IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

TQP DEVELOPMENT, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 2:11-CV-248-JRG
	§	
1-800-FLOWERS.COM, INC., et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court is the briefing on Newegg's Rule 50(b) Motion for Judgment as a Matter of Law (Dkt. No. 436); Newegg's Notice of Supplemental Authority (Dkt. No. 447); Newegg's Notice of Subsequent Authority (Dkt. No. 450); Newegg's Second Notice of Subsequent Authority (Dkt. No. 453); and TQP's Response to Newegg's Supplements (Dkt. No. 452.) For the reasons set forth below, Newegg's Motion for Judgment as a Matter of Law is GRANTED as to non-infringement.

BACKGROUND

The Court held a jury trial in this case and the jury entered a verdict on November 25, 2013. At the time of trial, the asserted claims of U.S. Patent No. 5,412,730 ("'730 Patent")—the sole patent-in-suit—were Claims 1, 6, 8, and 9. The Jury returned a verdict that the asserted claims were not invalid; that the asserted claims were directly infringed and that Newegg had induced its customers to infringe; and $ 2.3 MM as a "sum of money, if paid now in cash" that "would fairly and reasonably compensate TQP for its damages resulting from Newegg's infringement of the '730 Patent."[1] (Dkt. No. 407 ("Verdict").)

---

[1] At trial TQP had asserted that it, if damages were awarded, the proper amount was $ 5.1 MM. Newegg did not present its own expert testimony on damages.

After trial Newegg filed a Motion for Judgment as a Matter of Law (Dkt. No. 436) and a Motion for a New Trial (Dkt. No. 437). Briefing on these motions concluded on April 4, 2014. After briefing completed on its Motion for Judgment as a Matter of Law, Newegg filed three supplements, the last of which was filed on July 25, 2014. On June 4, 2014, Newegg filed its Notice of Supplemental Authority ("First Supplement"). (Dkt. No. 447.) On June 30, 2014, Newegg filed its Notice of Subsequent Authority ("Second Supplement"). (Dkt. No. 450.) On July 8, 2014, the Court ordered TQP to respond to Newegg's supplements. (Dkt. No. 451.) On July 25, 2014, Newegg filed a Second Notice of Subsequent Authority ("Third Supplement"). (Dkt. No. 453.) On August 7, 2014, the Court issued a Memorandum Opinion and Order on an issue of Newegg's Motion for Judgment Based on the Defense of Laches. (Dkt. No. 454.)

Newegg's Notice of Subsequent Authority (Dkt. No. 450) informed the Court of a June 20, 2014 ruling in a related case—*TQP Development, LLC v. Intuit Inc.*, Case No. 2:12-cv-180 (hereinafter ("*Intuit* Case")), Dkt. No. 192 (hereinafter "*Intuit* SJ Order"))—in which the judge in that case (J. Bryson) revised his earlier construction of a term in the '730 Patent and granted summary judgment of non-infringement.[2] In this case, TQP responded that it would be filing a Motion for Reconsideration of the grant of non-infringement in the *Intuit* Case. Newegg's Third Supplement (Dkt. No. 453) informed the Court that a Motion for Reconsideration of the *Intuit* SJ Order had been denied: Dkt. No. 203 in the *Intuit* Case (hereinafter "*Intuit* SJ Reconsideration Order") filed on July 23, 2014. On August 21, 2014, TQP filed a Notice of Appeal to the United States Court of Appeals for the Federal Circuit in the *Intuit* Case, which was docketed on August 26, 2014, appealing, among other rulings, the *Intuit* SJ Order and the *Intuit* SJ Reconsideration Order. On October 2, 2014, TQP's appeal of the orders in the *Intuit* Case was dismissed.

---

[2] Testimony from this trial comprised part of the evidence submitted in the summary judgment briefing in *Intuit*.

Newegg's Notice of Supplemental Authority (Dkt. No. 447) submitted the Supreme Court's, June 2, 2014, decision in *Limelight Networks, Inc. v. Akamai Technologies, Inc., et al.*, 134 S.Ct. 2111 (2014). Newegg asserted that the Supreme Court "rejected the rule of *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F. 3d 1301, 1305-07, 1318 (2012) (en banc) that a party can be liable for active inducement of infringement of a method claim under 35 U.S.C. § 271(b) when that party is not responsible for the performance of the entire method such that it would be a direct infringer under 35 U.S.C. § 271(a)." *Id.* The *Limelight* decision was reversed and remanded. *Id.* On May 13, 2015, the decision on remand issued in *Akamai Technologies., Inc. et al., v. Limelight Networks, Inc.*, 786 F.3d 899 (Fed. Cir. 2015). A petition for en banc rehearing was filed on June 25, 2015, in that case.

