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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

GOTV STREAMING, LLC,

Plaintiff,

v.

NETFLIX, INC.,

Defendant.

Case No. 2:22-cv-07556-RGK-SHK

Hon. R. Gary Klausner
Courtroom 850 – Roybal

MEMORANDUM IN OPPOSITION TO GOTV STREAMING, LLC'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Date: November 27, 2023
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I. INTRODUCTION

Netflix, Inc. partially opposes GoTV Streaming, LLC's motion for judgment as a matter of law under Rule 50(a). The Court already decided that it would not submit the issues of ownership and invalidity under 35 U.S.C. § 103 to the jury, and, in the interest of streamlining the disputes between the parties, Netflix does not oppose granting JMOL to GoTV on those two issues. However, GoTV is not entitled to JMOL of infringement of claim 16 of the '245 patent. Contrary to GoTV's argument, the '245 patent presented distinct issues from infringement of the '715 patent, and Netflix did not concede that the differences between the two patents were immaterial. GoTV's sole theory of direct infringement on the '245 patent at trial relied on alleged internal testing by Netflix, and GoTV bore the burden of proving that during such testing, Netflix made or used in the United States a non-transitory computer usable medium with all of the instructions required for a wireless device to execute the claimed steps. But GoTV's evidence of allegedly infringing testing was vague and incomplete, and GoTV comes nowhere close to showing that the jury was compelled to accept that evidence as proof of infringement. Indeed, for the reasons explained in Netflix's Rule 50(a) motion, (Dkt. No. 389-1 at 3-5), no rational jury could have relied on GoTV's evidence to find infringement of the '245 patent.

II. LEGAL STANDARD

Judgment as a matter of law may be granted where "the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury." *White v. Ford Motor Co.*, 312 F.3d 998, 1010 (9th Cir. 2002). "[C]ourts often caution that granting a judgment as a matter of law for the party bearing the burden of proof is reserved for extreme cases." 9B Wright & Miller, *Federal Practice and Procedure* § 2535 (3d ed. 2023). "A directed verdict for the plaintiff presents an exceptional case and is sustainable only if the evidence 'was such that the court could say that as a matter

of law the evidence was capable of only one interpretation and that in favor of liability." *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977) (quoting *Juhnke v. EIG Corp.*, 444 F.2d 1323, 1325 (9th Cir. 1971)).

III. ARGUMENT

A. The Court Declined To Submit the Issue of Patent Ownership to the Jury

The Court declined to submit the issue of patent ownership to the jury and stated its intention to rule, as a matter of law, that GoTV Streaming, LLC owns the '715 and '245 patents. (Dkt. 404-1 at 3 (Day 3 AM Tr. 57:7-9) ("I can tell you the Court is going to find, as a matter of law, that the issue of ownership is there."); Ex. A, Day 3 PM Tr. 62:22 (instructing jury "Ownership is not at issue.").) In the interest of streamlining the disputes between the parties, Netflix does not oppose this ruling on ownership. Specifically, the trial record shows that assignments of the '715 and '245 patents to GoTV Streaming, LCC were recorded in the Patent and Trademark Office on October 14, 2022. (Dkt. 404-6 at 2-5 (Tx. 317).)

B. The Court Declined To Submit the Issue of Invalidity to the Jury

The Court also declined to submit the issue of invalidity to the jury. Before trial, the Court ruled against Netflix's argument under 35 U.S.C. § 101 as a matter of law. (Dkt. 355 at 2 ("The Court's denial of Netflix's Motion (Dkt. No. 109) constitutes the Court's judgment as a matter of law that the claims of the Asserted Patents are not invalid under 35 U.S.C. § 101 and conclusively resolves Section 101 issues for purposes of this case."); Dkt. 109 at 2-7.) At trial, each party was allocated no more than four hours to present its case. (Day 1 Tr. 7:13-17.) Netflix did not present invalidity arguments under 35 U.S.C. § 103 to the jury in light of those time constraints and the pendency of Netflix's petitions for *inter partes* review. (Ex. B, Day 2 Tr. 213:20-25; Ex. A, Day 3 PM Tr. 34:9-11; Ex. C, *Netflix, Inc. v. GoTV Streaming, LLC*, IPR2023-00757, Paper 2 (PTAB) ('715 patent); Ex. D, *Netflix, Inc. v. GoTV Streaming, LLC*, IPR2023-00758, Paper 2 (PTAB) ('245

patent).) The Court therefore stated on the final day of trial that it would not submit the issue of invalidity to the jury. (Dkt. 404-1 at 3 (Day 3 AM Tr. 57:7) ("Validity is not going to be there."); Ex. A, Day 3 PM Tr. 62:22-23 (instructing jury "Validity is not at issue.").)

