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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE PERSONAL WEB TECHNOLOGIES, LLC, ET., AL., PATENT LITIGATION	**CASE NO.: 5:18-md-02834-BLF**
AMAZON.COM, INC., et., al., Plaintiffs, v. PERSONALWEB TECHNOLOGIES, LLC, et., al., Defendants.	**Case No.: 5:18-cv-00767-BLF** **Case No.: 5:18-cv-05619-BLF** **PERSONALWEB TECHNOLOGIES LLC'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND ITS INFRINGEMENT CONTENTIONS**
PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Counterclaimants, v. AMAZON.COM, INC. and AMAZON WEB SERVICES, INC., Counterdefendants.	Trial Date: March 16, 2020

PERSONALWEB TECHNOLOGIES, LLC, a Texas limited liability company, and LEVEL 3 COMMUNICATIONS, LLC, a Delaware limited liability company,

Plaintiffs,

v.

TWITCH INTERACTIVE, INC. a Delaware corporation,

Defendant.

I. ARGUMENT

A. PersonalWeb Did Not Have Reasonable Notice of Amazon's "Authorization" Claim Construction Position Until March 2019 and of Twitch's "Only" Claim Construction Position Until April 18, 2019.

1. Prior Court Ruling

Prior to the present suits before this Court, the PersonalWeb patents have been the subject of ten federal district court cases, one arbitration, eighteen *Inter partes* reexaminations, and seven *ex parte* reexaminations. Amazon now, with the benefit of hindsight, wants to focus on one particular non-final ruling and one filing out of the hundreds of rulings and filings in these 36 proceedings as putting PersonalWeb on notice of what Amazon was *going to*, but had not yet argued, regarding claim construction. Further, these prior proceedings involved very different products and methods than are accused in the present cases, in many cases involved different PersonalWeb patents or different claims of the PersonalWeb patents that are in common. None of the prior cases went to trial or were disposed of by summary judgment and thus none of the rulings were subject to appeal. Yet, in its opposition, Amazon argues that PersonalWeb should have anticipated that Amazon would argue the construction of two particular terms found in one particular claim construction ruling. Opp. at 2, 4. This despite Amazon not even expressly taking one of the positions expressed in a prior claim construction ruling until the *Markman* hearing on May 24, 2019.

That the prior court rulings are not the same as the claim construction issues just argued in the present cases is shown by Amazon's careful choice of words comparing them. For example, Amazon states, "Amazon's proposed construction for 'authorization' and 'unauthorized or unlicensed' *track* Judge Gilstrap's 2016 constructions." Opp. at 2 (emphasis added).

Similarly, Amazon also states, "Amazon proposed constructions for 'part value' and 'being based on a first function of the contents of the specific part' that, *consistent with* Judge Gilstrap's order, required the function's input to be only the data in the file and nothing else. ([Shamilov Decl.,] Ex. 5 (Ex. A to Amazon's Patent L.R. 4-2 Disclosures) at 9, 11.)" Opp. at 4 (emphasis added).

It is noteworthy that Amazon's Patent L.R. 4-2 Disclosures that Amazon cites here actually propose the constructions, "a value created by a computation on the sequence of bits that makes up the part" and "being based on a computation where the input is the all of the data in the specific part,"

respectively, for these two claim terms. (Dkt 452-6, Declaration of Saina S. Shamilov in Support of Opposition to Motion for Leave to Amend ("Shamilov Decl."), Ex. 5 at 9, 11). However, the proposed construction from the IBM case that Amazon relies on so heavily to show PersonalWeb had early notice of Amazon's claim construction in this case is very different from the construction Amazon proposed in its Patent L.R. 4-2 disclosure. As Amazon states in their opposition:

> In the same November 2015 joint claim construction statement, defendants IBM and GitHub proposed construing "given function of the data [in the data file]" as "computation where the input is all of the data in the data file, *and only the data in the data file*." (Prior Joint Statement at 2 (alteration in original).) PersonalWeb argued that the function to generate a True Name could be open-ended—i.e., it could use something other than "all of the data in the data file." (Prior Order at 15-16.)

Opp. at 4 (emphasis added). The emphasized "only" language in the IBM Joint Construction Statement is nowhere to be found in Amazon's proposed construction in its Patent L.R. 4-2 Disclosures. Further, as discussed in more detail below, Judge Freeman forced Amazon to modify this proposed construction to expressly include the "only" language to match what Amazon was arguing at the *Markman* hearing.

Plainly, neither of Amazon's original proposed constructions "required the function's input to be only the data in the file and nothing else" as Amazon now argues. *Id.*

2. September 2018 Preliminary Case Management Conference

Amazon states "At the September 2018 preliminary case management conference in this case, Amazon and Twitch made clear that they would seek the same constructions here: 'Judge Gilstrap . . . found that what [unauthorized or unlicensed] means is you have to determine whether you are compliant with a valid license' and '[t]hat's what these claims require.' (Shamilov Decl., Ex. 3 (Tr. of Sept. 20, 2018 Proceedings at 50:4-7).)

This is a complete misrepresentation of what Amazon told the Court, reversing the order of the two quotes and omitting the predicate for "that."

What Amazon actually said was, "So the idea is you look at all the true names on a Person's computer, you compare those against a list of people who have rights to that particular content,

software, or music, right. That's what these claims require." (Shamilov Decl., Ex. 3 at 50:1-4) PersonalWeb's proposed Amended Infringement Contentions have nothing to do with comparing people to a list of licensed users. It is immediately after this (incorrect) explanation of what the claims require that Amazon told the Court, "Two judges have construed them, Judge Gilstrap and Judge Davis, and they both found that what *this* means is you have to determine whether you are compliant with a valid license." (Shamilov Decl., Ex. 3 at 50:4-7) (emphasis added). This is anything but the "clear" expression of the claim construction position that Amazon eventually took, particularly as Judge Davis' construction is conspicuously absent from Amazon's opposition.

3. January 2019 Claim Constructions

As discussed in PersonalWeb's moving papers, Amazon and PersonalWeb exchanged preliminary claim constructions for 35 different claim terms in January 2019. Per the Patent Local Rules, Amazon and PersonalWeb knew that this list of 35 terms would have to be pared down to only ten that the Court would actually construe (Patent L.R. 4-1(b)) and that proposed constructions are often changed during the meet and confer process that lead to the selection of the final ten terms selected for construction by the Court. Under Amazon's logic, though, PersonalWeb (or any other patent owner) would have to immediately decide whether *any* of the 35 *preliminary* claim constructions necessitated amending their infringement contentions, even though it was known that 25 of these claim terms would later be dropped. This is an unreasonable burden to impose on a patent plaintiff and Amazon has not cited any cases that support the idea that the proper time to amend infringement contentions is only after the Preliminary Claim Constructions under Patent L.R. 4-2 and before the parties submit the Joint Claim Construction and Prehearing Statement under Patent L.R. 4-3. Indeed, if Amazon's logic were accepted, patent defendants would be incentivized to include as many claim terms as possible into their Preliminary Claim Constructions just so the patent plaintiff would have to consider amending their infringement contentions for every one of the claim terms in the Preliminary Claim Constructions, regardless of how spurious they are and how likely it is a term will make the final ten.

The date that Amazon took its official claim construction positions was March 12, 2019 in the Joint Claim Construction and Prehearing Statement. This is the date that PersonalWeb should be

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