MICHAEL A. SHERMAN (SBN 94783)
masherman@stubbsalderton.com
JEFFREY F. GERSH (SBN 87124)
jgersh@stubbsalderton.com
SANDEEP SETH (SBN 195914)
sseth@ stubbsalderton.com
WESLEY W. MONROE (SBN 149211)
wmonroe@stubbsalderton.com
STANLEY H. THOMPSON, JR. (SBN 198825)
sthompson@stubbsalderton.com
VIVIANA B. HEDRICK (SBN 239359)
vhedrick@stubbsalderton.com
STUBBS ALDERTON MARKILES, LLP
15260 Ventura Boulevard, 20TH Floor
Sherman Oaks, CA 91403
Telephone: (818) 444-4500
Facsimile: (818) 444-4520

Attorneys for **PersonalWeb Technologies, LLC**

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. and AMAZON WEB SERVICES, INC., Plaintiffs, v. PERSONALWEB TECHNOLOGIES, LLC, and LEVEL 3 COMMUNICATIONS LLC, Defendants.	**Case No.: 5:18-cv-00767-BLF** **Case No.: 5:18-cv-05619-BLF** **REPLY ON MOTION FOR CLARIFICATION** Hearing Date: December 12, 2019 Time: 9:00 a.m. Place: Courtroom 3, 5th Fl. Judge: Hon. Beth L. Freeman
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, and LEVEL 3 COMMUNICATIONS, LLC,

Plaintiffs,

v.

TWITCH INTERACTIVE, INC., a Delaware corporation,

Defendant.

I. INTRODUCTION

The Court's Order Construing Claims in this case (Dkt. No. 485 ("Claim Construction Order")) construes "unauthorized or unlicensed" as "not compliant with a valid license". By this Motion, PersonalWeb does not seek reconsideration of said Order or said construction. Rather, PersonalWeb seeks either clarification or supplementation of the Court's use of the word "license" in its claim construction. Local Rule 7-9(b) is inapplicable because Amazon changed its argument. This Motion is not predicated on changed facts or law. PersonalWeb disclaims any interest in seeking reconsideration of anything having to do with whether the two words "unauthorized" or "unlicensed" mean different things in the claims.

The parties' Joint Claim Construction and Prehearing Statement (Patent L.R. 4-3, Dkt. No. 380), the claim construction briefing, the oral hearing itself—all culminating in the Claim Construction Order—result in what is in effect a construction that includes a form of the construed term in the construction itself (*i.e.,* a definition that uses the word being defined). There is a certain circularity involved here. PersonalWeb submits that this Motion places the parties and Court at crossroads, *i.e.,* Court clarification, now, of what a "license" or a "valid license" means is likely case dispositive. As PersonalWeb stated in its Motion, if the Court meant something different than "valid rights to content," (*i.e.* a narrower/license instrument-type of meaning), then PersonalWeb will withdraw the report of its technical expert and consent to judgment of noninfringement, preserving its appellate rights.

II. AMAZON AND TWITCH ARE TRYING TO HAVE IT BOTH WAYS

On multiple occasions during the claim construction process Amazon and Twitch proposed constructions of the claim terms "licensed" and "unlicensed," as meaning "valid / invalid right[s] to content." (Dkt. 380 (Joint Claim Construction and Prehearing Statement), at 19; Ex. 1 to Sherman Decl. (Amazon's Jan. 28, 2019 Patent L.R. 4-2 Disclosure, Ex. A, p. 12).) The entire basis of the sanctions threat is based on an Amazon/Twitch construction of "license" that differs from express positions and arguments that Amazon/Twitch repeatedly made in the process of the just-completed claim construction process. Having embraced and adopted Judge Gilstrap's logic and conclusions about "licensed" meaning "valid rights to content"—and having prevailed before this Court—

Amazon/Twitch's sanctions threat disowns their prior representations. Amazon characterizing PersonalWeb as asking this Court to "plug[] into the Court's construction of the term 'unauthorized or unlicensed' a construction by a different court of a different claim term not at issue here" (Dkt. No. 521 (Opp.) at 1:3-4) is ironic. It is ironic because Amazon's claim construction arguments were based on the same Judge Gilstrap constructions. In retreating from its former position that "licensed" meant "valid rights to content," Amazon/Twitch are reduced to making the tortured and nonsensical argument that the adjectival and noun forms of "licensed" and "license" mean different things. (*Id.* at pp. 5-6.)

