

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:10-cv-24063-MORENO

_____)
MOTOROLA MOBILITY, INC.,)
)
Plaintiff,)
)
vs.)
)
MICROSOFT CORPORATION,)
)
Defendant.)
_____)
)
MICROSOFT CORPORATION,)
)
Counterclaim Plaintiff,)
)
vs.)
)
MOTOROLA MOBILITY, INC.,)
)
Counterclaim Defendant.)
_____)

**MICROSOFT CORP.'S MOTION FOR SUMMARY JUDGMENT OF
NONINFRINGEMENT FOR U.S. PATENT NOS. 5,502,839, 5,784,001, AND 6,272,333,
AND THAT MOTOROLA CANNOT RECOVER DAMAGES PRIOR TO NOV. 10, 2010**

THIS MOTION IS BEING FILED IN REDACTED FORM. THE UNREDACTED
VERSION OF THIS MOTION AND ATTACHMENTS THERETO ARE BEING FILE
UNDER SEAL

I. INTRODUCTION

Defendant and counterclaim plaintiff Microsoft Corporation (“Microsoft”) moves for summary judgment that it is not infringing U.S. Patent Nos. 5,502,839 (the ’839 Patent), U.S. Patent No. 5, 784,001 (the ’001 patent), and U.S. Patent No. 6,272,333 (the ’333 Patent), each asserted by Plaintiff and counterclaim defendant Motorola Mobility, Inc. (“Motorola”) against Microsoft in the present litigation. In addition Microsoft moves for partial summary judgment that Motorola is not entitled to any pre-notice damages.

A. Background of the Patented Technology of the ’839 Patent

Motorola’s ’839 patent describes a software interface designed to easily support input and output independence through the concept of virtual devices. All of the claims that Motorola has accused Microsoft of infringing require either a source of user input or input from a physical device. Specifically, Claim 9 requires a “source of virtual input.”¹ Claim 15 requires “an interface between processes and data in said system and physical input” and “means responsive to one of said physical input devices for generating a picture.”² The remaining asserted claims depend from either claim 9 (claims 10-14) or claim 15 (claims 16 and 18-23),³ so they include these limitations as well.

Although the parties disagree as to how these terms should be construed, these claim still require either user input or input from a physical device regardless of the construction. Neither party’s proposed construction would eliminate that core limitation from claims 9 or 15. Motorola proposes that “source of virtual input” in claim 9 should be construed to mean “A process which generates one or more picture elements from user input.”⁴ Microsoft proposes this term should be construed to mean “a physical input device corresponding to a virtual input device.”⁵ Motorola

¹ U.S. Patent No. 5,502,839 at col. 225, l. 46 (Ex. 1).

² *Id.* at col. 226, ll. 19-24.

³ *Id.* at col. 225, l. 59 – col. 226, l. 18; col. 226, ll. 36-38; col. 226, ll. 42-61.

⁴ Plaintiff Motorola Mobility Inc.’s Updated Proposed Claim Constructions for the Patents-in-Suit at 1 (Ex. 2).

⁵ Defendant Microsoft Corp.’s Disclosure of Proposed Claim Constructions at 10 (Ex. 3).

proposes that “means responsive to one of said physical input devices for generating a picture” in claim 15 should be construed to mean “generating a picture comprising one or more picture elements responsive to a user’s interaction with a physical input device.”⁶ Microsoft proposes this term should mean “generating a picture from the input from a physical input device.”⁷ Therefore, under either parties’ proposed claim construction, independent Claims 9 and 15, and all of their dependent claims, require user input or input from a physical device.

