IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 17-cv-02097-RBJ

REALTIME ADAPTIVE STREAMING LLC,

Plaintiff,

v.

SLING TV L.L.C.,
SLING MEDIA, L.L.C.,
ECHOSTAR TECHNOLOGIES L.L.C.,
DISH NETWORK L.L.C

Defendants.

ORDER re ATTORNEY'S FEES

The Court granted summary judgment dismissing plaintiff's remaining claims on July 31, 2021, concluding that the subject patent was invalid because it claimed an abstract idea ineligible for patenting. ECF Nos. 305 (order) and 306 (final judgment). Defendants then moved for an award of attorney's fees. Plaintiff objects. The Court finds that this was an "exceptional case" warranting an award of attorney's fees but will need additional information and likely a hearing to determine the reasonable amount of fees to be awarded.

BACKGROUND

Briefly, by the time summary judgment was granted, the remaining claim was Realtime Adaptive Streaming LLC's claim that defendants had infringed Claim 1 (and possibly other claims) of U.S. Patent No. 8,867,610 ("the '610 patent"). Entitled "System and Methods for Video and Audio Data Distribution," the '610 patent concerns data compression and decompression algorithms. It purports to optimize compression time for digital files to prevent

problems such as download delay, data buffering, and reduced system speeds. First it assigns a data profile based on the frequency that the data is accessed or written. Then it assigns a compression algorithm to each profile, depending upon whether the read to write ratio is balanced (symmetrical) or unbalanced (asymmetrical).

The Patent Act does not permit patenting of "laws of nature, natural phenomena, and abstract ideas." *Alice Corp. Pty. Ltd. v. CLSBank Int'l,* 573 U.S. 208, 216 (2014). In addressing defendants' argument that the '610 patent claimed an ineligible abstract idea, I followed a two-step process: first, was the claim directed to an abstract idea; and second, did the claim nevertheless contain an "inventive concept" sufficient to transform the abstract idea into a patent-eligible application. *See Mayo Collaborative Services v. Prometheus Laboratories, Inc.,* 566 U.S. 66, 77-79 (2012).

At the first step I found that the patent was indeed directed to an ineligible abstract concept, and that Realtime's reliance on this Court's definition of the claim term "throughput of a communication channel" to distinguish law on which defendants relied was unpersuasive because that term itself embodied an abstract idea. *Id.* at 10-11. At the second step I found that there was no "inventive concept" that rescued the claim, notably because it provided no details as to how the invention would work to solve the problems the patent claimed to solve, such as an unconventional encoding or decoding structure or other compression, transmission, or storage techniques. *Id.* at 14.

The merits of those findings and conclusions are currently on appeal to the Federal Circuit. However, the attorney's fee issue remains before me, and I regret that I have been unable to turn to it until now.

STANDARD OF REVIEW

"The court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. "An exceptional case 'is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.'" *University of Utah v. Max-Planck-Gesellschaft zur Foerderung der Wissenschaften e.V.,* 851 F.3d 1317, 1322 (Fed. Cir. 2017. There is no precise formula for making that determination. *Biax Corp. v. Nvidia Corp.,* 626 F. App'x 968, 970-71 (Fed. Cir. Feb. 24, 2015) (unpublished).

ANALYSIS AND CONCLUSIONS

A. Defendants' Entitlement to a Fee Award.

I find that this case was "exceptional" because Realtime disregarded repeated indicators that the '610 patent was likely invalid and pressed on at great expense to the defendants (and itself). A chronology of key events serves to explain this finding.

This case was filed on August 31, 2017. Initially Realtime claimed that defendants (collectively "Dish") had infringed three patents: U.S. Patent Nos. 8,275.897 ("the '897 patent"); 8,867,610 ("the '610 patent"); and 8,934,535 ("the '535 patent"). This was not Realtime's first venture into infringement litigation. In its motion for attorney's fees Dish characterizes Realtime as a "serial litigant," having filed some 145 cases, and Dish claims that Realtime was created by a patent attorney for the purpose of licensing and monetizing patents. ECF No. 308 at 10-11. That description does not bear on the merits of a particular case. If Dish infringed a valid patent it deserves a defeat in court, no matter what Dish speculates about Realtime's underlying business plan. However, Realtime's litigation experience does suggest that it should be particularly alert to the risks of pursuing a potentially invalid claim too long.

