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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. and AMAZON WEB SERVICES, INC., Plaintiffs, v. PERSONALWEB TECHNOLOGIES, LLC, and LEVEL 3 COMMUNICATIONS, LLC, Defendants.	**Case No.: 5:18-cv-00767-BLF** **PERSONALWEB TECHNOLOGIES, LLC'S NON-OPPOSITION TO AMAZON.COM, INC. AND AMAZON WEB SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT AND OPPOSITION TO MOTION REGARDING STANDING**
PERSONALWEB TECHNOLOGIES, LLC and LEVEL 3 COMMUNICATIONS, LLC, Counterclaimants, v. AMAZON.COM, INC. and AMAZON WEB SERVICES, INC., Counterdefendants.	Date: November 15, 2019 Time: 9:00 a.m. Dept.: Courtroom 3, 5th Floor Judge: Hon. Beth Labson Freeman Trial Date: March 16, 2020

PersonalWeb does *not* oppose entry of judgment of noninfringement on all of its counterclaims as set forth in Amazon's Proposed Order (Dkt. 541-1). PersonalWeb *does oppose* the entry of the portion of Amazon's Proposed Order, in square brackets, regarding standing. PersonalWeb also *opposes* any opinion, finding or conclusion by the Court that includes that summary judgment is entered based on anything other than as a direct result of the Court's Claim Construction Order (Dkt. 485).

I. INTRODUCTION

Other than the square bracketed portion of Amazon's Proposed Order, the order Amazon seeks is not substantively different than the order proposed in PersonalWeb's Motion for Judgment (Dkt. 538) (as modified in PersonalWeb's Reply (Dkt. 548)). Accordingly, PersonalWeb requests that its Motion for Judgment be considered ahead of Amazon's Motion for Summary Judgment of Noninfringement. The granting of PersonalWeb's Motion for Judgment would then moot Amazon's Motion for Summary Judgment of Noninfringement.

Following entry of the Court's Claim Construction Order, PersonalWeb agreed to Amazon's request that PersonalWeb immediately dismiss all claims against Amazon with prejudice. PersonalWeb's motion to clarify did not apply to PersonalWeb's claims against Amazon because while Amazon controls whether content is provided or accessed, it does so based on parameters set or controlled by its customers, not based on whether there are valid rights to any specific content. Thus, prior to the date expert reports were due, Amazon and PersonalWeb were in agreement that all of PersonalWeb's claims against Amazon should be dismissed with prejudice. Amazon has since reneged on its agreement for dismissals with prejudice and instead moved for summary judgment of noninfringement on new grounds unrelated to the issues addressed in the Claim Construction Order.

Nonetheless, PersonalWeb does not oppose the entry of Amazon's Proposed Order as submitted to the Court (without the portion in square brackets regarding standing), as it does not reference Amazon's new grounds for noninfringement. However, PersonalWeb *does* oppose Amazon's new noninfringement grounds: (1) permitting content to be provided or accessed, (2) determining whether a copy of a data file is present, or (3) comparison to a plurality of identifiers. All three of these new arguments are the subject of disputed, material facts. Moreover, none of these new

grounds relate to the "unauthorized or unlicensed" issue. Nor do any of these new grounds relate to any of the other claim terms construed in the Claim Construction Order. PersonalWeb also opposes granting summary judgment based on the lack of an expert report or on the lack of standing.

As to the substance of the new non-licensing noninfringement arguments, Amazon is now doing what it chastised PersonalWeb for purportedly doing in its motion to clarify—namely, seeking a redo of claim construction. In all three of its new noninfringement arguments, Amazon asks the court to read claim language to be substantively narrower than the plain meaning of the claim language (e.g., "not permitting the content to be provided to or accessed" as "not permitting the content to be provided to or accessed *forever*;" "determining, using at least the name, whether a copy of the data file is present on at least one of said computers" as "determining, using *only* the name, whether a copy of the data file is present on at least one of said computers"; "whether a … name … corresponds to one of the plurality of identifiers" as a name is "*compared* to a plurality of identifiers or values"). Throughout its motion, Amazon only argues that it does not meet the limitation as it wished it was written, not as it was actually written. As the claims are actually written, Amazon meets each of the claim limitations it raises.

Should Amazon's substantive noninfringement arguments fail, it contends that the absence of an expert witness report alone supports granting summary judgment motion on these new issues, despite making the same new noninfringement arguments that are made in the Twitch summary judgment motion and citing extensively to Mr. de la Iglesia's Twitch expert report.