B. Microsoft’s Direct2D

Motorola has accused the Microsoft product Direct2D of infringing claims 9-16 and 18-23 of the '839 Patent. Direct2D is a two-dimensional graphics rendering engine for Windows 7 that “provides Win32 developers with the ability to perform 2-D graphics rendering tasks with superior performance and visual quality.”⁸ [REDACTED]

[REDACTED]

[REDACTED]

C. Background of the Patented Technology of the '001 patent

The claimed invention of Motorola’s '001 patent describes a data communication receiver, such as a pager, that receives an alphanumeric message and displays that message along with a graphic matching any key words in that message. Each of the asserted claims 1, 4, and 6 require a variation of the graphic message accompanying the alphanumeric message when there is a match for the key word in the message. Claim 1 requires “presenting...the at least one image as a graphic message that is accompanied by the alphanumeric message on a display.”⁹ Claim 4 requires “a display...for presenting...the at least one image as a graphic message accompanied by the

⁶ Ex. 2 at 3.

⁷ Ex. 3 at 13.

⁸ About Direct2D webpage, available at [http://msdn.microsoft.com/enus/library/dd370987\(v=VS.85\).aspx](http://msdn.microsoft.com/enus/library/dd370987(v=VS.85).aspx).

⁹ U.S. Patent No. 5,784,001 at col. 8, ll. 14-18 (Ex. 4).

alphanumeric message.”¹⁰ Claim 6 requires “a display ... for presenting...a corresponding image as a graphic message accomplished by the message.”¹¹

The parties dispute whether the entire message or only a portion of it must be displayed along with the graphic image.¹² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Therefore, the availability of an argument under the doctrine of equivalents is the only disputed issue related to this term.

D. Background of the Patented Technology of the '333 patent

In general, the '333 patent concerns the delivery of data to a “subscriber unit.” '333 patent, Ex. 14 at 1:6–:10. [REDACTED]

[REDACTED] The '333 patent states that data is delivered to the "subscriber unit" by the "fixed portion" of the wireless communication system.

Ex. 14, '333 patent, at 1:9–:10.) Figure 1 of the '333 patent shows that the "fixed portion" (102) includes base stations (116) with antenna (118) that communicate with the "subscriber units"

(122) utilizing conventional radio frequency (RF) techniques:

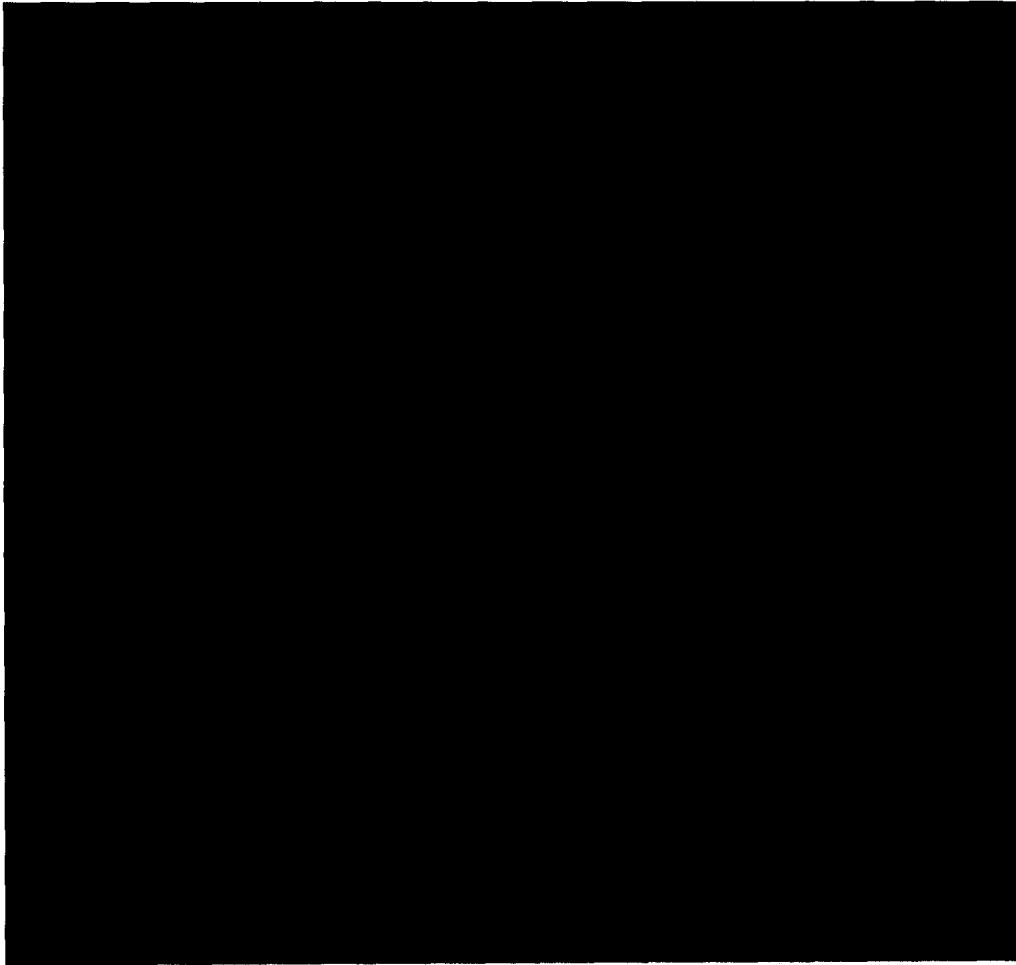
¹⁰ *Id.* at col. 8, ll. 44-47.

