UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RED BEND LTD. and RED BEND SOFTWARE INC., Plaintiffs, v. GOOGLE INC., Defendant.	CIVIL ACTION NO. 09-cv-11813
GOOGLE INC., Counterclaim-Plaintiff, v. RED BEND LTD. and RED BEND SOFTWARE INC., Counterclaim-Defendants.	

GOOGLE INC.'S PRELIMINARY NON-INFRINGEMENT CONTENTIONS

Pursuant to the Court's May 10, 2010 scheduling order and Local Rule 16.6, Google, Inc. ("Google") hereby serves its Preliminary Non-infringement Disclosures for U.S. Patent Number 6,546,552 on Plaintiffs Red Bend LTD and Red Bend Software, Inc. ("Red Bend").

PRELIMINARY STATEMENT, RESERVATION OF RIGHTS, AND GENERAL OBJECTIONS

1. This disclosure is directed to non-infringement issues only and does not address invalidity, unenforceability, or claim construction issues. Google reserves all rights with respect to such issues.

2. These non-infringement contentions are preliminary and are based on Google's current knowledge, understanding, and belief as to the facts and information available as of the date of these contentions. Google has not completed its investigation, discovery, or analysis of

information related to this action. Google reserves the right to amend, modify and/or supplement its non-infringement disclosures, including but not limited to the accompanying claim chart, (Exhibit A) as appropriate.

3. Defendant is providing these non-infringement contentions prior to any claim construction ruling by the Court. Any non-infringement analysis depends, ultimately, upon claim construction, which is a question of law reserved for the Court. Google reserves the right to amend, supplement, or materially modify its non-infringement contentions after the claims have been construed by the Court. Google also reserves the right to amend, supplement, or materially modify its non-infringement contentions based on any claim construction positions that Red Bend may take in this case.

4. Red Bend did not set out its contentions as to infringement under the doctrine of equivalents on a limitation by limitation basis. *See, e.g., Biogen, Inc. v. Berlex Laboratories, Inc.*, 113 F. Supp. 2d 77, 107 (D. Mass. 2000) ("[T]he doctrine of equivalents must be applied not only to each discrete claim, but also to the individual elements of each claim, rather than the invention as a whole that each claim describes.") (*citing Warner Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997)). Google reserves the right to amend, supplement, or materially modify its non-infringement contentions to the extent that Red Bend modifies, clarifies, or changes its infringement allegations to make a *prima facie* assertion of infringement under the doctrine of equivalents on a limitation by limitation basis.

5. Red Bend did not fully identify, on a limitation by limitation basis, which claims are allegedly infringed by the respective components of the accused product. *See Freedman Seating Co. v. American Seating Co.*, 420 F.3d 1350, 1358 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1167 (2006) ("the 'all limitations' 'rule holds that an accused product or process is not infringing

unless it contains each limitation of the claim, either literally or by an equivalent.'"). In particular, Red Bend has not specifically identified sections of source code as infringing a particular limitation. In some cases, Red Bend did not identify any component as infringing a particular limitation. For example, with respect to claims 8, 12, 21, 25, 42, 46, 55, and 59, Red Bend did not identify any component as implementing functionality such that "substantially each reference in an entry in said old [program/data table] that is different than corresponding entry in said new [program/data table] due to delete/insert modifications that form part of the transition between said old [program/data table] and new [program/data table] are reflected as invariant references in the corresponding entries in said modified old and modified new [programs/data tables]." Google reserves the right to amend, supplement, or materially modify its non-infringement contentions to the extent that Red Bend modifies, clarifies, or changes its infringement allegations to make a prima facie assertion of infringement on a limitation by limitation basis.

PRELIMINARY NON-INFRINGEMENT CONTENSIONS

I. Google Does Not Directly Infringe the '552 Patent.

Red Bend accuses Google's Courgette of directly infringing 34 claims of U.S. Patent No. 6,546,552 ("the '552 patent") "with respect to at least its use, distribution and/or posting of Courgette source code and/or executable code". *See* Plaintiffs Red Bend Ltd. and Red Bend Software Inc.'s Preliminary Infringement Disclosures at 1 ("Red Bend's Infringement Contentions"). Red Bend contends that claims 8, 9, 10, 11, 12, 21, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 34, 42, 43, 44, 45, 46, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66 and 67 (collectively, "the Asserted Claims") are literally infringed or, alternatively, infringed under the doctrine of equivalents. *Id*. at 2. Red Bend also accuses Google of indirectly infringing claims 8, 12, 21, 25, 42, 46, 55 and 59 of the '552 patent under 35 U.S.C. §§ 271(b) and (c), and of infringing claims

21, 25, 55 and 59 under 35 U.S.C. §§ 271(f)(1) and (f)(2). *Id.* at 2-3; *see also* correspondence from Eliot D. Williams to Susan Baker Manning dated May 18, 2010.