The pretrial conference order listed invalidity under 35 U.S.C. § 103 as an issue to be tried. (Dkt. 253-1 at 50-53). Accordingly, just as Netflix is entitled to JMOL on the six patent claims at issue in the pretrial conference order that GoTV failed to pursue at trial, (*see* Dkt. 389-1 at 7), Netflix concedes that GoTV is entitled to JMOL of no invalidity under 35 U.S.C. § 103.[1]

C. GoTV Is Not Entitled to JMOL of Non-Infringement of Claim 16 of the '245 Patent

GoTV's motion seeks JMOL of infringement of the '245 patent based largely on the jury's separate finding with respect to the '715 patent. (Dkt. 403 at 5). But contrary to GoTV's assertions, the infringement analyses for the '715 and '245 patents presented distinct issues and cannot be collapsed into a single inquiry. Critically, this Court granted summary judgment of non-infringement of the '245 patent in connection with customer mobile devices. (Dkt. 249 at 14.) At trial, GoTV was therefore required to prove infringement of the '245 patent based on Netflix's own internal testing, not the transmissions to customers that formed the basis of its theory with respect to the '715 patent. In addition, GoTV had to meet additional elements not present in claim 4 of the '715 patent. The jury's finding that GoTV did not meet this burden is supported by substantial evidence for at least five reasons.

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[1] Granting GoTV JMOL of no invalidity under 35 U.S.C. § 103 does not preclude Netflix from continuing to seek to have the same claims declared unpatentable in the IPRs. *See Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 282-83 (2016); *Novartis AG v. Noven Pharms., Inc.*, 853 F.3d 1289, 1294 (Fed. Cir. 2017).

First, GoTV points to a single, unsupported statement by its expert, Dr. Malek, that Netflix "practices" claim 16 "when they perform internal testing of Netflix's application." Dkt. 403 at 9 (citing Dkt. 404-9 at 55:9-11). But Dr. Malek also admitted that he didn't "know the specifics of how [Netflix is] performing the testing." (Ex. B, Day 2 Tr. 83:6-84:23.) Dr. Malek's conclusory testimony cannot "sustain a jury's verdict," *MobileMedia Ideas LLC v. Apple Inc.*, 780 F.3d 1159, 1172 (Fed. Cir. 2015), let alone compel a finding of infringement.

Second, a reasonable jury could find that GoTV did not prove that any of the accused Netflix testing took place in the United States, as required to prove direct infringement under 35 U.S.C. § 271(a). GoTV's sole cited support for the location of testing was testimony from Steve Johnson, the Vice President of Design at Netflix. (Dkt. 403 at 9). But Mr. Johnson stated that he was familiar only with "AB testing" (Ex. B, Day 2 Tr. 12:4-13:13), which GoTV admits is "*not* an activity giving rise to infringement or damages" (Dkt. 336 at 4 (emphasis in original)). Mr. Johnson also repeatedly disclaimed knowledge of the location of any other type of testing. (Ex. B, Day 2 Tr. 12:17-13:15 ("Again, I do not know about the engineering testing centers, only the AB testing centers of which I operate from.")). Because GoTV relies solely on evidence regarding unaccused testing, the jury could have reasonably determined that GoTV did not meet its burden to prove that the accused testing took place in the United States. The jury's finding of non-infringement is supported on this basis alone. *See, e.g.*, *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1206 (Fed. Cir. 2010) (reversing denial of JMOL of noninfringement because patentee identified no instances of testing in the United States).