The '730 Patent

The '730 Patent lists a sole inventor—Michael F. Jones—and is entitled "Encrypted data transmission system employing means for randomly altering the encryption keys." (Dkt. No. 348 at 12.) The '730 Patent was filed on April 23, 1992 (the patent is a continuation in part of Ser. No. 418,178, which was filed on, Oct. 6, 1989, and subsequently abandoned) and issued on May 2, 1995. (*Id.*) The '730 Patent was originally assigned to Telequip Corporation of Hollis, New Hampshire. (*Id.*)

The asserted claims—Claims 1, 6, 8, and 9—of the '730 patent are as follows (the Parties' identifications of specific limitations (e.g., a, b, c) have been added for Claim 1):

Claim 1. [(a)] A method for transmitting data comprising a sequence of blocks in encrypted form over a communication link from a transmitter to a receiver comprising, in combination, the steps of:

[(b)] providing a seed value to both said transmitter and receiver,

[(c)] generating a first sequence of pseudo-random key values based on said seed value at said transmitter, each new key value in said sequence being produced at a time dependent upon a predetermined characteristic of the data being transmitted over said link,

[(d)] encrypting the data sent over said link at said transmitter in accordance with said first sequence,

[(e)] generating a second sequence of pseudo-random key values based on said seed value at said receiver, each new key value in said sequence being produced at a time dependent upon said predetermined characteristic of said data transmitted over said link such that said first and second sequences are identical to one another a new one of said key values in said first and said second sequences being produced each time a predetermined number of said blocks are transmitted over said link,

[(f)] and decrypting the data sent over said link at said receiver in accordance with said second sequence.

Claim 6. The method of claim 1, wherein said provided seed value is one of a number of different seed values for a plurality of remote locations with which secure communication is required.

Claim 8. The method of claim 1, further comprising:

Associating different ones of seed values with each of a plurality of remote locations with which secured communication is required.

Claim 9. The method of any one of claims 3, 4, 5, 6, 7, or 8, further comprising:

Adding error control information to the data sent over said link, wherein the error control information is added prior to transmitting the data over said link.

The Accused Technology

The technology accused of infringement in this case relates to secure communications and the World Wide Web. Specifically the accused technology concerns secure Hypertext Transfer Protocol ("HTTP") communications, commonly referred to as "HTTPS." HTTPS, which one might commonly see as part of the address in a web browser (e.g. "https://"), requires

one of two additional protocols: called Secure Socket Layer ("SSL") or Transport Layer Security

("TLS").[3] (11/21 PM Tr. (Stubblebine) 63:16-21.) TQP accuses Newegg's use of either the

combination of the SSL protocol and the RC4 cipher or the combination of the TLS protocol and

the RC4 symmetric key encryption algorithm in Newegg's external facing servers. (11/19 AM

Tr. 61:17-23; 128:10-129:13; *see also* 11/21 PM Tr. (Stubblebine) 26:1-12 (describing RC4).)

TQP asserts that "SSL and TLS are essentially interchangeable" but that "SSL doesn't infringe

by itself" and "RC4 doesn't meet all the limitations by itself"; "it's only the combination" of SSL

with RC4 that infringes.   (*Id.*; *Id.* 61:25-62:2; 130:1-4.)

The SSL and TLS protocols, speaking generally, define an ordered process for

establishing secure communications.   As TQP's expert Dr. Jager testified, the secure

communications of the patent are "set up when the customer puts in this URL" and "goes to the

website," at which point "the customer's computer [is] led through . . . a process by the website

in order to setup [] secure communication." (11/19 PM Tr. (Jager) at 133:6-23; *see also* 11/21

PM Tr. (Stubblebine) 25:7-25 (describing SSL handshake).) Said another way, SSL and TLS are

the protocols that "lead[] the customer's computer through the negotiation." (*Id.*) "And as part

of that negotiation, an encryption algorithm [(in this case RC4) is] selected to protect the secrecy

of the data sent between the website and their computer."   Specifically, the SSL and TLS

protocols provide that the server selects the particular encryption algorithm—also referred to as a

"cipher suite" in this case—that will be used from among the various encryption algorithms

listed by the client as part a particular message called the ClientHello. (*Id.* 139:7-20.) As a

---

[3] SSL and TLS are standardized protocols with published specifications that have different versions.
(11/19 AM Tr. (Jager) 129:14-17; 130:21-25.) The evidence presented at trial concerned Newegg's use of SSL
version 3 and TLS version 1. (Id. at 129:18-25; 11/21 PM Tr. (Stubblebine) 77:13-17; 78:10-14.)

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.

fastcase®
Smarter legal research.