UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Duration Media LLC
Petitioner,

v.

Rich Media Club LLC
Patent Owner.

US Patent No. 11,443,329
Filing Date: May 11, 2021
Issue Date: September 13, 2022
Title: System And Method For Creation, Distribution And tracking Of Advertising Via Electronic Networks

RESPONSE TO INTERROGATORY TWO

Petitioner responds to the modified interrogatories as order by the Board in Paper 34 as follows.

I. Interrogatory 2

State whether Duration, after it stopped using Rich Media Club's services in 2020, continued to offer the same services including the same technologies that had been supplied by Rich Media Club/RealVu; and identify any and all changes that were made to the following features of Duration's services after Duration stopped using Rich Media Club's services in 2020: (1) a test for whether an ad space was in view; (2) tracking the time in view; and (3) triggering a realtime bidding auction to replace the in-view ad after a predetermined period of time.

A. Duration did not offer the same services using the same technologies.

Duration did not continue to offer "the same services including the same technologies that had been supplied by Rich Media Club/RealVu" for several reasons. First, Duration never had access to RMC's backend source code. The Board's order (Paper 34) stated that Duration had access to RMC's source code. Duration only had access to frontend software, limited to a simple JavaScript tag calling the backend software and the output of the backend software, just like any Internet user. RMC never expressly alleged that Duration had access to confidential backend software. It did not. During the period when Duration was offering the RealVu services to its customers, Duration simply provided instructions for how the RealVu software should operate, and RealVu implemented those instructions.

RealVu provided a simple HTML JavaScript tag that Duration embedded into its customers' web pages to allow its customers to access the RealVu confidential backend applications. Such JavaScript tags are basic building blocks of any modern webpage, wherein the browser sends a request to a backend server that performs complex operations that are invisible to the browser and the public. The backend server then sends a response to the JavaScript call for the browser to handle. Replication was impossible because Duration never had access to RealVu's backend source code. *Iron Grip Barbell Co., Inc. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004) ("Not every competing product that arguably falls within the scope of a patent is evidence of copying…. Rather, copying requires the replication of a specific product.").

Second, Duration hired its own engineers to develop its own confidential backend software conforming to industry viewability standards, other prior art technologies, and its own innovations. Duration took great care to ensure that its software did not practice the disclosure of the patents and applications in the '329 patent family.

Any similarity between features of Duration's and RMC's products is a function of standard industry practices, such as providing a well-known debug

interface. *See* Ex-2013 and Ex-2014.[1] Further, the feature of "replacing a first ad on a webpage with a second ad upon a determination that the ad space including the first ad is in or near the portion of a webpage that is visible to the user," as defined in interrogatory 1, (i) is not what is claimed in the '329 patent, as the claims of the '329 patent do not include determining that the ad space is "near" the portion of a webpage that is visible to the user, (ii) is not practiced by Duration and (iii) was well known before the priority date of the '329 patent. Accordingly, copying was both impossible and unnecessary.

B. Duration never had access to RMC's source code and therefore could not "change" it.

The interrogatory implies that Duration copied and then changed RMC's features. It is impossible for Duration to identify changes to something it did not and does not have. RMC must provide its source code for Duration to identify differences between its backend source code and RMC's. The frontend source code is publicly available, and RMC can confirm that there was no replication of any frontend

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[1] Note that there are several obvious differences between the implementations of the debug overlays, including variable names, colors, presentation of information, and the source code is completely different. The differences are public, too innumerable to list efficiently and are otherwise clearly identifiable by anyone.

software. Duration developed its software completely independent of RMC's product, which is publicly ascertainable.

Duration intentionally avoided any copying. Duration hired developers, who never worked with RealVu and did not have access to any of RealVu's backend source code, to implement new bespoke, non-infringing software.

Assuming that the RMC product practices the claims of the '329 patent,[2] Duration's product does not practice the following limitations of claim 1:

> *(b) in response to a determination that the predefined area that is used to display the advertisement has been in view within the visible area of the browser window for a predefined period of time, causing a communication to be sent to one or more dispatcher servers, wherein the one or more dispatcher servers are configured to:*
>
> *(i) receive the communication;*
>
> *(ii) cause a replacement advertisement to be selected for display on the ad content display page; and*
>
> *(iii) cause the replacement advertisement to be served to the remote computing device;*

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[2] Duration has no evidence of whether RMC practices the claims of the '329 patent and relies on the claim solely to provide a *bona fide* response to the interrogatory.

> *wherein the browser is further configured to render the replacement advertisement in the predefined area.*

Accordingly, Duration cannot identify changes between its backend implementation and RMC's because Duration never had access to it. To the extent that RMC implemented its backed application as required by claim 1, Duration's implementation is different.

Respectfully Submitted,

Dated: December 4, 2023

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