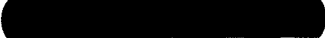
¹¹ *Id.* at col. 10, ll. 20-23.

¹² Microsoft's proposed construction of “graphic message that is accompanied by the alphanumeric message”/“graphic message accompanied by the alphanumeric message”/“graphic message accompanied by the message” is “At least one supplemental image is displayed along with the entire alphanumeric message.” (Ex. 3 at 18.) Motorola's proposed construction for the same term is “At least one image is displayed along with a portion of, or the entire, alphanumeric message.” (Ex. 2 at 6.)

¹³ First Expert Report of Dr. Martin E. Kaliski, Ph.D. Regarding Whether Certain Claims of U.S. Patent No. 5,783,001 are Practiced by Defendant Microsoft Corporation (“Kaliski 001 Infringement Report”) at ¶¶ 80, 95, and 126. (Ex. 5.) [REDACTED] (Ex. 6.)

¹⁴ Kaliski 001 Infringement Report at ¶ 81.



Ex. 14, '333 patent, FIG. 1 (annotations added). 

The '333 patent explains the problem to be solved: it is “desirable not to send data to a subscriber unit that the subscriber unit cannot utilize.” (‘333 patent, Ex. 14 at 1:27–:29 (emphasis added)). The ‘333 ’s solution requires maintaining an “application registry” in the “subscriber unit” that includes a list of the applications accessible to the “subscriber unit,” and also keeping a current copy of the “application registry” in the “fixed portion” of the wireless communication system, so that whenever the “fixed portion” has data to send to the “subscriber unit,” the “fixed portion” can check its copy of the “application registry” (not the “application registry” in the “subscriber unit”) and send the data only if the checking step determines that an application compatible with the data is

[REDACTED]

II. LEGAL ARGUMENT

A. Legal Principles Governing Summary Judgment

1. Summary Judgment Is Appropriate In Patent Cases to Secure the Just, Speedy and Inexpensive Determination of Every Action

“Summary judgment is as appropriate in a patent case as it is in any other case,” *Desper Prods., Inc. v. QSound Labs.*, 157 F.3d 1325, 1332 (Fed. Cir. 1998) (affirming district court’s grant of summary judgment of noninfringement), and should be employed in such cases “to avoid unnecessary expense to the parties and wasteful utilization of the jury process and judicial resources.” *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835 (Fed. Cir. 1984). “Summary judgment is not to be regarded as a disfavored procedural shortcut, but rather an integral part of the Federal Rules as a whole designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1).