Shortly after the case was filed Dish (and then co-defendant Arris Group, Inc.) filed motions to dismiss and for judgment on the pleadings. ECF Nos. 47 and 48. The motions were based on defendants' contention that the patents were invalid because they were directed to an abstract idea. *See* ECF No. 47, *passim;* ECF No. 48 at 1. The Court denied those motions during the course of a Scheduling Conference on March 7, 2018, finding that it would proceed to claim construction first. ECF No. 80 (transcript) at 14. But the Court also expressed its concern about validity:

> [I]f all you're talking about is algorithms and applying some formula, my intuition, my gut instinct would be, well, maybe the defendants have a point. Maybe this is just an abstract concept. This doesn't sound like something you would patent. It doesn't sound like it's technology. It just sounds like an idea.

Id. at 9.

Later in 2018, two courts found that Claim 15 of Realtime's similar '535 patent was invalid as directed to an abstract idea without an "inventive concept" that revived its patentability. Those rulings were highly significant to this Court's ultimate determination that the '610 patent suffered the same fate. The two patents have nearly the same title.[1] More importantly, the specifications for the two patents are virtually identical. ECF No. 305 at 2, 6. Most importantly, Claim 1 of the '610 patent and Claim 15 of the '535 patent are so similar as to be essentially the same in substance. *See id.* at 6-7 (chart comparing the components of the two claims). Thus, the reasoning in the two cases, *Realtime Adaptive Streaming LLC v. Google LLC,* No. CV 18-3629-GW(JCx) (C.D. Cal. Oct. 25, 2018) (slip op. filed at ECF No. 234-6) and *Realtime Adaptive Streaming, LLC v. Netflix, Inc.,* No 17-1692-CFC-SRF, 2018 WL 6521978

[1] The '610 patent is titled "System and Methods for Video and Audio Data Distribution." The '535 patent is titled "System and Methods for Video and Audio Data Storage and Distribution."

(D. Del. Dec. 12, 2018), featured prominently in my order granting summary judgment in this case. ECF No. 305 at 7-9.

In my view, the two cases should have featured prominently in Realtime's thinking about the present case. However, Realtime attempted to distinguish *Google,* largely based on Claim 1's term "throughput of a communication channel," which is not found in the '535 patent, and on my interpretation of the term in the Claim Construction Order.[2] The only reference to the term in the '610 Specification states: "In one embodiment, a controller marks and monitors the throughput (data storage and retrieval) of a data compression system and generates control signals to enable/disable different compression algorithms when, e.g., a bottleneck occurs as to increase the throughput and eliminate the bottleneck." ECF No. 2-2 at 9:53-58. The problem is, absent any indication of how the system tracks the number of pending requests to determine the throughput of the communication channel, i.e., a mechanism for determining the number of requests, the term is itself an abstract idea. *See* ECF No. 305 at 11.

Realtime attempted to discredit the *Netflix* case as wrongly decided, in part because it found Claim 15 of the '535 claim to be a representative claim. But the California court also implicitly found Claim 15 to be representative of at least Claims 16-30. More importantly, representative or not, Claim 15 is so similar to Claim 1 of the '610 patent that the two courts' rulings should have served as a red flag that Claim 1 faced serious trouble.

This case was stayed on February 26, 2019, pending an *Inter Partes* Review ("IRP") of the '610 patent's validity by the Patent Trial and Appeal Board. *See* ECF Nos. 157 and 161. While the stay was in effect certain events bearing somewhat on this case took place.

[2] In the Claim Construction Order, issued on January 11, 2019, I defined "throughput of a communication channel" to mean the "number of pending transmission requests over a communication channel." *See* ECF No. 151 at 8-10.

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