For at least the reasons discussed herein, and in Google's Opposition to Red Bend's Motion for Preliminary Injunction, its Surreply thereto, the declaration and testimony of Dr. Martin Walker, Google's presentation at the April 14, 2010 preliminary injunction hearing, and the attached chart (Exhibit A), (each of which Google incorporates herein by this reference), Google does not directly or indirectly infringe any asserted claim of the '552 patent, either literally or under the doctrine of equivalents.

A. Courgette does not literally infringe.

Google does not infringe for at least the following reasons:

1. Courgette does not generate difference results using "executable program[s]" or modified versions thereof;
2. Courgette does not generate a "modified old program [data table]" or a "modified new program [data table]";
3. Courgette does not process "substantially each reference";
4. Courgette does not distinguish references that change "due to delete/insert modifications" from any other references, rather it treats all references the same and does not reflect the values of references that change due to delete/insert modifications differently;
5. Courgette does not create the required "invariant references";
6. Courgette does not generate the claimed "compact difference result" from which the invariant references have been eliminated;
7. Google does not update the Chrome web browser software by creating a difference result using a modified old version of the Chrome web browser software and a modified new version of the Chrome web browser software; and

8. Google does not update copies of the Chrome web browser by "reconstituting a modified new program utilizing directly or indirectly at least said modified old program and said compact difference result" on the remote client computer.

First, Courgette does not generate difference results using "executable program[s]" or modified versions thereof . Each of the Asserted Claims requires an "executable" program or data table. Although the Courgette program initially inputs old and new executable programs, it promptly disassembles them into data structures that bear no resemblance to an "executable program." The disassembled tables and streams are symbolic in nature and not in an executable format. Any difference results are, therefore, the product of non-executable data structures as opposed to the executable programs, or modified versions thereof, required by the Asserted Claims.

Second, Courgette does not generate a "modified old program [data table]" or a "modified new program [data table]." Each of the Asserted Claims requires the generation of a modified old program (or data table) and a modified new program (or data table). These modified programs and data tables, properly construed, are executable programs with certain references replaced. In contrast, Courgette disassembles the input old and new executable programs into symbolic tables and encoded streams which are not executable. Therefore, Courgette does not generate "modified … program[s]" or "modified … data table[s]" and does not infringe.

The next three differences all relate to the limitation in each of the Asserted Claims that

> substantially each reference in an entry in said old program that is different than a corresponding entry in said new program due to delete/insert modifications that form part of the transition between said old program and new program to be reflected as invariant references in the corresponding entries in said modified old and modified new programs.

Third, Courgette does not process "substantially each reference," and therefore does not infringe.

Fourth, the claim element cited in the previous paragraph requires finding reference entries that change due to delete/insert modifications and then replacing or reflecting such references with invariant references. However, Courgette does not distinguish references that change due to delete/insert modifications from references that change for other reasons. Rather, Courgette treats all references that it recognizes the same way—by reflecting them in symbolic tables and encoded streams.

Fifth, Courgette does not create the required "invariant references." Courgette does not infringe because it does not exclude from the difference result each invariant reference—that is, all references that change due to delete/insert modifications between the modified old and new programs or data tables. Courgette preserves all unique references that it can recognize by recording their original values in symbol tables for the old and the new programs. The references are not changed to make them invariant. Additionally, all unique references within Courgette are sent to the difference generator and are also reflected in the compact difference result. Red Bend has asserted that Courgette assigns index values to references in the old and new programs that are made "similar" by an adjustment step. These index values, however, while in some instances similar between the old and the new programs, are not the same (or invariant) and are not sufficient by themselves to represent the value of a reference. The indexes are required to be used with the separate reference values of the symbol transmitted with the difference result that are necessarily different for each reference that changes due to insert/delete modifications. Therefore, references in Courgette that change due to delete insert modifications are not replaced with invariant references and are not eliminated from the difference result. Accordingly, Courgette does not infringe because it does not use invariant references to replace references that change due to delete/insert modifications, and does not prevent them from appearing in the difference result.

Sixth, Courgette does not generate the claimed "compact difference result" from which the invariant references have been eliminated. Courgette does not generate, receive, transmit, store or use a "compact difference result" within the meaning of the '552 patent. The '552 patent requires elimination from the compact difference result of references that change due to

delete/insert modifications. As described above, Courgette does not prevent references that change due to delete/insert modifications from appearing in the difference result, and therefore does not infringe.