2. Summary Judgment Must Be Entered If There Is No Genuine Issue Of Material Fact And The Moving Party Is Entitled To Judgment As A Matter Of Law

Under Fed. R. Civ. P. 56(c), summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law.” FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 322-23; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). As the moving party, Microsoft bears the initial burden of demonstrating that it is entitled to summary judgment. *Celotex*, 477 U.S. at 324-25. Even though all reasonable inferences must be drawn in favor of the non-moving party, once Microsoft satisfies its initial burden, summary judgment must be entered for Microsoft if Motorola fails to designate “specific facts” in the record showing that there is a genuine issue for trial. *See id.* at 324. An issue is “genuine” only if the specifically designated facts would allow a reasonable jury to return a verdict in Motorola’s favor. *See Anderson*, 477 U.S. at 249. “General assertions of fact issues, general denials, and conclusory statements are insufficient to shoulder the non-movant’s burden,” *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1578 (Fed. Cir. 1989), and where the non-moving party designates only evidence that is “merely colorable, . . . or is not significantly probative, summary judgment may be granted,” *Anderson*, 477 U.S. at 249-50 (citations omitted); *Celotex*, 477 U.S. at 322-23. Nor does raising some doubt about the existence of a fact satisfy the non-moving party’s burden in a motion for summary judgment. Rather “evidence must be forthcoming from the nonmovant which would be sufficient to require submission to the jury of the dispute over the fact.” *Avia Group Int’l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

3. Summary Judgment Need Not Await Claim Construction

A two-step analysis is normally required to determine infringement: first, the claims must be construed to determine their meaning, and second, the allegedly infringing device or method must be compared to the construed claims. *See Cybor Corp. v. FAS Tech., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998)(en banc). The Court need not construe the claims here to grant Microsoft’s motion for summary judgment. [REDACTED]

[REDACTED]

III. ANALYSIS

A. The Testimony of Microsoft's Principal Development Manager Responsible for Direct2D Demonstrates Direct2D Has No User Input or Input From a Physical Device

Motorola has alleged that Direct2D infringes independent Claims 9 and 15 of the '839 patent, as well as dependent claims 10-14, 16, and 18-23. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁶ [REDACTED]
¹⁷ [REDACTED]

[REDACTED]

B. Motorola’s Expert Testimony Offers Only Bald Conclusions and No Evidence of Direct2D Having User Input or Input From a Physical Device

Motorola’s expert report offers only conclusory statements – and provides no supporting evidence – to argue that Direct2D has user input or input from a physical device.

1. Claim 9’s Requirement of “A Source of Virtual Input”

Claim 9 requires “a source of virtual input, said virtual input comprising one or more picture elements.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Claim 15's Requirement Of "An Interface Between Processes And Data In Said System And Physical Input" And "Means Responsive To One Of Said Physical Input Devices For Generating A Picture"

Claim 15 requires, in relevant part, "an interface between processes and data in said system and physical input" and "means responsive to one of said physical input devices for generating a picture." As explained, Motorola's expert testimony merely offers conclusory statements without supporting evidence or explanation for the claim elements regarding input.

C. A Doctrine of Equivalents Argument is Not Available For The "Graphic Message That Is Accompanied By..." Limitation And Similar Limitations In Claims 4 and 6 of the '001 Patent

[REDACTED]

[REDACTED]

²⁸ ID2D1Geometry::FillContainsPoint Overloaded Method Webpage, at [http://msdn.microsoft.com/en-us/library/dd742749\(v=vs.85\).aspx](http://msdn.microsoft.com/en-us/library/dd742749(v=vs.85).aspx) (stating that FillContainsPoint "[i]ndicates whether the area filled by the geometry would contain the specified point").

[REDACTED]

[REDACTED]

[REDACTED]

See e.g., *Spine Solutions Inc. v. Medtronic Sofamor Danek USA Inc.*, 620 F.3d 1305, 1317 (Fed. Cir. 2010) (reversing district court’s denial of summary judgment of noninfringement because a clear disavowal of claim scope precluded application of the doctrine of equivalents to surrendered subject matter). The applicability of prosecution history estoppel is a legal question. See *Felix v. American Honda Motor Co.*, 562 F.3d 1167, 1181-82 (Fed. Cir. 2009). Therefore, it is appropriate for the Court to make a determination of at least partial non-infringement that Microsoft does not infringe the asserted claims of the '001 patent, literally or under the doctrine of equivalents, when Microsoft's construction is applied.