On the absence of an expert report, Amazon seeks to have it both ways. First, Amazon took the position that submitting any expert report of infringement once the Court had ruled against PersonalWeb on claim construction, would violate Rule 11. Now, Amazon says that PersonalWeb's "failure" to submit an expert report on infringement entitles it to summary judgment of noninfringement based on grounds that have nothing to do with the Court's claim construction.

After the Court's Claim Construction Order, Amazon threatened PersonalWeb with Rule 11 sanctions if it did not immediately halt its litigation against Amazon and dismiss its case with prejudice. PersonalWeb agreed the next business day and outlined proposed terms for a stipulation for entry of judgment (Amazon knew that it would have to stipulate to the dismissal it demanded as it had

answered PersonalWeb's claims). Amazon said it would consider PersonalWeb's proposal and both sides ceased all Amazon/CloudFront-focused discovery and discovery proceedings (*i.e.,* motions to compel). So too, in reliance on Amazon's indicated desire for immediate dismissal and the expectation that dismissal would be cooperatively worked-out and imminent, PersonalWeb did not serve expert reports in the Amazon case that were due on August 23, 2019.

Over a month later, Amazon first conveyed that it had reversed course and would not agree to a dismissal. (Dkt. 538-1 (Sherman Decl. to Motion for Entry of Judgment) and Dkt. 538-2 – 538-4 (Ex. 1-3 to Sherman Decl.) Apparently, Amazon saw an opening to take advantage of PersonalWeb's acceptance of Amazon's dismissal demand and not producing expert reports (saving Amazon from having to rebut them). Now, based on the Amazon-induced absence of PersonalWeb expert reports, Amazon is attempting to receive an essentially "default" summary judgment on issues unrelated to the Claim Construction Order. This type of gamesmanship should not be rewarded by this Court. That is why PersonalWeb hereby requests under FRCP 56(d) that the Court consider the unsigned declaration of Erik de la Iglesia, that is attached to the Sherman declaration, and further consider the facts relayed in the Sherman declaration as sufficient grounds thereunder, to either (1) accept for service and filing the unsigned de la Iglesia declaration (to be executed before filing) in opposition to the new grounds of non-infringement, or (2) deny the new grounds of non-infringement urged by Amazon. Under all the circumstances, PersonalWeb chooses to not now submit an executed version of the de la Iglesia declaration, without Court permission.

Amazon projects confidence it will win any appeal on claim construction. Yet, its stated reason for seeking summary judgment instead of dismissal is saving the Court from a possible remand and further appeal, which would only happen if Amazon *loses* a claim construction appeal. If Amazon *wins* the appeal, the only difference in having the Court rule on Amazon's new grounds of noninfringement is that Amazon will be able to try to use the summary judgment for issue preclusion in other cases—under artificial circumstances created by Amazon that put PersonalWeb at a disadvantage in opposing it. This is a further reason that Amazon's gamesmanship should not be rewarded by this Court.

II. ARGUMENT

Amazon servers send HTTP 304 messages which indicates to browsers operating under HTTP 1.1. protocol that they are permitted to continue to access expired Amazon webpage content in their caches when Amazon wants the browsers to keep using the cached content in rendering Amazon webpages. Amazon servers send HTTP 200 messages that make new content available that browsers access instead of the previously cached content when Amazon no longer wishes the browsers to use the previously cached file content in rendering Amazon webpages. Amazon uses MD5 ETags (i.e., ETag values generated by applying the MD5 hash algorithm to the file content and only the file content) in making the decision whether or not to continue to permit the browsers' access to the previously cached file content or to provide new file content for the browser to access and use instead of the previously cached file content. The MD5 ETags inform Amazon whether a copy of the current version of the webpage file is already cached (present) at the browser or needs to be provided. If a copy of the current version is already present at the browser, Amazon sends the HTTP 304 message permitting the browser to continue accessing the cached copy. If the file at the browser is not a copy of the current file version, Amazon sends the HTTP 200 message for the browser to access instead of the previously cached version.

Despite these undisputed facts, Amazon asserts that it "neither permits nor denies access to any data item stored by web browsers" because "web browsers can access any locally-stored Amazon data item, whether current or expired, licensed or unlicensed." Amazon supports this argument by citing to situations wherein a browser uses expired content in its cache anyway based upon a manual user input (e.g. pressing the "back" button). But these situations do not involve communications or interactions with the Amazon server and do not address the actual infringement scenario in which the Amazon server determines whether to permit continued access to previously cached content or to provide new content for access. Amazon also argues that it does not infringe because it does not compare the MD5 ETag received from a browser in a conditional GET request to a plurality of MD5 ETag values. But this argument is also unavailing because none of the asserted claims require such a one-to-many comparison.

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