable basis upon which to calculated pre-judgment interest in this case. If the purpose of pre-judgment interest is to make I/P Engine economically and financially "whole" for the lack of use of the royalties that it was awarded by the jury, the T-Bill rate would not accomplish that goal. Even the Prime Rate of 3.25% undercompensates I/P Engine for the true cost of its capital. Vringo's cost of capital during the PJI period is approximately 21.1% (see Exhibit 1 attached hereto). Thus, applying the Prime Rate of 3.25% to the damages award is highly conservative, fair and reasonable. Even from Google's perspective, the Prime Rate of 3.25% is far less than its cost of capital which, during the PJI period, has averaged 9.54%. (see Exhibit 2 attached hereto).

10. In contrast, the T-Bill rate represents the cost of borrowing of the Federal Government. It is not a reasonable basis upon which to calculate the time value of the royalties that I/P Engine was awarded by the jury for Google's and the other Defendants' infringement.

11. Dr. Ugone also takes issue with the factors that I would use in calculating supplemental damages. (See Ugone Decl., ¶ 8).

12. The parties do not dispute that the appropriate form of damages is a running royalty. The parties also do not dispute that the jury awarded a royalty rate of 3.5%. The only disagreement appears to be over the appropriate apportionment factor to use to arrive at the royalty base to which the 3.5% royalty rate would apply.

13. In my November 9, 2012 Declaration, I explain that the appropriate apportionment percentage is 20.9%. This is the flat going-forward apportionment percentage that I presented at trial (Trial Tr. at 820-21). The 20.9% apportionment factor is applied to Defendants' total U.S. revenues from the accused systems, AdWords, AdSense For Search and AdSense For Mobile Search (derived from the requested accounting) to determine the apportioned royalty base.

14. According to Dr. Ugone, an apportionment rate of 2.8%, not 20.9%, should be used for the calculation of Google's supplemental damages. He arrives at this figure by visually estimating the height of bars on a demonstrative exhibit presented to the jury (PDX-441) and comparing those estimated amounts to the $15.8 million that the jury awarded from Google. (See Ugone Decl. ¶ 8 and Exh. 2.) Several things are obvious from Dr. Ugone's calculation and his resulting opinion that the appropriate apportionment percentage should be 2.8%. Dr. Ugone's methodology ignores the fact that the jury awarded damages to I/P Engine from AOL, IAC, Gannett and Target as well as from Google. Dr. Ugone estimates the ratio of the jury award against Google as a proportion of the estimated $118 million in claimed damages for the period September 15, 2011 through September 30, 2011. (See Ugone Decl. Exhibit 2) Even assuming the premise of his calculation was reasonable (which it is not), the calculation is flawed on its

face. The damages figures presented to the jury in graphical form at PDX-083 and again at PDX-441 were the total damages for all defendants, not just the damages associated with Google's infringement. This can be seen by comparing the bar chart at PDX-083, which is clearly labeled as totaling $493 million in royalties, to PDX-441, the bar chart used by Dr. Ugone. Both present identical royalty amounts, with the only difference being that in PDX-441 the bars for Q4 2011 through Q3 2012 have been shaded, reflecting the post-laches time period. That the total amount of these bars, $493 million in royalties, represents all defendants, not just Google, is evident from the trial transcript and from PDX-055, a summary of the royalty damages that I presented to the jury during the trial. (Trial Tr. at 767:20-768-8).

15. By using only the $15.8 million awarded against Google and ignoring the $14,696,155 awarded against the other Defendants, Dr. Ugone is suggesting a meaningless and unreliable apportionment percentage. This can be demonstrated by applying his 2.8% apportionment factor to the period covered by the actual award. Total accused revenues (including the Google co-defendants) for the period from September 15, 2011 through September 30, 2012 were, based on accounting documents produced by Google (and admitted as trial exhibits?) were $16,181,666,400. Dr. Ugone's 2.8% apportionment factor, if applied to these undisputed amounts of revenue yield total royalties, for all defendants, of $15,858,033, not the total jury award of $30,496,155.

16. The only relevant apportionment percentage proffered at trial, however, and the only apportionment percentage ever suggested to the jury was 20.9%. Neither PDX-441 nor any other exhibit or demonstrative introduced at trial supports a 2.8% apportionment factor. To arrive at Dr. Ugone's conclusion, one must ignore all evidence presented at trial, back into an implied speculative apportionment factor, and ignore the rest of the jury award.

17. The likely reason for Defendants' convoluted apportionment calculation and exclusion of the damages awarded from the other defendants is the decimal point transposition error made by the jury in the verdict form. Based on my review of the verdict form and evidence submitted in this case, it is clear that the jury, in an apparent effort to adjust the total damages down to just the post-laches damages period, applied a percentage to the originally pre-laches damages amount of $493 million.[2] A simple mathematical calculation bears this out. Using the $493 million, including the Defendant-specific breakdown as the base, the jury awarded 35% of the damages I/P engine sought for the original damages period for each of AOL, IAC, Gannett, and Target. (See attached Exhibit 3) For each of these defendants, there can be no question that the jury applied its 3.5% royalty rate to the only apportionment factor that was presented at trial: 20.9%. The equivalent damages figure against Google, consistent with this approach, should have been $158,000,000. However, for Google, the jury awarded $15,800,000. This amount is simply 3.5% of the damages I/P sought for the original damages period—one tenth the amount awarded for the other defendants. (See attached Exhibit 3) The evidence of the underlying revenues for each of these defendants was the same. The apportionment percentage that was presented to the jury was always the same for all defendants, namely 20.9%. The royalty rate opinion I offered, 3.5%, was always the same for all Defendants. Thus, the portion of the amount I/P Engine sought for the original damages period should have been the same for each of the defendants. Because of the exactness of the numbers being 10 times off, the most plausible explanation is a simple decimal point transposition.

18. Again, the only apportionment percentage (relevant to this issue) with which the jury was ever presented was 20.9%. In contrast, there was no evidence at all of a 2.8% factor

[2] (See PDX-055 for an example of the damages breakdown by Defendant that was presented to the jury.)

and, in particular, no evidence upon which one could conclude that the intended royalty rate to be applied to Google was an order of magnitude lower than the other defendants. To arrive at Dr. Ugone's conclusion, one must jump through multiple hoops—none of which were ever proffered at trial.

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I declare under penalty of perjury that the foregoing is true and correct. Signed December 7, 2012 in Austin, Texas.

__/s/ Stephen L. Becker_____________
Stephen L. Becker, Ph.D.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2012, the foregoing **DECLARATION OF STEPHEN L. BECKER, PH.D. IN FURTHER SUPPORT OF PLAINTIFF I/P ENGINE, INC.'S MOTION FOR AN AWARD OF PREJUDGMENT INTEREST, POST-JUDGMENT INTEREST AND DAMAGES FOR DEFENDANTS' CONTINUING INFRINGEMENT**, was served via the court's CM/ECF system, on the following**:**

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