

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT DELAWARE**

ARENDI S.A.R.L.,)	
)	
Plaintiff,)	C.A. No. 13-919-JLH
)	
v.)	JURY TRIAL DEMANDED
)	
GOOGLE LLC,)	
)	
Defendant.)	

**LETTER TO THE HONORABLE JENNIFER L. HALL FROM DAVID E. MOORE
REGARDING UPDATE ON ISSUE RELATED TO THE PARTIES'
PROPOSED FINAL JURY INSTRUCTIONS AND PROPOSED VERDICT FORM**

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April 29, 2023

Dear Judge Hall:

Google writes regarding two updates on the parties' Proposed Final Jury instructions and Proposed Verdict Form being filed this morning:

1. The Court's proposal regarding an effective royalty rate on the verdict form

During the hearing in this case on April 28, 2023, the Court raised concerns about Arendi's royalty base calculation, which Google has submitted to the Court is a flawed calculation as to all twelve accused apps and four accused devices. *See* 4/28/23 Trial Tr. (Rough) at 1061:1–19, 1070:1–13; D.I. 479 (4/23 Letter Motion Regarding Arendi's New Damages and Willfulness Theories) at 2–3; D.I. 496 (4/27 Motion for JMOL of No Damages or, in the Alternative, Nominal or Limited Damages) at 3–6. The Court therefore asked the parties to consider whether the Verdict Form should ask the jury for a reasonable royalty *rate*, “to try to avoid any downstream issues.” 4/28/23 Trial Tr. (Rough) at 1070:8–1071:3.

While Google appreciates the Court's proposal, it believes that asking the jury for a royalty rate would be highly prejudicial and confusing and constitute error for several reasons:

First, asking the jury for a royalty rate would endorse the methodology of Arendi's damages expert, Mr. Weinstein, over Google's damages expert, Mr. Kidder. Mr. Weinstein has opined on a damages methodology that calculates and uses effective per-unit royalty rates. 4/26/23 Trial Tr. (Rough) at 589:15–599:3; 615:15–616:6. Mr. Kidder (who has not yet taken the stand) took a different approach: he calculated a lump sum royalty that is not tied to accused units and did *not* calculate or use any effective royalty rate.

Second, asking the jury for a royalty rate would put a heavy thumb on the scale of damages in favor of Arendi. As a practical matter, the jury is highly unlikely to set any royalty rate lower than a \$0.01 per unit, effectively setting a floor on damages that would be inappropriate and inconsistent with Google's damages theories. The Court would effectively remove from the jury its freedom to render a verdict adopting Google's damages theories.

Third, asking the jury for a royalty rate is likely to cause jury confusion because there is no evidence of any single “blended” royalty rate that could apply in this case, where there are two categories of accused products (apps and mobile devices). Even Mr. Weinstein calculates and uses two royalty rates, not one, for those two categories. *See* 4/26/23 Trial Tr. (Rough) (Weinstein) at 596:3–25; 4/28/23 Trial Tr. (Rough) (Hearing) at 1070:20–1071:1.

Fourth, because an effective royalty rate does not comport with either party's damages theories, there would be heightened risk that any damages verdict might deviate from both parties' damages theories. A damages verdict that is unexplainable based on the record might require a new trial on damages. *See, e.g., Trustees of Bos. Univ. v. Everlight Elecs. Co.*, 199 F. Supp. 3d 473, 474 (D. Mass. 2016).

Google appreciates the Court's effort to address Arendi's failure to apportion its damages request, and is open to considering other alternatives to ensure that, as the law requires, any jury award is limited to infringing accused products. It bears repeating, though, that Arendi has the burden of presenting sufficient evidence to support a damages award that is both nonspeculative

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and properly apportioned to infringing (not non-infringing) products. Arendi's failure to do so—a product of its failure to account for how its infringement claims changed at summary judgment and then on the eve of trial—should not require Google to accede to a likely prejudicial compromise means of calculating damages through a royalty rate.

2. License or Release Defense – The Samsung Agreement

At the April 28, 2023 hearing, the Court also asked the parties to further discuss how to address the Samsung Agreement issue—whether that agreement covers accused Google apps on Samsung devices—in the Final Proposed Jury Instructions and Final Proposed Verdict Form. *See* 4/28/23 Trial Tr. (Rough) at 1117:2–7. As Google does not believe that a per-unit royalty rate is appropriate, that proposal does not resolve the Samsung Agreement issue for purposes of the jury instructions and verdict form.

Although the parties remain at an impasse over how to interpret the Samsung Agreement, there seems to be agreement that it would be challenging to instruct and ask the jury about this issue without further guidance from the Court. For instance, Arendi proposes two alternative jury instructions, the first of which would require a ruling on the law in its favor, and the second of which assumes the Court has held that the Samsung Agreement is ambiguous. Either of these proposed instructions would be improper without a ruling on whether or not the Samsung Agreement is ambiguous. Alternatively, accounting for that open question in a jury instruction (as Google has proposed and believes is necessary) might also invite error. A ruling before final jury instructions and closing argument on whether or not the Agreement is ambiguous would address these concerns. The parties appear to agree that, until answered, that predicate question may prevent the jury from being properly instructed. *See* D.I. 469 (4/20/23 Google letter brief) at 3; D.I. 472 (4/21/23 Arendi response letter) at 1–2 (“On the merits of what the Agreement means, there are three possibilities: the contract is unambiguous in Arendi’s favor; it is ambiguous; or it is unambiguous in Google’s favor. An appropriate jury instruction can be crafted at the charging conference *to reflect any of those rulings.*” (emphasis added) (footnote omitted)).

Respectfully,

/s/ David E. Moore

David E. Moore

DEM:nmt/10782914/12599.00040

cc: Clerk of the Court (via hand delivery)
Counsel of Record (via electronic mail)