Third, a reasonable jury could find that GoTV failed to prove that the accused testing took place on wireless devices as required by claim 16. GoTV's cited testimony (Dkt. 403 at 9-10) is not to the contrary. Mr. Eichacker's testimony on testing of "TVUI devices" (Dkt. 404-11 at 148:25-149:05) is insufficient to show

the televisions being tested were connected wirelessly, as opposed to using a wired connection. (*Cf.* Ex. B, Day 2 Tr. 174:16-18 (discussing televisions with a wired connection)). Similarly, neither Mr. Castro nor Mr. Boudrant discussed the specific devices used in the accused testing, let alone whether those devices were wireless or wired. (Dkt. 404-14 (134:21-23, 135:10-15, 135:19-23); Dkt. 404-16 (125:10-12, 125:17-19, 125:22-24, 126:4-6).) Ms. Kwok's testimony on "mobile automation test labs" also discussed testing generally, but did not specifically address the features of the accused testing, including which devices were used in the accused testing. (Dkt. 404-12 at 23:18; *cf.* Dkt. 336 at 4 (A/B testing not accused).) Finally, Dr. Malek conceded that he did not know the "specifics" of the "wireless devices" used in the accused Netflix testing or the standard used to "communicate between the back end and the client device" in the alleged testing. (Ex. B, Day 2 Tr. 84:1-4, 12-15; *see also id.* at 84:21-23.) The jury was therefore entitled to find that GoTV did not prove that Netflix performs the accused testing with wireless devices.

Fourth, GoTV incorrectly asserts that Netflix "does not dispute" that its testing met the limitation requiring instructions "rendering said renderable content on said wireless device." (Dkt. 403 at 8.) But as explained in Netflix's JMOL motion, GoTV's sole evidence regarding this limitation was Dr. Malek *own* testing. (Dkt. 249 at 15; Ex. B, Day 2 Tr. 57:1-4; Dkt. 389-1 at 4-5.) Dr. Malek's testing cannot meet GoTV's burden to prove direct infringement by "actual users." *See, e.g.*, *Acco Brands, Inc. v. ABA Locks Mfrs.*, 501 F.3d 1307, 1313 (Fed. Cir. 2007) (patentee "failed to point to specific instances of direct infringement" where "sole witness at trial who testified to having used [the accused product] in an infringing manner was [patentee's] expert"); *see also Mirror Worlds, LLC v. Apple Inc.*, 692 F.3d 1351, 1359 (Fed. Cir. 2012) ("But demonstration to a jury during trial does not constitute evidence of infringement on which a claim of infringement can be based."). Separately, Dr. Malek's testing also failed to establish that the rendering

functionality came from Netflix's software, rather than third-party software. *See* Ex. B, Day 2 Tr. 56: 18-25. In fact, Dr. Malek did not even know what platform was used in Netflix's alleged testing. Ex. B, Day 2 Tr. 84:16-20.

Sixth, GoTV's argument that an apparatus claim is not limited to a particular "method or use" (Dkt. 403 at 9) makes no sense in the context of the claim at issue. Claim 16 is a "Beauregard claim," *i.e.*, "a claim to a computer readable medium (e.g., a disk, hard drive, or other data storage device) containing program instructions for a computer to perform *a particular process*." *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373 (Fed. Cir. 2011) (emphasis added). Specifically, the "non-transitory computer usable medium" required by claim 16 must contain "instructions" that "when executed … implement a method of rendering content on a wireless device" that meets all the specified claim limitations. (Ex. E, Tx. 14 at 21:42-45; *see also id*. at 21: 46-67, 22:17-19.) But GoTV did not establish that *all* of the relevant "instructions," including rendering instructions, were present in the same "non-transitory computer usable medium" of a Netflix-owned device used in the accused testing.

In short, a reasonable jury could have relied on any one of multiple holes in GoTV's case to conclude that GoTV failed to carry its burden of proof on claim 16 of the '245 patent. GoTV has not established that this is an exceptional case warranting JMOL on an issue on which GoTV bore the burden of proof.

IV. CONCLUSION

For the reasons set forth above, Netflix requests that the Court deny GoTV's request for JMOL of infringement of claim 16 of the '245 patent.

Dated: October 26, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Netflix, Inc., certifies that this brief contains 2,054 words, which complies with the word limit of L.R. 11-6.1 and the May 2023 Standing Order Regarding Newly Assigned Cases.

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