There are three data points that reveal the circularity of approach and now demonstrate the need for clarification:

First, in Amazon's Patent L.R. 4-2 Disclosure served on January 28, 2019, Amazon proposed constructions of the terms "licensed" and "unlicensed," citing the Gilstrap Order as "valid/invalid rights to content." (Declaration of Michael A. Sherman ("Sherman Decl."), Ex. 1 (Amazon's Jan. 28, 2019 Patent L.R. 4-2 Disclosure, Ex. A, p. 12).) Twitch followed suit, and proposed constructions of the terms "licensed" and "unlicensed," citing the Gilstrap Order as "valid/invalid rights to content." (Sherman Decl., Ex. 2 (Twitch's Jan. 28, 2019 Patent L.R. 4-2 Disclosure, Ex. A, p. 12).) This was followed shortly by the parties' Joint Claim Construction and Prehearing Statement pursuant to Patent Local Rule 4-3 filed on March 12, 2019 (Dkt. No. 380), where Amazon and Twitch *again* proposed constructions of the terms "licensed" and "unlicensed," citing the Gilstrap Order, as "valid / invalid right to content." (Dkt. 380, at 19.). Ultimately those two terms were not the actual terms subject to the Claim Construction Order because when the Court ordered the parties to reduce the number of terms for construction to 10 terms (April 9, 2019 Dkt No. 401), the terms "licensed" / "unlicensed" did not make the final cut.

Second, Amazon and Twitch persisted in embracing Judge Gilstrap's "valid / invalid right to content" construction made in the *IBM* case when, on pages 3-9 of the Responsive Claim Construction Brief of Amazon and Twitch filed April 22, 2019 (Dkt. No. 412), in section III A, titled "The Patents-in-Suit treat 'authorization' and 'licensing' the same and disclose no alternate meaning for either concept" Amazon/Twitch asserted:

> Judge Gilstrap recognized that licensing and authorization are the same concept in the patents, and provided the correct construction for these terms. (*Compare* Gilstrap Order at 25 (construing "licensed" as "valid rights to content"), *with id.* at 28 (construing "authorized" as "compliant with a valid license"); *see also id*. ("The Court therefore reaches the same conclusions [regarding the "authorization" terms] for substantially the same reasons as for the terms 'licensed' and 'unlicensed.'").) In his order, Judge Gilstrap quoted the precise language proposed for construction here. (Gilstrap Order at 25 (quoting the phrase "unauthorized or unlicensed copies" in the '442 patent).).

(Dkt. 412, at 8:3-10.)

Third, at the claim construction hearing on May 24, 2019, the following two exchanges occurred, highlighting both (1) Amazon/Twitch's equation of Judge Gilstrap's prior constructions in the *IBM* case as directly applicable here, coupled with (2) the Court's response to such equation, and the Court's observation about the ease of a construction of "unlicensed:"

> Mr. Hadden: Good morning, Your Honor. I have some books, too. It's probably not surprising.
>
> The Court: No. It's always helpful.
>
> Mr. Hadden: (handing.) Okay. Obviously we have different constructions. We're essentially adopting the constructions from Judge Gilstrap in the prior case where "unauthorized or unlicensed" means "not compliant with a valid license," and "authorization" means "a valid license."
>
> ***
>
> The Court: When Judge Gilstrap issued his order, he was construing "authorization" and was not looking at this other claim term of "authorized" or "unlicensed" or --
>
> Mr. Hadden: Part of that is correct, part of that is not correct.
>
> The Court: So --
>
> Mr. Hadden: He construed "authorization" and he construed "license."
>
> The Court: Well, license, yes, he did.
>
> Mr. Hadden: And he did not construe the terms together. But in his order, he quotes that language directly from that claim, "unauthorized or unlicensed," in his construction of "authorization."
>
> The Court: but since he wasn't asked to deal with the term "unauthorized or unlicensed," construing the term "unlicensed" is -- I mean, any of us can do that. That actually doesn't need construction when it stands alone.

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