

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

ART+COM INNOVATIONPOOL GMBH,

Plaintiff;

v.

GOOGLE INC.,

Defendant.

Civil Action No. 1:14-217-TBD

MEMORANDUM ORDER

I. Motions in Limine

Presently before the court are (A) the motions in limine of Plaintiff ART+COM Innovationpool GmbH (“ART+COM” or “ACI”) (D.I. 365-13 at PageID 10290, 10337, 10386), Google’s oppositions (D.I. 365-13 at PageID 10308, 10360, 10391), and ACI’s replies (D.I. 365-13 at PageID 10334, 10377, 10397) and (B) the motions in limine of Defendant Google Inc. (“Google”) (D.I. 365-14 at PageID 10401, 10462, 10609), ACI’s oppositions (D.I. 365-14 at PageID 10453, 10594, 10641), and Google’s replies (D.I. 365-14 at PageID 10458, 10605, 10662). For the reasons stated below, and the court having heard oral argument, **IT IS HEREBY ORDERED THAT:**

A.1. ART+COM’s Motion in Limine #1 is **DISMISSED-IN-PART** as moot, **GRANTED-IN-PART**, and **DEFERRED-IN-PART**. ACI’s Motion in Limine #1 (D.I. 365-13 at PageID 10290) seeks to bar certain testimony by Google’s technical expert, Dr. Michael Goodchild, that ACI argues is inconsistent with the court’s claim construction of U.S. Patent No. RE44,550 (“the ’550 patent”). Google opposes. D.I. 365-13 at 10309. The issues as to Dr.

Goodchild's opinions regarding steps (a) and (c) are resolved by the agreement of the parties, and are now moot. *See* D.I. 365-13 at PageID 10291, 10309, 10335.

The court concludes that ACI's Motion in Limine #1 with respect to steps (e) and (f) of claim 1 of the '550 patent effectively raises issues of claim construction. It is improper for counsel to argue conflicting claim constructions to the jury. *CytoLogix Corp. v. Ventana Med. Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005). And "[w]hen the parties raise an actual dispute regarding the proper scope of [patent] claims, the court, not the jury, must resolve that dispute." *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008). The court concludes that further claim construction is necessary as to steps (e) and (f) of claim 1 of the '550 patent.

With respect to step (e) of claim 1 of the '550 patent, which requires, "representing the data for the field of view in a pictorial representation having one or more sections," **the parties shall submit supplemental briefing** of no more than 10 pages, double-spaced, by 5:00 pm EDT on Tuesday, May 17, 2016, on the proper interpretation of the claim, as was agreed to at the pre-trial conference. *See* D.I. 377 at 45.

ACI's Motion in Limine #1 is **GRANTED** with respect to step (f) of claim 1, which requires, "dividing each of the one or more sections . . . into a plurality of smaller sections, requesting higher resolution space-related data for each of the smaller sections." '050 patent, col. 10 ll. 33-41. ACI argues that Dr. Goodchild's opinion is inconsistent with the plain meaning of the claim when he states that the claimed invention requires traversing each parent node of a given resolution/layer before traversing any child/subnodes, *i.e.*, that every one of the "one or more sections" must be "divid[ed] . . . into a plurality of smaller sections" before any "requesting higher resolution space-related data" takes place. The court previously construed step (f) to

require, “dividing each of the one or more sections . . . into a plurality of smaller sections, prior to requesting higher resolution space-related data for each of the smaller sections.” D.I. 148 at 17, and explained that “the steps must occur in order. The device cannot request higher resolution data for a ‘smaller section’ before that section exists.” D.I. 148 at 18. Google’s interpretation of “each” to mean “every” in this instance is not persuasive. While the steps must be performed in order for a given “section,” it is not necessary that *all* “sections” must be divided before higher resolution space-related data can be requested for *any* of the “smaller sections.”

The motion is **GRANTED** so that Dr. Goodchild is precluded from testifying that the claim requires that all of the sections must be divided into smaller sections before any requesting of higher resolution space-related data can take place.

A.2. ACI’s Motion in Limine #2 seeks to exclude Google’s “single data source” non-infringing alternative. The motion is **DENIED**. The substance of this motion was already addressed by the court’s prior ruling. *See* D.I. 354 at PageID 9715.

A.3. ACI’s Motion in Limine #3 requests that the court rule in advance of Dr. Goodchild’s testimony which of the references asserted by Google have been proven to qualify as prior art. This motion essentially seeks to reargue questions that were resolved by the summary judgment order of April 28, 2016. D.I. 354. The motion is **DENIED** without prejudice to ACI’s ability to request, at the conclusion of the evidence, a jury instruction that particular references asserted by Google do not qualify as prior art.

