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7 THE INTERNET SOCIETY and INTERNET
ENGINEERING TASK FORCE

8

UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

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TODD S. GLASSEY and MICHAEL E.
12 MCNEIL,

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Plaintiffs,

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v.

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MICROSEMI INC; US GOVERNMENT –
POTUS; THE STATE OF CALIFORNIA,
19 GOVERNOR BROWN; THE IETF and THE
INTERNET SOCIETY; APPLE INC.; CISCO
20 INC.; eBAY INC.; PAYPAL INC.; GOOGLE
INC.; JUNIPER NETWORKS; MICROSOFT
21 CORP; NETFLIX INC.; ORACLE INC.;
MARK HASTINGS; ERIK VAN DER
22 KAAY; AND THALES GROUP AS
UNSERVED DOES,

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Defendants.

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) CASE NO.: 14-CV-3629 (WHA)
)
) DEFENDANTS THE INTERNET
) SOCIETY AND INTERNET
) ENGINEERING TASK FORCE'S
) OPPOSITION TO PLAINTIFFS' MOTION
) FOR PARTIAL SUMMARY JUDGMENT
) ON "IETF PERFORMANCE RIGHTS
) AWARD" [DKT. 139]
)
) Hearing Date: January 29, 2015
) Time: 8:00 a.m.
) Place: Courtroom 8
) Judge: Hon. William H. Alsup

1 Defendants the Internet Society (“ISOC”) and the Internet Engineering Task Force (the
2 “IETF”) (collectively, the “ISOC Defendants”) submit this opposition to Plaintiffs’ motion for
3 partial summary judgment on “IETF Performance Rights Award” (Dkt. 139).

4 ARGUMENT

5 Plaintiffs have requested that the Court “issu[e] Plaintiffs a performance rights standing
6 against any IETF protocol Plaintiffs can demonstrate contains their protected Phase-II IPs.” (Dkt.
7 139, at 1.) In making this motion, Plaintiffs are putting the cart before the horse by requesting this
8 Court to grant them “performance rights standing,” as a matter of law, in *unidentified* copyrights
9 owned by the ISOC Defendants. Although the precise contours of Plaintiffs’ request is unclear, it
10 appears that they are requesting the court to grant them co-ownership of the copyrights to
11 unspecified IETF publications—relief that was not requested in the Second Amended Complaint
12 (“SAC”).

13 As a threshold matter, the SAC fails to state any claim for relief against the ISOC
14 Defendants for the reasons fully set forth in the ISOC Defendants motion to dismiss. (*See* Dkt.
15 142.) For example, to the extent that the SAC asserts any claims sounding in copyright, such
16 claims must fail because Plaintiffs do not allege ownership of (or identify) a copyrighted work.
17 (*See id.* at 9.) Thus, the ISOC Defendants not only dispute the facts upon which Plaintiffs’ motion
18 depends, but also maintain that the facts alleged in the SAC are insufficient for this action to
19 proceed further. As such, Plaintiffs’ summary judgment motion is premature and wholly without
20 merit.

21 Rule 56 of the Federal Rules of Civil Procedure provides that a court shall grant a motion
22 for summary judgment if “the movant shows that there is no genuine issue as to any material fact
23 and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).¹ As
24 the moving party, Plaintiffs bear the burden of persuasion. *See Nissan Fire & Marine Ins. Co., Ltd.*
25 *v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

26 _____
27 ¹ Although Plaintiffs have purported to move pursuant to Rule 56(b), the ISOC Defendants will
28 treat this motion as though it were made pursuant to Rule 56(a).

1 Through this current motion, Plaintiffs appear to be requesting the Court to grant them co-
2 ownership over certain IETF copyrights despite the fact that (i) the SAC does not include a request
3 for such relief; (ii) Plaintiffs have not put before the Court facts or authority to demonstrate that
4 Plaintiffs have any rights to the IETF's copyrighted materials; and (iii) Plaintiffs have not
5 identified a single copyrighted work at issue in this case, let alone one in which they are entitled to
6 an ownership interest. This request arises from Plaintiffs' naked assertion that the ISOC
7 Defendants are licensing the technology described in various IETF standards or inducing
8 infringement of patent rights—an allegation for which Plaintiffs provide no factual basis, which is
9 further demonstrated by their failure to put before the Court any license granted by the ISOC
10 Defendants to a third party for use of certain technology, or facts that even suggest the existence of
11 such a license.

12 In addition, Plaintiffs appear to rely upon the following “fact” sources for this motion:
13 conclusory allegations from the SAC (Dkt. 113), a condensed version of those allegations set forth
14 in “Glassey’s Narrative on IETF specific 35USC271 infringements” (Dkt. 140-4), and two IETF
15 Best Current Practice (“BCP”) protocols (Dkt. 140-1, 140-2).² These documents provide no
16 grounds whatsoever for granting Plaintiffs co-ownership of the copyright to any IETF standard—
17 let alone grounds that satisfy their burden of persuasion. Thus, Plaintiffs’ motion is not grounded
18 in fact and fails to establish entitlement to judgment as a matter of law with respect to the
19 ownership of IETF copyrights.