Seventh, Google does not update the Chrome web browser software by creating a difference result using a modified old version of the Chrome web browser software and a modified new version of the Chrome web browser software. Google does not update copies of the Chrome web browser by generating a "modified old program" on the remote client computer. Therefore, Courgette does not infringe.

Eighth, Google does not update copies of the Chrome web browser by "reconstituting a modified new program utilizing directly or indirectly at least said modified old program and said compact difference result" on the remote client computer. Nor does Google update copies of the Chrome web browser by "reconstituting said new program utilizing directly or indirectly at least said compact difference result and said modified new program" on the remote client computer. Neither of the executable programs that are disassembled by Courgette into streams of symbolic data so that Courgette can create a difference result are the "modified new program" or the "modified old program" of the Asserted Claims, and even if they were, neither of the executable programs are "reconstitute[ed]" on the remote client computer as claimed.

B. Courgette does not infringe under the doctrine of equivalents.

Red Bend makes the conclusory assertion that Google infringes under the doctrine of equivalents. Red Bend's Infringement Contentions at 2. Red Bend fails, however, to identify which particular limitations are present under the doctrine of equivalents, or state its contentions as to how the differences between each limitation and Courgette are either insubstantial or how Courgette performs substantially the same function as the claimed limitation in substantially the same way to achieve substantially the same result. Google therefore objects to Red Bend's purported assertion of the doctrine of equivalents as facially insufficient. Google reserves its rights to move to strike the relevant portions of Red Bend's Infringement Contentions.

Subject to its objections, and without waiving any objections, Google states that Courgette does not infringe either literally or under the doctrine of equivalents because the differences between Courgette and the '552 patent are substantial and neither the Courgette source code nor a Courgette executable software program performs substantially the same function in substantially the same way to achieve substantially the same result as the claimed limitations.

Moreover, the applicant amended the claims to limit them to "executable" programs, and specifically argued as to all claims that "[i]n extracting [a] diff between 2 versions of executable files … there is no source involved, and neither statements, not any textual or other symbolic representation of the program even exist." *See* RedBend0000151. Red Bend is estopped from trying to recapture through the doctrine of equivalents claim scope surrendered during prosecution. Because Courgette uses symbolic structures, and not executable programs, to generate the difference result, it does not infringe literally or under the doctrine of equivalents.

C. The Courgette source code cannot infringe the asserted method and system claims.

The Courgette source code cannot itself be used to practice the claimed method and cannot itself create the claimed system. Only an executable software program could, even in theory, be used to practice the claimed method or create the claimed system. The Courgette source code therefore does not and cannot infringe. Google's "use, distribution and/or posting of Courgette source code" are therefore not acts of infringement.

D. The "posting" of Courgette is not an act of infringement.

Although Red Bend accuses Google of directly infringing the Asserted Claims by "posting [the] Courgette source code and/or executable code," Red Bend's Infringement Contentions at 1, the "posting" of code cannot even in theory constitute the making, using, selling, offering to sell or importing of the patented invention within the meaning of 35 U.S.C. § 271(a). Source code cannot itself create the claimed system, and cannot itself be used to

practice the claimed method. Google does not post Courgette as a stand-alone executable program.

II. Google Does Not Indirectly Infringe the '552 Patent

Red Bend accuses Google of indirectly infringing claims 8, 12, 21, 25, 42, 46, 55, 59 and their dependent asserted claims under 35 U.S.C. §§ 271(b) and (c), "by supplying and/or making available the Courgette source code as open source to non-parties inside and outside the United States, who directly infringe these claims by using or executing the code and/or combining it with other software and hardware to practice the claimed inventions." Red Bend's Infringement Contentions at 2, correspondence dated May 18, 2010. Red Bend further accuses Google of indirectly infringing claims 12, 25, 46, and 59 "under 35 U.S.C. §§ (f)(1) and (f)(2), by supplying the Chrome web browser to, and using, implementing and/or executing Courgette code for, non-party users inside and outside the United States, who when such code is so used, implemented or executed, directly infringe those claims." Red Bend's Infringement Contentions at 3, correspondence dated May 18, 2010.

For at least the reasons discussed herein, Google does not directly or indirectly infringe any asserted claim of the '552 patent.

A. Red Bend Has Not Properly Plead Indirect Infringement

Red Bend's Amended Complaint fails to state a claim for which relief can be granted as to Red Bend's indirect infringement allegations. As detailed in Google Inc.'s Motion to Dismiss Plaintiffs' Indirect Infringement Claims and the accompanying Memorandum of Law, which Google incorporates herein by this reference, Red Bend failed to allege any facts that would entitle it to relief under 35 U.S.C. § 271(b) or (c). Nor has Red Bend alleged any facts that would entitle it to relief under 35 U.S.C. § 271(f). Red Bend's Amended Complaint does not reference § 271(f) or attempt allege facts that would entitle Red Bend to relief under § 271(f).