As prosecution history estoppel bars Motorola from using the doctrine of equivalents to recover surrendered subject matter in this phrase, it also bars Motorola’s proposed construction. Motorola's proposed construction attempts to recover the same disclaimed subject matter – display of less than the entire original message with a supplemental image. This issue is addressed more fully in Microsoft’s Claim Construction Brief in the section related to this element of the '001 patent.

[REDACTED]

D. Microsoft Does not Infringe the Asserted Claims of the '333 Patent

Motorola accuses Microsoft of infringing claims 12 and 13 of the '333 patent. Claim 12

[REDACTED]

is an independent claim and claim 13 depends from claim 12, below:

12. A subscriber unit in a wireless communication system for *controlling a delivery of data* from a *fixed portion of the wireless communication system*, the subscriber unit comprising:

- a receiver for receiving the data;
 - a processing system coupled to the receiver for processing the data; and
 - a transmitter coupled to the processing system for communicating with the fixed portion of the wireless communication system,
- wherein the processing system is programmed to:
- maintain an *application registry comprising a list of all software applications that are currently accessible to the subscriber unit*; and
 - in response to a change in accessibility of an application, update the application registry; and control the transmitter to communicate the change to the fixed portion of the wireless communication system.*

Microsoft's accused products do not infringe claim 12 because at least five limitations (corresponding to sections a-e below) of claim 12 are not met. Dependent claim 13 is not infringed for at least the reasons discussed below with respect to claim 12.

1. The Microsoft Accused Products Do Not Meet the Limitation "Data"

Under Microsoft's construction, "data" means "information to be processed by an application, not an application or a software update for an application." Ex. 15, Geier Report, ¶

113. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Therefore, Motorola cannot show how this limitation is satisfied.

3. [REDACTED]

Under Microsoft's construction, "controlling a delivery of data" means "delivering data only after checking in the fixed portion whether an application compatible with the data is accessible to the subscriber unit." Ex. 15, Geier Report, ¶ 129. [REDACTED]

[REDACTED]

5.

[REDACTED]

Under Microsoft's construction, "application registry comprising a list of all software applications that are currently accessible to the subscriber unit" means "one official list of all applications currently accessible to the subscriber unit, including applications that can be downloaded over the air." Ex. 15, Geier Report, ¶ 154. [REDACTED]

[REDACTED]

[REDACTED]

6.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. Motorola Is Not Entitled To Recover Any Damages Prior to Notice

Defendant Microsoft moves for partial summary judgment with respect to any and all claims or alleged damages of Plaintiff Motorola prior to November 10, 2010 relating to the Motorola Patents-in-Suit. [REDACTED]

[REDACTED]

[REDACTED] Accordingly, based on the undisputed facts, Motorola is not entitled to recover damages predating notice to Microsoft of the subject patents or claimed infringement, and therefore Microsoft is entitled to partial summary judgment with respect to such claims and damages in accordance with 35 U.S.C. § 287. Microsoft incorporates in its Motion the Statement of Undisputed Material Facts attached hereto as Exhibit A.

Title 35 U. S. C. § 287 provides:

(a) Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word "patent" or the abbreviation "pat.," together with the number of the patent, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] As a result, under 35 U.S.C. § 287, Motorola is not entitled to recover any damages that may have occurred prior to that date, and Microsoft is entitled to entry of partial summary judgment as to any such claims or damages.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Microsoft's motion for summary judgment of non-infringement of all asserted claims of the '839, '001, and '333 Patents, and that Motorola is not entitled to recover any damages prior to November 10, 2010.

Dated: July 21, 2011

By _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of July, 2011, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send email notification of such filing to all counsel who have entered an appearance in this action.

/s/ _____

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