B.1. Google’s Motion in Limine #1 seeks to exclude any testimony, evidence, or argument suggesting that Google or its former employees copied ACI’s patented technology. The motion is **DISMISSED** as moot. ACI has agreed that it will not allege that Google copied

ACI's Terravision system. *See* D.I. 365-14 at PageID 10454. This ruling does not preclude objections to individual questions relating to the 1995 interactions between SGI and ACI.

B.2. Google's Motion in Limine #2 seeks to exclude evidence of Google's petitions for Inter Partes Review of claims of the '055 patent and the PTAB's denial of institution of those petitions. The motion is **GRANTED**. Under Federal Rule of Evidence 403, the court has discretion to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, or misleading the jury. In both IPR2015-00788 and IPR2015-00789, the PTAB's decision not to institute was reached on a record that was less than complete and without the benefit of a full adversarial proceeding. *See* D.I. 365-14 at PageID 10489-94, 10499-504. The danger of prejudice and confusion outweighs the probative value of this evidence. There will be no reference at the trial to the PTAB's decision not to institute Inter Partes Review against claims of the '550 patent.

B.3. Google's Motion in Limine #3 is **DISMISSED** as moot. Google urges the court to exclude any evidence, testimony, or argument suggesting that a prior art publication does not disclose a limitation because the limitation had allegedly not been implemented. D.I. 365-14 at PageID 10610. ART+COM opposes, and states that it will not argue that a publication's disclosure requires actual implementation in a system or product to qualify as prior art. D.I. 365-14 at PageID 10642. Objections to individual questions concerning implementation of prior art are not foreclosed at trial by this ruling.

II. Google's motion for reargument

Google has moved for reconsideration of the court's order of April 28, 2016, (D.I. 353) denying its motion to preclude testimony of Mr. Nawrocki regarding his per-session damages theory. D.I. 359. The issue has been fully briefed. D.I. 368. The court heard argument at the

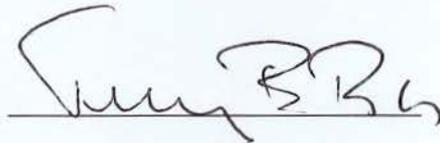
pretrial conference on May 12, 2016. For the reasons set forth below, Google's motion is **DENIED**.

A motion for reconsideration may only be granted if the moving party demonstrates “(1) an intervening change in controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Google contends that Mr. Nawrocki improperly included certain categories of revenue in the royalty base for his per-session theory and that the evidence does not support Mr. Nawrocki's 13% apportionment. But the court previously addressed these very arguments, and Google fails to establish any clear error of fact or law.

As for Mr. Nawrocki's calculation of the royalty base for his per-session theory, Google argues that it was improper for Mr. Nawrocki to begin with revenue figures from the entire Google Geo product group. But, as the court previously explained, to the extent the various revenue sources rely upon an accused product like Google Earth Free in their implementation, they are properly included in a damages analysis so long as a proper apportionment is undertaken. D.I. 354 at PageID 9719. There is evidence that Google Geo, of which Google Earth is a part, improves the quality and targeting of advertising for Google across multiple products and contributes to more local queries on Google.com, which collectively drives advertising revenue. *See* D.I. 369, Ex. B at 126; Ex. H at 101. The evidence further supports the view that the products are to varying degrees interrelated. *See, e.g., id.* at Ex. I, 33:2–9. Mr. Nawrocki's calculation of the royalty base is “methodologically sound.” D.I. 354 at PageID 9720.

As for Mr. Nawrocki's 13% apportionment, Google contends that Mr. Nawrocki's representations "lack any support in the record." D.I. 359 at 9. But, as the court previously found and Google itself acknowledges, Mr. Nawrocki's 13% figure is derived from a 2008 Google-prepared business plan with projected advertising revenue for Google Earth, Google Maps, and Google Maps API. D.I. 354 at PageID 9720. The 13% figure is further supported by other evidence in the record. *See id.* "Mr. Nawrocki's 13% figure may or may not be the most accurate apportionment for Google Earth's contributions to the Geo segment, but that goes to the weight and credibility of the evidence." *Id.* at PageID 9721. Mr. Nawrocki's apportionment employs valid methodology and "can properly be applied to the facts at issue." *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593 (1993). Though this does not reflect a decision on the weight and credibility of the evidence, Mr. Nawrocki's apportionment does not run afoul of Rule 702 of the Federal Rules of Evidence.

It is **SO ORDERED** this 16th day of May, 2016.

A handwritten signature in black ink, appearing to read "Timothy B. Dyk", written over a horizontal line.

Honorable Timothy B. Dyk

United States Circuit Judge, sitting by designation