Google therefore objects to Red Bend's Infringement Contentions to the extent they purport to assert claims of indirect infringement under §§ 271(b), (c) or (f), and Google reserves

its rights to move to dismiss the relevant portions of the Amended Complain and/or to strike the relevant portions of Red Bend's Infringement Contentions.

Additionally, Google asserts that because the Courgette software does not directly infringe, to the extent there is any indirect usage of the Courgette software by third parties, such use does not infringe for the same reasons identified above with respect to direct infringement. There is and can be no direct infringement premised on use of Courgette to perform program updates that could support an allegation of indirect infringement.

B. Google does not induce infringement under 35 U.S.C. § 271(b).

Google's distribution of Courgette does not and cannot induce the infringement of the '552 patent because Courgette does not infringe.

Google's distribution of Courgette source code does not induce the infringement of claims 8, 21, 42, and 55 of the '552 patent for the additional reason that there is no evidence of use of Courgette as an executable by a third party in the United States to create difference results. Moreover, there can be no direct infringement sufficient to support inducement of infringement in any event by any Courgette based update for the reasons identified above with respect to direct infringement. Furthermore, re-posting of the Courgette source code by a third party is not direct infringement for the same reason that Google's posting of the Courgette source is not infringement—source code by itself cannot create a system or practice a method unless and until it is compiled into machine code and run on a computer. To the extent that Red Bend contends that acts outside of the United States can or do support its claims under § 271(b), this is legal error; it is not an infringement to make or use a patented product outside of the United States.

Google's distribution of Courgette does not induce the infringement of claims 12, 25, 46, and 59 of the '552 patent for the additional reason that there is no evidence that any third party in the United States has made use of Courgette code by compiling the code into an executable. Source code by itself cannot create a system or practice a method unless and until it is compiled into machine code and run on a computer. To the extent that Red Bend contends that acts

outside of the United States can or do support its claims under § 271(b), this is legal error; it is not an infringement to make or use a patented product outside of the United States.

C. Google does not contributorily infringe under 35 U.S.C. § 271(c).

Google's distribution of Courgette does not and cannot contribute to the infringement of the '552 patent because Courgette does not infringe.

Google's distribution of Courgette does not contribute to the infringement of claims 8, 21, 42, and 55 of the '552 patent for the additional reasons that there is no evidence of use of Courgette as an executable by a third party in the United States to create difference results, and there can be no direct infringement sufficient to support contributory infringement in any event by any Courgette based update for the reasons identified above with respect to direct infringement. To the extent that Red Bend contends that acts outside of the United States can or do support its claims under § 271(c), this is legal error; it is not an infringement to make or use a patented product outside of the United States. The re-posting of the Courgette source code by a third party is not direct infringement for the same reason that Google's posting of the Courgette source is not infringement—source code by itself cannot create the claimed system or practice the claimed method.

Google's distribution of Courgette does not contribute to the infringement of claims 12, 25, 46, and 59 of the '552 patent for the additional reasons that there is no evidence of use of Courgette code compiled into an executable by a third party in the United States, source code by itself cannot create a system or practice a method unless and until it is compiled into machine code and run on a computer, and/or the execution by Google of Courgette is not equivalent to direct infringement by a third party. It is not an infringement to make or use a patented product outside of the United States.

In addition, the Courgette source code cannot infringe under 35 U.S.C. § 271(c) because uncompiled source code is a staple article or commodity of commerce suitable for substantial noninfringing uses. Also, Courgette in its compiled form is suitable for substantial noninfringing

uses, and can be run without executing any functionality accused by Red Bend of meeting the limitations of the Asserted Claims.

D. Google does not infringe under 35 U.S.C. § 271(f).

Google is not liable for infringement under § 271(f) because Courgette does not infringe.

Google is not liable for infringement of claims 21, 25, 55, and 59 under § 271(f) for the additional reasons that source code is not machine readable, and is not a "component" the foreign supply of which gives rise to liability under § 271(f).

In addition, the Courgette source code cannot infringe under 35 U.S.C. § 271 (f) because uncompiled source code is a staple article or commodity of commerce suitable for substantial noninfringing uses. Also, Courgette in its compiled form is suitable for substantial noninfringing uses, and can be run without executing any functionality accused by Red Bend of meeting the limitations of the Asserted Claims.

Respectfully Submitted,

GOOGLE, INC.

By its attorneys,

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