20 Indeed, the ISOC Defendants dispute many of the purported facts underlying Plaintiffs’
21 motion. Contrary to Plaintiffs’ baseless assertion that “IETF protocols run the world” (Dkt. 139, at
22 5), the use of IETF standards is completely voluntary, and the ISOC Defendants do not enforce the
23 use of those standards.³ In support of their motion, Plaintiffs point to two IETF publications—BCP
24 78 (Dkt. 140-1) and BCP 79 (Dkt. 140-2)—that they claim set forth licensing policies for

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26 ² Plaintiffs also submitted a disclosure that Glassey had posted on the IETF concerning their
purported rights. (Dkt. 140-3.)

27 ³ See <http://www.ietf.org/rfc/rfc3935.txt>

1 infringing upon patent rights. (*See* Dkt. 139, at 6.) As noted in the ISOC Defendants’ motion to
2 dismiss, the text of those two documents directly contradicts Plaintiffs’ allegations. (*See* Dkt. 142,
3 at 8-9.) In BCP 78, the IETF expressly states that, to the extent any third-party contribution to an
4 IETF publication is protected by copyright, the contributor grants to the IETF a license to use and
5 sublicense such copyrights, but such license “shall not be deemed to grant any right under any
6 patent, patent application, or other similar intellectual property right disclosed by the Contributor.”
7 (Dkt. 140-1, at 10-11, §§ 5.3, 5.5.) Moreover, in BCP 79, the IETF declares the following position
8 with respect to intellectual property rights that may be implicated by its standards:

9 The IETF takes no position regarding the validity or scope of any
10 Intellectual Property Rights or other rights that might be claimed to
11 pertain to the implementation or use of the technology described in
12 this document or the extent to which any license under such rights
13 might or might not be available; nor does it represent that it has made
14 any independent effort to identify any such rights.

15 (Dkt. 140-2, at 8, 21; *see also* <https://www.ietf.org/ipr/policy.html>.)

16 Thus, the allegations made by Plaintiffs in this motion (and the SAC) demonstrate a
17 fundamental failure to understand the purpose and function of the standards promulgated by the
18 IETF (as well as a failure to understand copyright law). Finally, even if Plaintiffs had accurately
19 described the ISOC Defendants’ actions, this summary judgment motion still would fail because it
20 is entirely dependent upon Plaintiffs’ assertion of ownership rights to certain patented technology.
21 However, not only do the pleadings fail to support Plaintiffs’ ownership claims, but defendant
22 Microsemi also has expressly contradicted those allegations in its own motion to dismiss and in
23 opposing other meritless motions by Plaintiffs for partial summary judgment. (*See* Dkt. 153, at 8;
24 Dkt. 145, at 1 (“Microsemi . . . is the sole owner of and only party permitted to enforce the two
25 patents at issue”).) At the least, this raises a genuine issue of material fact that supports denial of
26 Plaintiffs’ motion here.

27 Accordingly, Plaintiffs are not entitled to judgment as a matter of law granting them
28 “performance rights standing” with respect to any IETF copyright.

1 **PLAINTIFFS ARE VEXATIOUS LITIGANTS**

2 As this Court has recognized, Plaintiff Glassey “has commenced several actions in [this]
3 district.” (Dkt. 109, at 2:26-28.⁴) Since filing the SAC on November 13, 2014 (Dkt. 112),
4 Plaintiffs have bombarded the Court with frivolous filings—seven motions and three requests for
5 judicial notice (one of which this Court promptly denied (Dkt. 116)). This barrage of filings has
6 generally extended the rambling accusations of the three complaints and included requests for
7 relief that have no foundation in the SAC or otherwise. Accordingly, if the SAC is not stricken
8 with prejudice, in order to prevent the ISOC Defendants (and presumably the other defendants in
9 this action) from incurring further expenses in connection with additional conclusory and wholly
10 meritless filings, the ISOC Defendants respectfully request that this Court issue an order to show
11 cause for Plaintiffs to demonstrate why they should not be deemed vexatious litigants and required
12 to receive leave of the Court for any future affirmative filings in this action. *See Brown v. Hoops*,
13 No. CV-11-5414, 2013 WL 5329484, at *1 (C.D. Cal. Sept. 20, 2013) (directing clerk to “no
14 longer accept for filing any further motions and/or any further requests for affirmative relief in this
15 action”).

16 **CONCLUSION**

17 For all of the above reasons, Plaintiffs’ motion for partial summary judgment against the
18 ISOC Defendants should be denied, and this Court should issue an order to show cause concerning
19 treatment of Plaintiffs as vexatious litigants for the remainder of this action.

20 DATED: December 15, 2014

21 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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23 By: /s/ Jason D. Russell
24 JASON D. RUSSELL
25 Attorneys for Defendants
THE INTERNET SOCIETY and INTERNET
ENGINEERING TASK FORCE

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27 ⁴ Microsemi also identified a state court action that Plaintiffs filed concerning similar subject
28 matter to the present action. (See Dkt. 145, at 5-6.)

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ECF CERTIFICATION

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this 15th day of December, 2014. As of this date, plaintiffs in pro se and all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF System.

/s/ Jason D. Russell
JASON D. RUSSELL